FRENCH v. BREWER.

Case No. 5,096.

[3 Wall. Jr. 346;[1] 38 Leg. Int. 324; 9 Pittsb. Leg. J. 153.]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1861.

OIL MINING RIGHTS—BILL FOR PRELIMINARY INJUNCTION.

1. Deeds, however apparently formal, must be interpreted upon a view of the whole paper, and in subservience to what appears to be the scope of them, especially when it appears, as it often does in the United States, that the instrument is the production of an ignorant scrivener who has used legal terms without exact knowledge of their legal import The technical rules of the old English books must be applied with intelligence; and only after an examination of the whole deed.

2. In cases of obscure instruments, especially on motions for a preliminary injunction, a court may inquire into the actual state of the knowledge which the parties to it had upon the subject of it; and where it involves questions of science, may refer to the state of public knowledge or that of learning at the time the deed was made.

3. Where the meaning of a deed is not absolutely clear, and the rights of the party claiming under it are disputed, a preliminary injunction will not be granted to restrain a person acting in violation of alleged rights, unless it is plain that irreparable injury is likely to be suffered. And where the defendant is laying out his own money in such a way that the complainant, if his construction of his deed be true, can ultimately get the benefit of it all, and where the defendant has not received from his outlay any return as large as the outlay itself, the injury will not be regarded as irreparable.

Bill for injunction, the case being thus: In the beginning of the present century, a stream was discovered not far from Mead-ville, in Crawford county, Pennsylvania, upon the surface of which, as of the smaller rivulets running into it, a species of oil frequently flowed; and to such an extent in some places, that when a candle was applied to the surface, the oil would ignite and blaze in a lambent flame on the creek itself. The people in the neighborhood of the stream, which was now called "Oil Creek," were aware of this peculiarity of the water; but the population thereabouts, was sparse in those days, and no great deal of mineral-ogical science was applied to the subject. The schoolmaster called it a "phenomenon," and this was regarded by the learned as a full and lucid explanation of the matter. The Indians, it is said had known this peculiarity of the stream, and applied the oil to surgical purposes, in the cure of external injuries or sores. The early white settlers used it in the same way, and also for different domestic or farm purposes. It flowed along with the water—on its surface—but the descent of the water being rapid, and the stream itself shallow, the only mode in which the people could get the oil separated from the water was by making little ditches or pits along side of the creek, and drawing off a certain amount of water of the stream into them. This being left in a state of stagnation, the oil would soon collect in a coagulated form on the surface; when the women would go out, and inserting blankets under the water, raise them and secure the oil; the blankets being porous enough to let the water flow through them, but sufficiently close to retain, till

they could empty it, the thicker substance of the oil. Enough oil was obtained in this way, to make it worth while for the farmers and others in the neighborhood occasionally to go through this somewhat laborious process of getting it; but the oil never became in those days a subject of much value or of any commerce. Sometime, however, in the spring of 1858—the date is important—a person named Edwin Drake, residing at Titusville, a town on this creek, conceived that the oil must be a mineral substance, some way connected with coal formations; and that it probably came from a great depth below the creek, and through some fissures in the rocky formation, from coal strata on the adjoining lands, and therefore that it could be far better got by boring on the lands themselves. His conjecture proved to be right, and led the way to a branch of industry which in five years has, in western Pennsylvania, become an immense one, covering whole regions from Lake Erie to the Ohio, with operations in what is now called "petroleum" or "rock oil."

{In the case here reported,—which was a bill in equity to restrain certain persons from boring on some lands for this oil,—Drake was examined as a witness, and his account may deserve perpetuation. It was in these words: "That some time in the forepart of 1858the deponent entered upon the lands which are the subject of this bill, for the purpose of gathering oil, and developing the same; that he, at great expense, during that and the following year, sunk, by boring, the first well that was known for obtaining oil in that region of the country; that this method was wholly

unknown previous thereto; that in consequence of this, and the want of proper implements to operate with, and the necessity of obtaining new patterns for these, and especially for iron pipe for driving to the rock, a very great expense was incurred, amounting at least to $4,500, in establishing the first well; that this proved successful in obtaining large quantities of oil."][2]

