UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 78-137

MATTHEW NEELEY, ET AL, PLAINTIFFS,

VS. MEMORANDUM OPINION AND ORDER

MIDDLE STATES COAL COMPANY, ET AL, DEFENDANTS.

* * * * * * * *

On 19 January 1906, the Wiremans, Daniel and Susan, entered into an agreement with John W. Kaufman to convey the mineral rights to certain lands on the waters of Bull Creek of the Main Licking River in Magoffin County, Kentucky. The agreement contained a reference to a reservation of an indefinite twenty (20) acres around the house. Kaufman assigned his rights, or certain rights, under the agreement to E. H. Yost on 5 March 1906. Subsequently, E. H. Yost made an assignment to D. V. Lowther on 27 March 1908. By reason of an internal dispute, among many about "who owned and owned what", a civil action was instituted in the Magoffin Circuit Court, wherein the Wiremans, Kaufman, assignees and others were parties thereto. This action concluded in a judgment and Court sale of the mineral rights to D. V. Lowther as purchaser in December of

1912. The judgment and Court sale did not mention nor contain any reservation or exception.

The plaintiffs in this action are heirs and successors of the Wiremans. The defendants are successors to the purchaser at the Court sale. The dispute is for royalties from coal allegedly taken from an area in or near the old homeplace. The tempo and legal theories of this action were, in many ways, similar to the weather in the month of March. Initially, the parties considered or treated the 1906 agreement as a conveyance. Subsequently, an issue developed as to whether or not the alleged reservation was a part of the property on which the defendants were mining. However, the defendant, Middle States Coal Company, consistently denied that plaintiffs were the owners of the mineral rights on which the defendant has been mining.

A trial was had upon the merits by the Court, and upon its conclusion the parties were directed to file post-trial briefs upon the following issues:

1. Whether or not the 1906 agreement contained a reservation?

2. Whether or not the failure of the judgment and Court deed to mention or contain a reservation was a mutual mistake and a scrivener's error?

3. Whether or not the plaintiffs, at the conclusion of the evidence may amend their pleadings to raise the issue of reformation of a deed?

4. What is the effect of the Statute of Limitations?

An issue was subsequently added by the Court:

5. Whether or not this Court may reform the deed of another Court?

After considering the pleadings, evidence and statements of points and authorities, the Court is of the opinion and finds that the plaintiffs are not entitled to the relief demanded in their complaint.

1906 Agreement to Convey

While the 1906 agreement to convey may have demonstrated an intent for the Wiremans to have a reservation or exception, it did not definitively establish one. Land within exception in a deed must be described with same certainty as property granted. Carr v. Baldwin, 190 S.W.2d 692, 162 A.L.R. 285; Dotson v. Kentland Coal and Coke Co., 265 S.W.2d 466. The terms "reservation" and "exception" in deeds are often used interchangeably as meaning the same thing, and hence a technical misnomer does not defeat an attempted reservation or exception. Clark v. Pauley, 165 S.W.2d 161; Rhodes v. Bennett, 211 S.W.2d 693. While the parties recognized that the 1906

agreement was a contract to convey and that an ambiguous reference therein would be of the same ambiguity in a deed, the plaintiffs contend that by reason of a merger doctrine such intent for an exception or reservation is a part of the Court deed in 1912. Allen v. Henson, 217 S.W.2d 120; Borden v. Lichford, 619 S.W.2d 715. Further, the ambiguity is made sufficiently definite by the evidence introduced at the trial as to the location of the homeplace so as to cure any such defect. Scott v. Spurr, 184 S.W. 866.

Conceding, arguendo, the framework of plaintiffs' legal reasoning, the Court is of the opinion and finds that the probative evidence did not sufficiently establish the location of the homeplace buildings nor the geometric configuration of the twenty-acre boundary around said buildings to create a valid exception or reservation.

FAILURE OF JUDGMENT AND DEED
TO CONTAIN RESERVATION OR EXCEPTION

There was no evidence as to the motive, intent or reason for the failure of the Court deed to contain an exception or reservation as contained in the contract to convey. Under Kentucky law, a simple preponderance of the evidence is not enough to overcome a presumption that the deed on file in public records is a true and complete testimonial as to the terms of the conveyance. K.R.S. 61.060; Hi Hat Elkhorn Coal Co. v. Kelly, 205 F.Supp. 764.

AMENDMENT TO RAISE ISSUE OF REFORMATION

Kentucky Rule of Civil Procedure 15.02, which is the same or similar to Federal Rule of Procedure 18(b), permits an amendment of the pleadings at the conclusion of the evidence. However, the Court may take cognizance only of issues that have been tried as if made up by the pleadings. Notwithstanding evidence demonstrating an intent for a reservation or exception in the agreement, because of the failure of same in the Court deed, together with a paucity of evidence as to the homeplace and an indefinite boundary therearound, and the failure to plead such issue and the passing of seventy years in time, the Court denies the motion to amend.

