Volume 34 | Issue 2 Article 16

February 1928

Does and Express Waiver of Subjacent Support Preclude Injunction Against Damages to an Upper Vein of Coal

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offense, the commission of which is accomplished by giving a check on a bank, in which the maker has insufficient funds or credit to pay the same, and intent to defraud is not an element of the offense, or knowledge of the condition of the maker's bank account. Drawing the check, without sufficient funds on deposit to meet it, was the act the legislature intended to punish, in accord with the views expressed in *State* v. *Pishner, supra,* and it makes no difference whether the vendor or lender relies upon the financial ability of the maker, or the representation of funds in bank. The reasoning in *State* v. *Cunningham, supra,* is apparently based upon a false premise, *i. e.,* the offense is committed against the payee of the check. It is conceivable that business men and bankers had something to do with the passage of the act, and the offense the Legislature intended to prohibit consists in the public nuisance resulting from the practice of putting worthless checks in circulation. Therefore the offense could very well be committed, even though the check were postdated.

—KENDALL H. KEENEY.

DOES AN EXPRESS WAIVER OF SUBJACENT SUPPORT PRECLUDE INJUNCTION AGAINST DAMAGE TO AN UPPER VEIN OF COAL?—A decision has recently been handed down by the Supreme Court of Appeals which has a far-reaching effect on the coal mining industry of the state, involving as it does the respective rights of the owners of upper and lower seams of coal. In this case[1] the plaintiff, owner of the Sewickley vein of coal which overlies the Pittsburgh vein, sought to enjoin the owner of the latter from mining his coal in such a manner as would necessarily result in injury to the plaintiff's mine, and in endangering the lives of his workmen. The plaintiff introduced evidence tending to show that the defendant could avoid such injury by use of another method, or by changing the mine openings. De-

[1] Continental Coal Co. *v.* Connellsville By-Product Coal Co., 138 S. E. 737 (W. Va. 1927).

fendant's deed contained a provision that it should have the right to remove all coal without any liability for damages arising from such removal and without leaving any support for overlying strata. The Court held that since plaintiff had notice of the provisions of the defendant's deed, it could not enjoin defendant from exercising its rights in strict accordance with the terms of the deed, when those rights were exercised in a proper manner, and that damages having been paid for in advance, plaintiff could not invoke the maxim "*sic utere tuo ut alienum non laedas*" to prevent such damages. Is there then no theory by which the courts can adequately protect rights acquired by contract and still protect a valuable natural resource for the use of the owner, and the benefit of the public at large?

It has been said that the subject matter of the law is interests,[2] that is, human wants, claims and desires, and in dealing with those interests it is impossible to secure all of them, since they are conflicting. So the end of law is to secure or satisfy as many interests as possible, and sacrifice as few as possible.[3] This modern movement in law is, among other things a progress toward an equitable practicalization of the law, and of the interpretation and application of the law.[4] In this application the rights of individuals are not looked at exclusively, but they are considered in relation to the rights of other individuals, and particularly with respect to the interests of the public, *i. e.*, society as a whole. Dean Pound observes eight noteworthy changes taking place in this generation,[5] one of these being a limitation on the right of the individual to use his property. Courts in the past have said that an owner of land might build a fence on his own land as high as he pleases, and in so doing his motives cannot be enquired into, for to do otherwise would detract from his right of

[2] See POUND, THE SPIRIT OF THE COMMON LAW 91-93.

[3] Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195 (1914).

[4] See Hardman, "Stare Decisis and the Modern Trend," 32 W. VA. L. QUAR. 163 (1926).

[5] POUND, SPIRIT OF THE COMMON LAW 185-190. These changes as listed are: (1) Limitation on the use of property; (2) limitation on the freedom of contract; (3) limitation on the power of disposing of property; (4) limitation on the power of a creditor or injured party to exact satisfaction; (5) revival of the "liability without fault" idea; (7) tendency to hold that public funds should respond for injuries to individuals by public agencies; (8) insistence upon the interest of society in dependent members of the household.

property.[6] But courts in later cases[7] have reached a contrary conclusion saying that the owner has the right to make any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused another.[8] The maxim *"sic utere tuo ut alienum non laedas"* (so use your own property as not to injure the rights of another) is the basis of the latter conclusion.[9]

Do the facts of the principle case present a situation where plaintiff can invoke the maxim? An owner of property may impose on it any burden, no matter how injurious or destructive, that is not inconsistent with his general ownership, not violative of public policy, nor injurious to the property of others.[10] And although an owner of land is entitled to subjacent support for his land,[11] he may by apt words in the deed surrender this right[12] and the sale of such subjacent support is not violative of public policy.[13] Such is the state of affairs in the principal case, the plaintiff taking with notice of the exemption of the defendant from liability for damages. But does it necessarily follow that the defendant can exercise his rights in any manner he sees fit? The law should secure to the owner of property his reasonable wants with respect to the use of his property, and in the exercising of his contract rights. What is reasonable should depend on the facts of the particular case. The evidence tended to show (and the trial court so found) that defendant could have avoided injury to the plaintiff by either of two ways, namely, by adopting a different method of removing his coal, or by changing the location of his section headings, and that to use either method would be just as efficient and economical as the method the defendant is now using.