In November, 1855—that is to say, two years or more before the discovery and labors of Drake, as thus recorded, the defendants, being then owners in fee of 160 acres of land on Oil creek, including a certain island particularly well situated for gathering oil in the old way—while the complainants owned 105 acres on the same creek, adjoining this tract of 160 acres, but lower down on the creek than the defendants', made to the complainants a deed, somewhat peculiar in its expression. It ran thus: "The said parties of the first part," (the now defendants) "do hereby lease and by this indenture have leased to the said parties of the second part," (the now complainants) "their heirs and assigns, for the full term of ninety-nine years, all the oil or paint on or being on any of the lands," &c. (of the defendants), "with the privilege of"—the deed went on rather oddly to say—"of going on to and of taking away all or so much of the oil or paint at any time and at all times, as is consistent with the pleasure or interest of the said parties of the second part, on the following described lands only, viz.:" (Here followed a description of certain lands of the defendants.) "Reserving to the said parties of the first part" (that is to say, to the now defendants, who had large mill works near this land), "their heirs and assigns, the right and privilege at all times to pass over and repass with teams, wagons, sleighs, carts, sleds, or any other vehicle, to and from their mills, over said ground or lands, together with all ground or land necessary for yard and mill privileges and mechanical purposes: And the said parties of the second part their heirs and assigns," the deed proceeded, "are not in any case to approach with their work or excavations so as to endanger or obstruct in any manner their mills, races, dams and ponds, or to impair or obstruct their lumbering and mechanical business as they do now or may hereafter exist"

It was made plain enough in behalf of the complainants, that between the date of the deed just mentioned and the time of Mr. Drake's discovery, the defendants never attempted to claim any oil on or about this tract of 105 acres—the tract on the upper part of the creek—but that in May, 1860, finding that Mr. Drake had discovered a new mode of getting at the oil, and of making a great subject of commerce out of it, they too, by numerous workmen and under-tenants had been sinking wells and carrying away the oil also; although, as yet, all the oil that they had got had not paid off the cost of sinking the wells. The complainants—citizens of Connecticut, who were largely engaged in boring for oil—finding that the defendants were interfering with the monopoly of the substance which they had got through Mr. Drake's discovery, now filed a bill, praying an account for the oil that the defendants had already got from the 160 acres, and an injunction against

taking any more, in any way, and especially by the process of boring wells. The bill alleged that the complainants had expended large sums of money in the development of the oil on the 160 acres, and of the means and methods of obtaining it from the land, by reason of which the premises aforesaid, and the right and title thereto, and interests therein of the complainants, had been greatly increased in value; so that they were now believed to be worth $100,000 more than before such expenditure and development; that the rights and claims of the complainants were acknowledged until the expenditure was made, and the development had resulted in increasing the value. It complained in substance, further, that respondents occupied the 160 acres to the exclusion of complainants, and had excavated and bored numerous wells thereon, and taken the oil therefrom, "thereby" preventing complainants from taking and using it, and preventing the same from oozing and flowing down the creek from the tract of 160 acres to that of the 105 acres below it and belonging to complainants. The testimony showed that the respondents had bored wells, and had a large number of hands employed in boring others. But there was no evidence that they have meddled with or sensibly affected the flow of the oil down the creek, or the collection of it by complainants, either on their own land or on the island. Nor was there any proof that the oil raised from the upper works, flowed in any way, either above or below the surface, to the lands below, of the complainants, or to the island where they were permitted to enter and make pits: whatever might be the inference which a geologist, on looking at the soil, would draw if the wells were very numerous, and near to the stream.

Mr. Church, for complainants, rested strongly on the general expressions of the deed, and on the old and technical rules as given in Coke, Shepherd's Touchstone and other books, about interpreting them; citing authorities very fully. This he said was a deed of indenture, leasing for ninety-nine years "all the oil and paint lying on or being on any of the lands," &c. It was therefore an original conveyance, absolute in character during the time limited therein. The grant of the oil is complete and explicit. It conveys a corporeal right; and, by the terms of the deed, is assignable. The language of