POWER OF THIS COURT TO AMEND A COURT DEED OF ANOTHER COURT

The 1912 deed was a Court deed. It was a deed made and approved by a judgment of the Magoffin County Circuit Court. The jurisdiction of the Court as to the parties and subject matter has never been questioned. The validity of the judgment has never been challenged nor placed in issue. Even if the parties agreed that a mutual mistake had been made, the Court is not convinced that it has the power to reform a deed made pursuant to a judgment of another court. The judgment of a court having

jurisdiction of the parties and the subject matter is conclusive as to all the media concludeni against collateral attack. U.S.C.A., Const. Article 4, Section No. 1; Jackson v. Kentucky River Mills, 65 F.Supp 601; Smith v. Decker, 374 S.W.2d 487; Harper v. Martin, 552 S.W.2d 690. This Court finds that any action to reform the 1912 deed is a collateral attack upon the judgment ordering and approving such deed. Any action concerning relief from such judgment or orders of the Magoffin County Circuit Court must be in said Court pursuant to Rule 60 of the Kentucky Rules of Civil Procedure.

STATUTES OF LIMITATION

This matter having been disposed of upon other grounds, the Court is of the opinion that it is unnecessary to comment upon the remaining issues.

Accordingly, IT IS HEREBY ORDERED, that judgment be entered for the defendants denying plaintiffs the relief demanded in their complaint, pursuant to this memorandum opinion and order.

This the 9th day of February, 1983.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 78-137

MATTHEW NEELEY, ET AL, PLAINTIFFS,

VS: FINAL JUDGMENT

MIDDLE STATES COAL COMPANY, ET AL, DEFENDANTS

Pursuant to a memorandum opinion and order entered this date, it is ORDERED and ADJUDGED,

That judgment be and hereby is entered in favor of the defendant, Middle States Coal Company, and against the plaintiffs, Matthew Neeley, et al., denying the plaintiffs demands and claim for relief and that said plaintiffs take nothing herein and that the defendant have and recover its costs herein expended.

This is a judgment between all the parties upon all the issues and there is no reason for delay;therefore, this is a final judgment.

This the 10th day of February, 1983.

G Wix Unthank
Judge

and skill which may be used under same or similar circumstances.

[6] Appellee contends that there was no evidence of negligence on its part and the case should not have gone to the jury in any event. In view of the conflict of opinion concerning the safety and practicability of insulating the wires, and the fact that they were maintained in close proximity to the lot where decedent and other employees of the construction company were required to work, we think that there was sufficient evidence of negligence to go to the jury.

[7, 8] Appellee also insists that the decedent was guilty of contributory negligence as a matter of law, and appellant contends that no instruction on contributory negligence should have been given. We do not think either argument warrants an extended discussion. The evidence is not sufficient to indicate wanton or reckless negligence on the part of the defendant. Neither was there such evidence of negligence on the part of the decedent as would justify us to conclude that he was contributorily negligent as a matter of law. The instruction on contributory negligence was properly given.

[9] Appellant also complains of the admission of certain evidence interpreting the ordinance in question. Since the ordinance is plain and unambiguous on its face, such evidence was incompetent. However, it is competent to introduce evidence relating to the effectiveness, practicability, or safety of complying with its terms.

[10] Appellant also insists that the court erred in refusing to admit certain testimony which appears in the record by avowal. The crane operator avowed that if permitted to testify on the subject he would state that while operating his crane elsewhere near high tension wires the electric current "jumped" from the wires to his boom. The court properly excluded this testimony, since appellant did not show that the conditions relative to the operation of the crane elsewhere were similar to the conditions in the instant case. Moors v. Kentucky Electrical Company, 182 Ky. 825, 208 S.W. 15. The conditions may have been greatly dissimilar. For example, the amount of voltage carried by the high tension wires in the two situations may have greatly varied.

For the reasons indicated, the judgment is reversed for proceedings consistent with this opinion.

MILLIKEN, J., not sitting.

DOTSON
v.
KENTLAND COAL & COKE CO. et al.

Court of Appeals of Kentucky.

Feb. 26, 1954.

Action by successors in title to grantee named in deed conveying coal and minerals under 720 acres of land, against owner of surface of such land, to quiet title against exception contained in deed, and to recover value of coal removed by defendant by reason of such exception. The Pike Circuit Court, Pike County, R. C. Littleton, J., entered judgment decreeing the exception invalid, and defendant appealed. The Court of Appeals, Duncan, J., held that where exception reserved to grantor "five acres on the west side of Dicks Fork of Feds Creek near where the bank is now opened", and, immediately after execution of deed in 1903, grantor commenced removing coal through the open bank referred to in the exception, and such operations were continued for some 46 years by grantor and by defendant, as grantor's successor, even if the description in deed were insufficient to identify the five acres excepted, possession and use of the coal bank by grantor and by defendant cured the defect, and

amounted to a selection of the coal most accessible to the opening.

