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Real Property--Conveyance of Surface Construed

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property due to the proximity of a high voltage electric wire, a demurrer to the declaration was sustained.¹⁶ The case is not without authority. One court has held that even where the abutting owner has title to the fee in the street, he is not allowed compensation for increased danger of lightning, liability of wires to blow down or impediment to firemen.¹⁷ It would seem that this case presents one more of those unfortunate incidents where there is an actual damage but one for which the law does not provide a remedy.

Wires charged with a deadly current of electricity, while their danger is not apparent to the senses, cause death and injury daily and constitute a serious menace both as a cause of fire and an impediment to the fighting of fire.¹⁸ Such a hardship as that occasioned by the decision in the Karcher Case can be remedied. Where the safety of inhabitants and their property reasonably requires that wires shall be placed in underground conduits, such may be accomplished by a reasonable exercise of the police power.¹⁹ In proper cases, this important power should be used for the protection of the lives and property of the inhabitants of towns and cities.

—H. C. H.

REAL PROPERTY — CONVEYANCE OF SURFACE CONSTRUED. — The Supreme Court of West Virginia, when recently called upon to decide whether or not the following clause:

“ . . . all that surface of a certain tract or parcel of land containing 110 acres lying on the head waters of Dolls Run, Monongalia County, West Virginia, known as the tract of land that F. M. Meredith, guardian, etc., and Mary F. Morris conveyed to the said grantors on the 14th day of June, 1889, subject to ingress and egress and water privilege for drilling oil and gas wells on the same and the right to lay pipes to convey oil and gas therefrom or over the same, and to work upon said land in drilling said wells, or removing any or all machinery therefrom”

in a deed passed the coal and mining rights, advanced the some-

¹⁶ Karcher v. Wheeling Electric Co., 118 S. E. 154, (W. Va. 1923).

¹⁷ Hewett v. Western Union Telegraph Co., 4 Mackey 424, 2 Am. Elect. Cas. 222 (D. C. 1886).

¹⁸ See CURTIS, THE LAW OF ELECTRICITY, Ch. XII, p. 497.

¹⁹ Electric Power Co. v. The City of New York, 29 Misc. 48, 60 N. Y. Supp. 590 (1899); People v. Squire, 145 U. S. 175, 4 Am. Elect. Cas. 122 (1892).

what astounding and hitherto unprecedented doctrine that the word "surface" when used as the subject of a conveyance is not a word having a fixed and definite meaning and that resort might be had to the interpretation placed on the clause by the parties to ascertain whether the coal passed.¹ The Court said that there was an express exception of the oil and gas, and invoked the familiar rule of logic: "The expression of one thing is the exclusion of another," to bear them out in holding that the coal passed.

Was there an express exception of the oil and gas? It is submitted that this argument of the court is founded upon a fallacious minor premise; that, to the careful reader, of the clause:

" subject to ingress and egress and water privilege for drilling oil and gas wells on the same and the right to lay pipes to convey oil and gas therefrom or over the same, and to work upon said land in drilling said wells, or removing any or all machinery therefrom"

it will appear that the effect of the language used is to reserve to the grantors a mere incorporeal surface right, in aid of the enjoyment of the corporeal property not conveyed. If this be true, as submitted, the decision stands on the single proposition that the word "surface" when used as the subject of a conveyance may be rendered, by the interpretation placed thereon by the parties, so broad and comprehensive as to include minerals.

Previous to this case, the common acceptance of the term "surface" in this state, and as judicially defined here, was, "that portion of the land which is or may be used for agricultural purposes."² It is true that the case of *Dolan v. Dolan*,³ does under somewhat similar circumstances hold that minerals may be included in a conveyance of the surface. But in that case there were two saving circumstances, which prevent that case from being a precedent for the proposition advanced here. First, there was an express exception of one of the minerals, and hence the court had a proper case for the application of the rule of logic hereinbefore referred to. Second, there the court was dealing with a will, in which case there is a strong presumption against intestacy.⁴ To have decided otherwise would have left the testator intestate as to the minerals

¹ *Ramage v. South Penn Oil Co.*, 118 S. E. 162, (W. Va. 1923).

² *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795, (1902).

³ 70 W. Va. 76, 73 S. E. 90, Ann. Cas. 1913 D. 125. (1910).

⁴ *Smith v. Schlegel*, 51 W. Va. 245, 41 S. E. 161, (1902); *Bartlett v. Patton*, 33 W. Va., 71, 10 S. E. 21, (1889); *Houser v. Ruffner*, 18 W. Va. 244, (1881); *Gallagher v. Rowan*, 86 Va. 823, 11 S. E. 121, (1890).

excepted where there was a manifest intention to leave nothing undisposed of.⁵

The word "surface" has been variously defined, as the mere *vestmentae terrae*, the top of the earth and whatsoever is on the face thereof;⁶ as not the mere plane surface, but all the land except the mines;⁷ as the non-mineral portion of the land which covers and envelopes the minerals;⁸ and as that portion of the land which is or may be used for agricultural purposes.⁹

The holding of the West Virginia Court marks a salient departure from the rule of *stare decisis*. The case in question overrules previously adjudicated West Virginia cases and is contrary, not only to the weight and preponderance, but so far as the writer has been able to determine, to all the American and English authority on the point. Without going into the merits of the present tendency of the courts towards a relaxation of the rigid rule of adherence to precedents as to the law in general, it is certainly regrettable that the rule should be so clearly violated in the field of real property, where it has hitherto been rigidly applied and where it is especially important that vested rights should not be disturbed.¹⁰

The Supreme Court of the United States is definite in laying down the proposition that a decision overruling a former case does not come within the constitutional prohibition against impairing the obligation of contracts, and that the prohibition only applies to legislative action.¹¹ Although judicial legislation is not unconstitutional, it is submitted that the courts should be slow to change the law where contractual or vested rights will be extinguished thereby.¹²

—W. B. H.

BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE—AVOIDANCE.—
The plaintiff agreed to erect a hotel building in a certain time. The contract provided for extension of time in case of delay with-

⁵ Dolan v. Dolan, *supra*, note 3.

⁶ Wakefield v. Buccleuch, 36 L. J. Ch. 179, L. R. 4 Eq. 613, (Eng. 1867).

⁷ Pountney v. Clayton, L. R. 11 Q. B. Div. 320 (Eng. 1883); Dolan v. Dolan, *supra*.

⁸ Kansas Natural Gas Co. v. Board of Commissioners of Neosho County, 75 Kan. 335, 89 Pac. 750, (1907); Big Six Development Co. v. Mitchell, 138 Fed. 279, 1 L. R. A. (N. S.) 332, (U. S. 1905).

⁹ Williams v. South Penn Oil Co., *supra*.

¹⁰ Clarke v. Figgins, 27 W. Va. 670, (1886); Braxton v. Bressler, 64 Ill. 488, (1872); Sweeting v. Sweeting, 10 Jur. N. S. 31 (Eng. 1863); 34 HARV. L. REV., 74.

¹¹ Central Land Co. v. Laidley, 159 U. S. 103 (1894).

¹² Thomas v. State, 76 Ohio St. 341, 81 N. E. 437, (1907).