It is submitted that if the defendant could have used another method of mining which is equally as efficient and

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[6] Koblegard *v.* Hale, 60 W. Va. 37, 53 S. E. 793 (1906).
[7] Barger *v.* Barringer, 151 N. C. 433, 66 S. E. 439, 25 L. R. A. N. S. 881 (1909); Bush *v.* Mockett, 95 Neb. 552, 145 N. W. 1001 (1914); Norton *v.* Randolph, 176 Ala. 381, 58 So. 283 (1912).
[8] Bush *v.* Mockett, *supra.*
[9] Bush *v.* Mockett, *supra.*
[10] Allerton *v.* N. Y. L. & W. Ry. Co., 199 N. Y. 489, 93 N. E. 270 (1910).
[11] Goodykoontz v. White Star Mining Co., 94 W. Va. 654, 119 S. E. 862 (1923).
[12] Griffin *v.* Coal Co., 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. N. S. 1115 and note (1906).
[13] Godfrey *v.* Weyanoke Coal & Coke Co., 82 W. Va. 665, 97 S. E. 186 (1918).

economical as the method he insists on using, and by the use of which the upper seam of coal would be adequately protected, while by pursuing the method of his choice the upper seam will be destroyed, it would not be beyond the power of a court of equity to direct the defendant to use that method which will protect, rather than destroy the upper seam. By so doing the court would not be impairing the obligations of contract, nor taking the property of the defendant without due process of law, but would only be regulating the manner in which he should use and enjoy his property. The chief difficulty with the application of the maxim *"sic utere"* would be that the plaintiff must affirmatively show that one method of mining is equally as efficient as the other, and therefore that the defendant had some ulterior motive in adopting the method he insists on using. This would be a matter of expert testimony, which would probably lead to long and expensive litigation. A case whose facts are rather analogous to those of the principal case is that of the *Gulf Pipe Line Company* v. *The Pawnee-Tulsa Petroleum Company*.[14] There the plaintiff, who bought land subject to the mining lease of the defendant was granted an injunction against the defendant, preventing the defendant from drilling a well so near to the plaintiff's land as to endanger his property, and the lives of his workmen, on the ground that the defendant would derive no special benefit from drilling there, while the plaintiff would be subjected to great injury, and despite the prior rights of the defendant of which the plaintiff knew, the court said the former must use his rights in such a manner as not unnecessarily to injure the latter's inferior rights.[15] It would seem that the plaintiff in the principal case would have had a much stronger case had it sought to enjoin the defendant *before* defendant had started operating in the manner complained of, for to do so now would subject the defendant to a heavy burden of expense to which he should not be subjected.

But aside from the interests of the individuals in this particular case there are other and important interests appear-

[14] 34 Okla. 775, 127 Pac. 252 (1914).
[15] To the same effect see Gillespie *v.* American Zinc and Chemical Co., 247 Pa. 222, 93 Atl. 272 (1915).

ing, to which the Court should have given some weight, namely, the interests of the state in the conservation of natural resources. That there is such interest is evidenced by the fact that many states have passed legislation to the effect that such natural resources should not be wasted, and the courts have gone a long way to hold such legislation constitutional, as a valid exercise of the police power.[16] Natural gas has usually been the object of such legislation because the necessity of conserving it, if it is to last long, is apparent to everyone. It is submitted that the conservation of coal is just as important to the economic welfare of the state as the conservation of gas, though at the present time the supply is more plenteous. Our Supreme Court of Appeals has held valid legislation forbidding the excavation of coal within five feet of the boundary line,[17] the court recognizing the social interest in conserving it in the following language, "The mining of coal is one of the largest industries carried on in the state * * * * and in the aid of an industry so great and widely diffused the state as a whole is interested."

It would seem that under the decision of the principal case, the only remedy for the economically unsound result reached therein would seem to be legislation, which in view of the decisions of the courts, might well be held constitutional as a valid exercise of the police power, thus conserving to the state a valuable taxable resource as well as preserving millions of tons of coal for the use of the people. But legislation would not seem to be necessary if under the facts of the principal case it appeared that there are two equally efficient methods of mining the coal, one of which would not damage the plaintiff's coal, for the defendant should not be allowed to make an anti-social use of his superior rights, under the maxim *"sic utere"* or on broad general grounds of public policy.

—JOHN V. SANDERS.

[16] Walls *v.* Midland Carbon Co., 254 U. S. 300, 41 Sup. Ct. Rep. 118 (1920); Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900); Lindsey *v.* Natural Carbonic Gas Co., 220 U. S. 61 (1911).

[17] Maple *v.* John, 42 W. Va. 30, 24 S. E. 608 (1896).