Judgment reversed with directions.

1. Deeds ⇐139

Land embraced in an exception must be described with same definiteness and certainty that is required when describing the property granted, and if the exception is not described with certainty, grantee is entitled to benefit of the defect.

2. Deeds ⇐139

Where an exception is described as only a certain quantity of land out of a larger tract, the grantor can cure the uncertainty in the description of excepted area by selection of excepted quantity, in which case exception is not void if selection is made in a reasonable time.

3. Mines and Minerals ⇐55(5)

Where deed conveying coal and minerals under 720 acres of land, executed in 1903, contained exception reserving to grantor five acres "on the west side of Dicks Fork of Feds Creek near where the bank is now opened", and, immediately after execution of deed, grantor commenced removing coal through the open bank referred to in the exception, which operations were continued for some 46 years without complaint or objection from grantees or their successors in title, even if the description in deed were insufficient to identify the five acres excepted, defect was cured by possession and use of the coal bank, which amounted to a selection of the coal most accessible to the opening.

J. E. Childers, Francis M. Burke, Pikeville, for appellant.

Hobson & Scott, Pikeville, for appellees.

DUNCAN, Justice.

This appeal is from a judgment decreeing invalid an exception which appears in a conveyance of coal and minerals.

On March 26, 1903, G. W. Dotson conveyed to Northern Coal & Coke Company the coal and minerals under 720 acres of land in Pike County. The deed contains this exception: "Grantor G. W. Dotson reserves five acres on the west side of Dicks Fork of Feds Creek near where the bank is now opened." Appellant, Mary J. Dotson, is the owner of the surface and acquired by deed from G. W. Dotson all of his title to the excepted minerals. Appellee, Kentland Coal & Coke Company, is the successor in title of Northern Coal & Coke Company.

An open coal bank was located on the land at the time of the conveyance, and the appellant and her grantor have continuously mined and removed coal from this bank since the execution of the deed in 1903. The mining of coal from this opening seems to have been limited to such quantities as were necessary for the domestic use of the Dotsons and their neighbors until early in 1949, when appellant's son commenced mining on a commercial basis. At that time, appellant made a survey for the purpose of marking the boundary of the 5-acre exception. No complaint was made by appellees concerning the removal of coal until sometime in 1949. In December of that year, appellees instituted this action to quiet title and recover the value of coal removed by appellant. The lower court held the exception invalid, quieted appellees' title, and referred the case to the master commissioner for an accounting on the amount and value of coal mined by appellant.

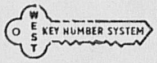
[1, 2] Kentucky, with a majority of the states, is committed to the view that land embraced in an exception must be described with the same definiteness and certainty that is required when describing the property granted, and if the exception is not described with certainty, the grantee is entitled to the benefit of the defect. Justice v. Justice, 239 Ky. 155, 39 S.W.2d 250; Carr v. Baldwin, 301 Ky. 43, 190 S.W.2d 692, 162 A.L.R. 285; Jenkins Co. v. Ramey, Ky., 239 S.W.2d 458. An exception to the general rule, likewise recognized by a majority of the jurisdictions, is that where an exception is described as only a certain

quantity of land out of a larger tract, the grantor can cure the uncertainty in the description of the excepted area by a selection of the excepted quantity, in which case the exception is not void if the selection is made in a reasonable time. Pima Farms Co. v. McDonald, 30 Ariz. 82, 244 P. 1022; Stephens v. Terry, 178 Ky. 129, 198 S.W. 768.

[3] Assuming, without deciding, that the description in this deed is insufficient to identify the 5 acres of coal which are excepted, the defect is cured if the appellant's possession and use of the coal bank are sufficient to bring her within the rule of Stephens v. Terry, supra. Neither that case nor those from other states in which the rule is applied indicates the exact manner in which the selection of the excepted area shall be made. We doubt that any hard and fast rule applicable to all situations would be practical since the manner of selection and means of identification would necessarily vary as depending on the facts and circumstances of each case. Here, the exception was of coal and minerals. Immediately after the execution of the deed in 1903, the grantor commenced removing coal through the open bank referred to in the exception. These operations were continued for some forty-six years without complaint or objection from appellees or their predecessors in title. Under the circumstances, we think this amounted to a selection of the coal most accessible to that opening.