the deed in Caldwell v. Fulton, 7 Casey [31 Pa. St.] 475, is, "the right and privilege of digging and taking away stone coal, to any extent, the grantee may think proper to do, or cause to be done, under any of the land now owned and occupied by the said grantor, provided, nevertheless, the entrance thereto, and the discharge therefrom, be on the foregoing described premises;" that is, on a certain 16 acres granted in fee by the same deed. The supreme court of Pennsylvania held that this was a grant of the coal corporeal, and not of a mere privilege incorporeal, and was exclusive of the grantor. The grant here is of "all the oil on any of the lands of the grantors, in," &c. The instrument is that of the grantors, and is to be taken most strongly against them. The restriction, if a restriction is meant in the words—"With the privilege of going on and taking away all or so much of the oil or paint, &c, on the following described lands only"—is repugnant to the preceding grant, and void. The first expression is plain in its meaning; the later words are ambiguous. Under those circumstances the latter, even if they were apparently restrictive, would be inoperative; for certainty previously expressed, is never to be restrained by subsequent ambiguity. But, by a slight straining, we can reconcile these different parts, and are bound to do so, if we can in any way. "An exception in a deed," says Shepherd's Touchstone, 75, "must be of something separable from that which is before expressed." And hence the words subsequent to the lease or grant, of "all the oil on any of the lands," should be made to apply—as they can be made to apply—to gathering it on that part whereon the right to the use for lumbering business is reserved to the grantors. In fact, this later clause being new, means something new; something by way of addition to that already granted. "With," in this connection, means "in company with"—"as an appendage." The later words are in fact disjointed from the earlier and complete grant: and they refer to the later part of the subject spoken of; that is to say, to the rights reserved about lumbering. This mode of construction will harmonize the apparently conflicting parts of the instrument. The fact that the plan of raising oil by wells had not been discovered in November, 1855, when the deed was made, is unimportant. The deed is to be interpreted by its plain words; according to what it says; and who shall declare that it was not in view of the very purpose of trying the experiment, which Drake did try, that the grant was obtained? The discovery was made soon after the deed. The conjecture made by Mr. Drake, as to the source of this oil, was one natural to be made; and certain to be made by some one, as the region along this stream became, as it was rapidly becoming, populous, rich and enlightened. It does violence to the words to restrict them to the old way of getting oil by blankets. How was a right to get oil from the creek, in a blanket a grant of "all the oil and paint lying or being on any of the lands," &c? Whatever the deed does or does not mean, it is impossible to say that it means nothing more than that the complainants might practice the old fashioned and half savage operation of the blanket. It is a dangerous rule—one, certainly, having no place among Blackstone's—by which to construe deeds, to speculate

upon the supposed state of the scientific knowledge of a purchasing party. It would be a pre-eminently dangerous one in regard to the purchase of mining rights, where science is constantly advancing from conjectures to certainties, and enterprise is continually based upon speculation—upon "inklings"—which the purchaser carefully conceals. The present plaintiffs are citizens of Connecticut and probably made the purchase under scientific counsel, and with a strong suspicion of what has turned out to be a fact. Assuming that this part of his case had been made out, Mr. Church argued without difficulty in favor of an injunction.

McCalmont & Kerr, for respondents, contended that the deed was too obscure for a court to interpret it in this form of proceeding, and in a way which would be so injurious to the defendants; as the grant of an injunction would plainly be.

GRIER, Circuit Justice. The instrument on which this controversy arises is anomalous in character. It is the work of a conveyancer ignorant of legal forms, and wholly unlearned in the law. It does not profess to sell or convey absolutely all the mines of paint or petroleum lying in or under the 160 acres. If it had done so, the title to the minerals would necessarily include a right to enter on the land of the grantor to take them away. A lease for years is a contract for the use of lands or tenements; and although it may be for a full consideration paid down, and reserve no rent to be paid in future, yet it contemplates a temporary use of the thing leased, whether it be a farm or a mine, and a return of the possession thereof to the owner or reversioner. Suppose it was a lease for one year to "take at all times so much of the oil as is consistent with his pleasure or interest" would this confer an absolute title to all the oil, whether taken within the year or not? The great and governing rule in the construction of all contracts or deeds is to ascertain the intention of the parties, and this must be by a careful examination of the whole instrument. This is more especially necessary in a country where every man is his own scrivener, and freely uses legal terms without a knowledge of their true or precise legal import. It is no doubt a just rule of construction, that restrictive words, repugnant to an absolute grant or

