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Contracts--Builder's Excuse for Failure to Secure Architect's Approval

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RECENT CASES

CONTRACTS—BUILDER'S EXCUSE FOR FAILURE TO SECURE ARCHITECT'S APPROVAL.—In a recent case in which a building contractor had fully performed his duty, there was evidence tending to show that the architect in charge of the work, whose decision was made final by the contract, arbitrarily or capriciously refused his approval. *Held,* that a jury is justified in setting aside or ignoring the architect's decision. *Berry* v. *Huntington Masonic Association,* 93 S. E. 355 (W. Va. 1917).

The court in this case has overruled or modified the law as stated in previous decisions in this state. Heretofore the cases have shown a decided tendency to apply the strict common-law rule as to the performance of express conditions precedent to building and construction contracts which make the approval of the architect or engineer in charge a condition precedent to the payment of the contractor. *Plumbing Co.* v. *Carr,* 54 W. Va. 272, 46 S. E. 458 (1903); *Charleston Lumber Co.* v. *Friedman,* 64 W. Va. 151, 166, 61 S. E. 815 (1908); *Barrett* v. *Coal Co.,* 51 W. Va. 416, 41 S. E. 220 (1902). At common law the failure to show the approval of the architect or engineer in such a case would be excused only by showing that such approval was refused because of collusion with the owner. *Clark* v. *Watson,* 18 C. B. N. S. 278; *Batterbury* v. *Vyse,* 2 H. & C. 42. American courts have shown a tendency to relax the old common-law rule and in a majority of jurisdictions proof of the approval of the architect or engineer will be excused by showing such approval has been withheld arbitrarily, capriciously or through mistake. *Bradner* v. *Roffsell,* 57 N. J. L. 32, 29 Atl. 317 (1894); *Bentley* v. *Davidson,* 74 Wis. 421, 43 N. W. 139 (1889). Some cases have taken the extreme view that proof that the contract has been substantially performed is evidence from which the jury may find the approval of the architect or engineer has been improperly withheld. If so, proof of such approval is excused. *Nolan* v. *Whitney,* 88 N. Y. 648 (1882); *MacKnight Flintic Stone Co.* v. *New York,* 160 N. Y. 72, 54 N. E. 661 (1899); *Bird* v. *St. John's Episcopal Church,* 154 Ind. 138, 56 N. E. 129 (1900). This extreme view has the effect of substituting the verdict of a jury for the approval of the expert chosen by the owner to see that the contract is properly performed. On the other hand, the old common-law rule is unjust to the contractor because it may permit the architect or engineer to defeat the contractor's honest claim and cause the latter to lose the product of his labor and materials which has become a part of the land. While the rule adopted in

the principal case may be difficult to support on time-honored principles of the law of contracts, it is to be commended because it mitigates the harshness of the strict common-law rule and at the same time sufficiently protects the owner by giving him the benefit of the honest judgment of his architect or engineer.

MINES AND MINING—CONSTRUCTION OF OIL AND GAS LEASE—WHAT IS A GAS WELL.—In an action for gas rental on a lease providing for a royalty of one eighth of the oil and $300 per annum for "each and every gas well," it appeared that a well produced both oil and gas. The evidence tended to show that the well had a very strong rock pressure and a capacity of about one million feet of gas per day, but that the gas could not be marketed profitably by the lessee. *Held,* that the well was a "gas well" within the meaning of the lease. *Prichard* v. *Freeland Oil Co.,* 93 S. E. 871 (W. Va. 1917).

When this case was previously before the Supreme Court, *Prichard* v. *Freeland Oil Co.,* 75 W. Va. 450, 84 S. E. 495 (1914), the court decided that the term "gas well" in this lease meant a well from which, considering its location with reference to any market for gas and its capacity as a gas producer, the lessee, by reasonable effort, could market or use the gas with reasonable profit. The judgment entered for the plaintiff in the trial court was reversed on the ground that the evidence failed to show that the well in question produced gas in such quantity that it could be marketed with profit by the lessee. Although the evidence tended, in the principal case, to show that the lessee could not market the gas from this well with profit, yet the court held that the evidence was sufficient to sustain the judgment for the plaintiff. Thus the court as to the same lease has materially modified its former holding as to the meaning of the term "gas well" by disregarding proof of the lessee's inability to dispose of the gas at a profit. In other words, the idea of the court now seems to be that "gas well' means such a well as operators of oil and gas wells in the neighborhood would consider a gas well. This appears to be a more reasonable construction, and more in conformity with the probable intent of the parties, than the construction placed upon the term in the former case. Under the construction put upon the lease in the former case, a well could not be a gas well, no matter how productive, unless its product could be profitably utilized by the lessee. The holding in the principal case, that the lessee may be liable for both the oil royalty and the gas rental from the same well, is in accord with decisions in other jurisdictions. *Mathes* v. *Shaw Oil Co.,* 80 Kan. 181, 101 Pac. 998 (1909); *Indiana Natural Gas and Oil Co.* v. *Wilhelm,* 44 Ind. App. 100, 86 N. E. 86 (1908); *Pittsburg-Columbia Oil & Gas Co.* v. *Broyles,* 46 Ind. App. 3, 91 N. E. 754 (1910).