Appellees argue that there is nothing to indicate whether the excepted area is to be in the shape of a circle, semicircle, or square, or whether the open bank is intended to be in the center or in some other part of the 5-acre boundary. It is insisted that the only way by which the selection could have been made definite and certain was by immediately going upon the ground and laying off and marking the excepted boundary. Although the method suggested would certainly have been more definite and satisfactory, we do not think it was required under the facts of this case. The use of the open bank amounted to a clear notice to appellees that the bank was to be somewhere in the excepted area and that the coal accessible to that bank was to be mined. If appellees' agents were uncertain as to the location of the excepted coal, they could have required a more definite location at any time. After permitting the use of this coal bank for forty-six years, appellees cannot now invoke the aid of a court of equity simply because appellant did not do all that she might have done in marking the exterior boundaries of the excepted area.

The judgment is reversed with directions to lay off to the appellant 5 acres of coal most accessible to the open bank now located on this land.



SHEMWELL et al. v. SPECK et al.

Court of Appeals of Kentucky.

Feb. 26, 1954.

Action involving validity of modification of zoning ordinance. The McCracken Circuit Court, Holland G. Bryan, J., entered judgment from which landowners adjoining those who obtained modification appealed. The Court of Appeals, Cullen, C., held that where circumstances surrounding a three block area between school premises and public housing project were such that a reclassification as to the entire three block area to remove zoning restriction to one family residences would have been justified, and restriction was removed as to only a small segment of that area, although adjoining owners in that area might logically have complained of discrimination by failure to remove restrictions from their property, they were not entitled to complain that the reclassification of a portion thereof damaged the value of their property, and reclassification could not be overturned on such basis.

Judgment affirmed.

to cross the track in front of the train, his injuries were proximately caused by the failure of the crew to give signals of its approach or to maintain their lookout duty. That being true, under the rule above quoted, the Court should have sustained appellant's motion for a directed verdict.

The judgment is reversed, for proceedings not inconsistent with this opinion.

301 Ky. 43

CARR et al. v. BALDWIN et al.

Court of Appeals of Kentucky.

Nov. 23, 1945.

1. Deeds ⇐139

Land within exception in deed must be described with same certainty as property granted.

2. Deeds ⇐139

An exception in deed of "1 acre at the old Peace graveyard" did not describe excepted land with sufficient certainty, as shape and location of such land could not be ascertained from description.

3. Deeds ⇐139

Where deed is valid and only exception therein of certain part of land conveyed is void for uncertainty of description, title to whole tract passes.

4. Deeds ⇐139

In action to quiet title to lot as constituting part of acre excepted in plaintiffs' ancestor's deed to defendants' predecessors in title, petition, alleging that ancestor placed stones and markers at corners of excepted plot and died after his grantees' conveyance of land to one defendants' grantor, but not that such ancestor went on ground and marked plot with grantees' knowledge and consent within reasonable time after executing deed, was insufficient on demurrer.

5. Pleading ⇐34(3, 4)

Pleadings must be construed most strongly against pleader, and no presumptions will be indulged in his favor.

Appeal from Circuit Court, Whitley County; Flem D. Sampson, Judge.

Action by Jim Carr and others against Will Baldwin and others to quiet title to a lot and require removal of a church building therefrom. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Stephens & Steely, of Williamsburg, for appellants.

Hiram H. Owens, of Barbourville, W. B. Early, and L. O. Siler, both of Williamsburg, for appellees.

REES, Chief Justice.

On August 17, 1943, George Lawson and wife conveyed a small lot to the trustees of the Cumberland Valley Advent Christian Conference to be used for church purposes. The lot adjoined an old graveyard, and was described as follows:

"Beginning at a stone in the northeast corner of Peace graveyard; thence northward course 50 feet; thence a westward course 75 feet to a stone; thence a southward course 50 feet to a stone at the fence of the graveyard; thence an eastward course 75 feet with the fence of the graveyard to the beginning."

A church building was erected on the lot, and on February 24, 1945, the heirs at law of J. W. Carr, deceased, brought an action against the trustees of the church and George Lawson and wife alleging that they were the owners of the lot. They asked that their title be quieted, and that the trustees of the church be required to remove the building from the lot. The defendants demurred to the petition, the demurrer was sustained, and the plaintiffs declined to plead further. From the judgment dismissing their petition, the plaintiffs have appealed.