sale of a thing, may be construed to be inoperative, because they contradict the clearly expressed terms of the deed, as to the nature and extent of the estate granted, and render it ineffectual for the purpose clearly intended by the parties. But we must first examine the whole instrument, all its parts, and each provision or covenant contained in it, to ascertain the intention of the parties, before this rule can apply. We should ascertain the nature of the thing which is the subject of the grant, and the state of knowledge of the parties. The rules of construction adopted with regard to leases or conveyances of coal mines or other solid mineral substances, may have little application to this newly discovered mineral liquid. There would be no necessary contradiction in the terms of a lease of coal mines, that the lessee might take all the coal, or so much as he pleased, under a tract of 100 acres, while it prohibited his entry on all but 10 acres for the purpose of sinking the shafts for his mines. It may be true that wells sunk on the 105 acres or on the island, might or might not drain the oil from the whole 160 acres. As to this fact, the parties have furnished no evidence whatever, and it is probably a fact not yet ascertained or known. We must have reference, in interpreting this obscure paper, to the state of knowledge of the parties, and of the whole country, with regard to the subject matter of this contract, and the mode in which this mineral oil was obtained. When the instrument was executed, the only method known by which the oil could be obtained, was by digging trenches, and raising the oil by blankets from the water. The natural flow of the creek would carry the oil on its surface from the lands of the respondents to those of the complainants, which were lower down; unless the oil was arrested above. That part of the 160 acres called the island was conveniently situated for making the trenches to gather the oil as it came down. Recalling, as the reporter's statement gives it to us, and as the affidavits disclosed it, the knowledge of the parties and the people on the subject of this contract, and the fact that till the time of Drake's discovery the oil had found its way to the surface through chance fissures in the strata under the stream, and that it was not till 1858 that boring to, find the source of the oil was practised—much of the difficulty in the construction of this instrument, by reason of apparent contradiction in its covenants, vanishes.

It is not necessary, however, nor perhaps proper to express any conclusive opinion as to the construction and effect of this instrument before the final hearing. It is sufficient, for the purpose of the present motion, to say:

1. That it is, at least, doubtful whether the complainant's deed conveys in absolute estate all the oil under the respondent's lands, or only a license for a term of years to collect what flowed on the surface of Oil creek; or whether parties could be said to contract about a subject matter of which both were wholly ignorant Caldwell v. Fulton, 7 Casey [31 Pa. St.] 479, cited by Mr. Church, has ho similarity to the present. It is no doubt true, that minerals beneath the surface may be conveyed as corporeal hereditaments, and thus severed in title from the surface soil; and there is no doubt that livery of seizin is

unnecessary either here or in England since the statute of uses and the introduction of deeds of bargain and sale. But it might nevertheless be a sufficient reason for construing an instrument to take effect as a grant of an incorporeal hereditament, which requires no livery of seizin, that it contains no apt technical words to grant, bargain, or sell absolutely a corporeal hereditament, or an unsevered portion of the grantor's land.

Since that decision, a court administering the law of Pennsylvania, might be justified in construing a grant of "the full right, title and privilege of digging and taking away stone coal to any extent" from the land of the grantor, as an absolute bargain and sale of the coal to the grantee. But we must construe the deed before us ex visceribus suis; having reference to the peculiar nature of the subject matter and the knowledge of the parties with regard to it. With these facts in view it is at least doubtful whether the parties intended by this anomalous instrument to grant anything more than a license for a term of years to take all of the oil floating down the creek, and to use the island for that purpose, in consideration of the grantee's license to them to have a mill race over their land. A final decision of this question must be reserved till a final hearing of the case.

2. There is no evidence to support the charge of the bill, that wells bored by the respondents prevent the oil from flowing down the creek, or that they, have interfered in any way to arrest such flow or hinder the enjoyment of any of the complainants' right on the island. We do not know, and are not informed by the pleadings or evidence, that the oil taken from the rocks above would ever have flowed (above or below the surface) down to the island, or to the one hundred and five acres below.

3. The oil taken by defendants thus far has not compensated the expense and trouble of boring the wells. An injunction now would compel the respondents to cease their business and discharge a large number of hands. It would inflict a certain injury on the respondents, while the benefit to the complainants, like their title, is uncertain. If they recover on final hearing, the new wells will be a benefit to them, and not an irreparable injury. Injunction refused.

[1] {Reported by John William Wallace, Esq., and here reprinted by permission.}

[2] {From 18 Leg. Int 324.}

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