It was alleged in the petition that on April 2, 1906, J. W. Carr conveyed to Robert Peace and Martha Peace, his son-in-law and daughter respectively, 22.30 acres of land situated on the waters of Big Poplar creek in Whitley county. A copy of the deed was filed with and made a part of the petition. After describing the tract of land by metes and bounds, the deed contained this: "Reserving 1 acre at the old Peace graveyard." Robert Peace and Martha Peace conveyed the 22.30-acre tract of land to Sam Croley on June 24, 1927. Croley conveyed it to

George Lawson on March 31, 1930. The petition alleged that the lot conveyed to the church by George Lawson was part of the 1 acre reserved by J. W. Carr in the deed of April 2, 1906. Although the Carr deed referred to the 1-acre tract as a reservation, actually it was an exception. The distinction between reservations and exceptions contained in conveyances of real property is pointed out in Stephan v. Kentucky Valley Distilling Company, 275 Ky. 705, 122 S.W.2d 493. The question is: Was the land embraced in the exception described with sufficient definiteness and certainty? If not, the petition failed to state a cause of action, and the court properly sustained the demurrer thereto. The court in its judgment stated:

"The court * * * finds that the reservation contained in the deed, copy of which is attached to the petition in equity and on which this action is based, is too vague and indefinite and has such lack of certainty as to the location of the one acre, sought to be reserved as to be impossible of judicial identification."

[1, 2] Land embraced in an exception must be described with the same definiteness and certainty that is required when describing the property granted. Prewitt v. Wilborn, 184 Ky. 638, 212 S.W. 442. The description in the Carr deed was merely "1 acre at the old Peace graveyard." Apparently it was the intention of the grantor to except out of the grant 1 acre, including the old Peace graveyard, although this is not clear. There was an old burial plot known as the Peace graveyard, but its size does not appear. It does appear that it was surrounded by a fence at the time the deed from Lawson to the trustees of the chuch was made. Whether the exception in the Carr deed included this old graveyard, or was to adjoin it, a description from which its shape and location can be ascertained is wholly lacking.

[3] Where a deed is valid and only the exception is void for uncertainty or vagueness, the title to the whole tract passes; the exception alone being void. Justice v. Justice, 239 Ky. 155, 39 S.W.2d 250. Appellants attempted to bring the case within the exception to the foregoing rule set forth in Stephens v. Terry, 178 Ky. 129, 198 S.W. 768, 771. In the Stephens case the court said:

"If a description of an exception is that it is a certain quantity out of a larger tract, the grantor can cure the uncertainty by a selection of the excepted quantity, and in such case the exception is not void if the grantor makes the selection within a reasonable time. This principle is in accordance with the text in 13 Cyc. 679, where it is said:

"'An exception should describe the property with sufficient certainty. Uncertainty or vagueness of description renders a reservation void, unless there is something in the exception, deed, or evidence whereby it can be made sufficiently certain. Uncertainty of location can, however, in a proper case, be cured by the grantor's election within a reasonable time, followed by acts in pais.'"

[4] The appellants alleged in their petition that J. W. Carr in his lifetime placed cornerstones and markers at the corners of the one acre plot of ground reserved by him as a family burial plot, and that two of the markers were beyond a fence erected around a part of the reserved tract. It was alleged in the petition that J. W. Carr died "about the year 1933," and in appellants' brief it is stated that he died in 1935. In any event, he died long after his grantees had conveyed the 22.30-acre tract of land to Sam Croley and after Croley had conveyed it to the appellee George Lawson. It is nowhere alleged that Carr went upon the ground and marked the excepted plot with the knowledge or consent of the grantee. It was necessary that appellants allege facts showing that the grantor made the selection within a reasonable time. This they failed to do.

[5] In view of the familiar rule that pleadings are to be construed most strongly against the pleader and that no presumptions in his favor will be indulged in, the circuit court properly sustained the demurrer to the petition.

The judgment is affirmed.

HAMBLIN et al. v. JOHNSON et al.

Court of Appeals of Kentucky.

Dec. 5, 1952.

As Modified on Denial of Rehearing Feb. 6, 1953.

Suit between adjoining landowners to reform deeds to conform to allegedly correct division line. The Circuit Court, Whitley County, J. B. Johnson, J., entered judgment fixing division line and reforming deeds of both parties to conform with line as so fixed, and defendants appealed. The Court of Appeals, Duncan, J., held that defendants' immediate and remote grantors were not necessary parties to reformation, since location of division line directly affected only present owners of the land involved.

Judgment affirmed.

1. Appeal and Error ⇐671(3), 907(3)

Where appellants brought to Court of Appeals only a partial record which omitted testimony heard in lower court, Court of Appeals was confined in review to sufficiency of pleadings to support judgment, and, upon all disputed issues of fact, was required to assume that evidence supported finding of lower court.

2. Reformation of Instruments ⇐33

In suit between adjoining landowners to reform deeds to conform to allegedly correct division line, defendants' immediate and remote grantors were not necessary parties, since location of division line directly affected only present owners of the land involved.

3. Limitation of Actions ⇐60(6)

Where a grantee under deed, which by mutual mistake does not describe the property granted, has been in possession of the land, limitation is not a bar to reformation of the deed.

4. Limitation of Actions ⇐179(1)

In suit between adjoining landowners to reform deeds to conform to allegedly correct division line, allegation in plaintiffs' petition that they possessed the land to the line which they claimed to be correct, was sufficient to remove case from application of statute of limitations. KRS 413.120.

5. Reformation of Instruments ⇐45(5)

In suit between adjoining landowners to reform deeds to conform with allegedly correct division line, evidence sustained finding that defendants were not innocent purchasers.

6. Reformation of Instruments ⇐28

A deed may be reformed against a subsequent purchaser with notice.

B. B. Snyder, Williamsburg, for appellant.

L. O. Siler and Glenn H. Stephens, Williamsburg, for appellee.

DUNCAN, Justice.

This appeal is from a judgment fixing the boundary line between appellants' land and the adjoining land of appellees. The relief granted carried with it a reformation of the deeds of both parties to conform to the division line fixed by the court.

[1] The appellants have brought to this court only a partial record which omits the testimony heard in the lower court. We are, therefore, confined in our review to the sufficiency of the pleadings to support the judgment. Upon all disputed issues of fact, we are required to assume that the evidence supports the finding of the lower court.

From the pleadings and memorandum opinion of the court, we are able to gather some of the facts. Green Lawson died in 1942, the owner of a sixty-five acre mountain farm, separated into two parts by the L. & N. Ry. running through the farm in an approximate east-west direction. By his will, Green Lawson directed that his lands be equally divided between his daughters, Nannie Honeycutt and Laura Barnhill, and the appellee, Albert Johnson, the latter having been reared in the home of testator. In the voluntary partition, Johnson was given the residence and about twenty acres of the land located south of the railroad. Laura Barnhill received land on the north, and Nannie Honeycutt was awarded all remaining land south of the railroad, which joined the lands partitioned to Johnson. In the division of the lands,

the parties employed Sam Rains, a deputy county court clerk and surveyor. In his capacity as surveyor, he made some sort of a survey of the division lines pointed out to him by the parties, and in his capacity as deputy clerk, he prepared the partition deeds.

No fence was erected on the line between Johnson and Nannie Honeycutt, and the land was cultivated on the Honeycutt side up to the division line claimed by Johnson. In 1944, Nannie Honeycutt sold her land to Alfred McFaddin, and McFaddin, in 1946, sold to the appellant, Dant Hamblin. The present dispute arose in 1949 when Hamblin commenced the construction of a fence on what Johnson contended was his side of the line as agreed upon in the division. On April 4, 1950, Johnson filed his petition in equity against Hamblin, seeking to have the description in his deed reformed so as to conform to what he contends was the correct division line. Special and general demurrers were filed and overruled, and the issues were completed by answers and replies, with amendments to both the petition and answer. The court, after hearing the evidence, finally went upon the land in company with a deputy sheriff and fixed a division line between the parties, differing materially from the line claimed by Hamblin and slightly from that claimed by Johnson. The line located by the court was fixed by the judgment and the deeds reformed in their descriptions to that extent.

At the outset, we may say that neither of the deeds as originally prepared will plat according to the degrees and distances given. An effort to reconcile the conflicting claims convinces us that mistakes exist in both instruments.

[2] Appellants insist that the special demurrer to the petition should have been sustained because of a defect of parties, in that appellants' immediate and remote grantors were necessary parties to a reformation. From a technical standpoint, it may have been better practice for appellants' grantors to have been named as parties. However, the location of the division line directly affects only the parties to this action. Wherever it may be fixed, Johnson's ownership extends to the line on one side and Hamblin's on the other. The question of the extent to which Nannie Honeycutt and Alfred McFaddin may be bound by the judgment is not before us, and we do not pass upon the question. The only possible interest they could have had would have been as possible warrantors, and that is an issue which could not affect Johnson's right to a location of the division line.

[3, 4] Appellants rely upon the five-year statute of limitations as defeating appellees' right to the reformation. KRS 413.120. The rule is that limitation does not run where a grantee under a deed, which by mutual mistake does not describe the property granted, has been in possession of the land. Carr v. Burris, 148 Ky. 232, 146 S.W. 424. Appellees' petition alleged their possession to the line which they claimed. We think this allegation is sufficient to remove the case from the application of the statute.

Appellants rely upon the case of Martin v. Wagers, 310 Ky. 363, 220 S.W.2d 580, as supporting their plea of limitations. In that case, the possession of the party seeking reformation was not shown and the matter of limitations was determined without regard to the possession of either party. We think this case is distinguishable on the facts.

[5, 6] Finally, it is insisted that the deed cannot be reformed against appellants because they are innocent purchasers. The court found that appellants were not innocent purchasers, and we must assume that the evidence supported the court's finding in this respect. A deed may be reformed against a subsequent purchaser with notice. Althaus v. Bassett, Ky., 245 S.W.2d 943.

The judgment is affirmed.

have instructed the jury peremptorily to find for the defendant; and, second, that the verdict is flagrantly against the evidence, as the weight of the evidence shows that Hill did not use the words charged. We deem it necessary to consider only the first ground.

The undisputed proof is that there is a president of the company, who has charge of its business, and under him is a superintendent, under whom Hill worked. Hill was in charge of a certain branch of the company's business; but he was not one of the company's chief officers, and had not general control of the company's affairs. There was no evidence that the company authorized Hill to use the words charged, or that it approved or ratified his speaking them. In the case of Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481, we had before us the question when a corporation is liable for a verbal slander uttered by one of its agents, and, after pointing out the difference between a verbal slander and a libel, and referring to many authorities, we thus stated our conclusion in the matter: "And so we think that, when it is sought to charge the master or principal in any state of case with liability for defamatory utterances of the servant or agent, it is not sufficient to aver or prove that the servant or agent at the time was engaged in the service of the master or principal, or acting within the scope of his employment, in the ordinary use of that word. But it must be further averred and shown that the principal or master directed or authorized the agent or servant to speak the actionable words, or afterwards approved or ratified their speaking." To the same effect are Odgers on Libel and Slander, p. 368; 18 Am. & Eng. Ency. of Law, 1059; 10 Cyc. 1216; Redditt v. Singer Mfg. Co., 124 N. C. 100, 32 S. E. 392; Sawyer v. R. R. Co., 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Ann. Cas. 440; Behre v. National Cash Register Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; Southern Ry. v. Chambers, 126 Ga. 408, 55 S. E. 37, 7 L. R. A. (N. S.) 926; Lindsey v. St. Louis, etc., R. R. Co., 95 Ark. 534, 129 S. W. 807; Singer Sewing Mach. Co. v. Taylor, 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90; Kane v. Boston Mutual Life Ins. Co., 200 Mass. 265, 86 N. E. 302.

It is true there is some conflict of authority on the question, but in the case above referred to this court took the view of the question which is in accord with the weight of authority, and we adhere to the conclusion we then reached. In some of the cases in which the contrary view has been announced the person speaking the words was the alter ego of the corporation; and in the case of the president of the corporation, or some like officer having general charge of the affairs of the corporation, we think the utterances of the agent may be regarded as those of the corporation. But that rule cannot be applied to subordinate agents. A verbal slander is the individual act of him who utters it, often arising out of his momentary excitement. It is the voluntary and tortious act of the speaker. There can be no joint utterance, and so two persons are not liable. He alone is liable who spoke the words. Many things are actionable, when printed and published, which are not actionable if published orally, and it seems to us a sound principle that the verbal utterances of an agent of limited powers should be regarded as his personal act, rather than the act of his principal, unless authorized by the principal in fact or ratified by him. We therefore conclude that, under the evidence, the circuit court should have instructed the jury peremptorily to find for the defendant.

Judgment reversed, and cause remanded for a new trial.

CARR et ux. v. BURRIS et al.

(Court of Appeals of Kentucky. May 8, 1912.)

1. REFORMATION OF INSTRUMENTS (§ 45*)—SUFFICIENCY OF EVIDENCE—DEED.

Evidence, in an action for reformation of a deed, on the ground of mistake in the description of the land, *held* sufficient to show mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157–193; Dec. Dig. § 45.*]

2. REFORMATION OF INSTRUMENTS (§ 36*)—ACTION—SUFFICIENCY OF PETITION—MISTAKE.

A petition by a grantee for the reformation of a deed, on the ground of mistake in the description of the land, which alleges that, by an oversight or mistake on the part of the grantor, he failed to embrace in the deed all of the land purchased from him, and that the grantor sold a particularly described tract of land, and in making the deed included only a part of the land therein, while not in terms pleading mutual mistake, shows such mistake sufficiently to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141–146; Dec. Dig. § 36.*]

3. REFORMATION OF INSTRUMENTS (§ 32*)—ACTION—LIMITATION—GRANTEES' POSSESSION—POSSESSION OF LAND.

Where a grantee under a deed, which, by mutual mistake, does not correctly describe the property granted, has been in possession of the land, limitation is not a bar to reformation of the deed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119–121; Dec. Dig. § 32.*]

Appeal from Circuit Court, Barren County.

Action by Celia Gillock Burris and another against D. R. Carr and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Basil Richardson and Baird, Richardson & Summers, all of Glasgow, for appellants. Duff & Hutcherson, of Glasgow, for appellees.

CLAY, C. Appellees, Celia Gillock Burris and Mary Belle Gillock, brought this action against D. R. Carr and wife to reform, on the ground of mistake, a certain deed executed, acknowledged, and delivered to them by Carr and wife on July 2, 1901. It was charged in the petition that the lot or parcel of land which appellees purchased of appellants is located in Glasgow, Ky., and was bounded as follows: "Beginning at Carter's corner on Broadway street; thence with said street southwest 94 feet to Main Cross street; thence with said street southeast 178 feet to West's or Carr's line; thence northeast 94 feet to another of said Carter's corners; thence northwest 178 feet with Carter's line back to the beginning corner on Broadway."

But by the deed in question appellants conveyed to appellees only a part of the land purchased, which is described in the deed as follows: "Beginning at the southwest corner of Carter on Main Cross street in the town of Glasgow, Ky.; thence south and with said street about 93 feet to Brown street; thence southeast with said street to a point midway between Main Cross street and Lewis street, about 132 feet; thence N. E. and parallel with said first line about 93 feet to intersect said Carter's line; thence with his said line to the beginning."

It is further alleged in the petition that, immediately after the purchase of the lot first above described, they inclosed and took possession of same, and have had same under fence ever since. Appellants denied the allegations of the petition and pleaded the five-year statute of limitations. By reply, appellees denied the applicability of the five-year statute of limitations and pleaded their actual possession of the land purchased. Judgment was entered in favor of appellees, and D. R. Carr and wife appeal.

The evidence of appellees is to the effect that Judge Carr first proposed to sell the one-half of the lot running from Broadway to Lewis street. In discussing the matter, he asked appellees to take the whole lot at $400; but they declined to buy it. Afterwards he and J. T. Wooten, a former county clerk, and a cousin of appellees, stepped off the part intended to be conveyed, and placed stakes at a point about 178 feet from Broadway. He then stated that he had marked off more than one-half of the lot, and was willing to take $250 for it. Appellees declined to pay $250, but finally agreed to pay $225 for it. This amount was agreed on. Thereupon Carr drew the deed in question, which was read in the presence of Mrs. Burris. The deed was turned over to J. T. Wooten, who put it to record. The fact that the deed did not cover the land actually purchased did not become known to appellees until just a few months before action was brought. The evidence of appellees is corroborated by that of J. T. Wooten, who also testifies to the fact that he and Judge Carr staked off the portion of the lot purchased by appellees. Shortly thereafter, he built a fence where the stakes were placed; and Judge Carr paid for one-half of the fence.

A year or two later, appellees built a barn on a part of the lot now in controversy. The barn and fence were in plain view, and showed that the lot actually sold to appellees contained more than one-half of the original lot, running from Broadway to Lewis street.

The evidence for appellant is to the effect that he contracted to sell appellees only one-half of the original lot, or a lot running back from Broadway 150 feet. He charged more for this lot, because it faced on a better street, and was the more valuable half. He never intended to sell, and as a matter of fact did not sell, any more than one-half of the lot. He drew the deed exactly in accordance with the contract of sale. The only way the lot was staked off by Wooten was by placing one plank at the point at which they stepped. This was done after the deed itself was read and delivered to appellees. Didn't know that appellees had inclosed more than one-half of the lot until shortly before suit was brought. While he passed by the lot in question occasionally, he could not tell from a casual inspection of it that the fence and barn were placed more than one-half the distance from Broadway.

[1] For appellants, it is insisted that the evidence is not sufficiently clear and convincing to justify a reformation of the deed on the ground of mistake. While we have no doubt that Judge Carr has detailed the circumstances of the transaction exactly as he remembers them, yet when we take into consideration the positive evidence of Mrs. Burris and Wooten, as to the terms of the sale, and the amount of ground included therein, together with the very strong circumstances in appellees' favor that they actually inclosed 178 feet of ground and built a barn thereon, and that the fence and barn had been there in plain view for several years, we see no reason to disturb the finding of the chancellor in favor of appellees.

[2] It is insisted, however, that the petition fails to allege a mutual mistake of the parties to the deed, and that therefore the deed cannot be reformed. While it is true that the petition states that, by oversight or mistake on the part of D. R. Carr, he failed to embrace in the deed all the lot purchased from him, the petition also sets out the fact that appellees actually purchased, and Carr and wife sold, to them a particularly described tract of land, and that in making the deed only a part of the land was included in and covered by the deed. While

mutual mistake on the part of the parties was not in terms pleaded, the facts alleged show mutual mistake; and we therefore conclude that the petition is sufficient to support the judgment in favor of appellees.

[3] But it is insisted that, more than five years having elapsed after the execution of the deed, it cannot now be reformed on the ground of mistake. Appellees pleaded, however, and the proof shows, that ever since their purchase of the 178 feet they have had it fenced, and have had actual possession of it. It is the rule that when a deed, by mistake, does not correctly describe the property granted, it may be reformed; and limitation is not a bar to such correction, where the vendees have been in possession of the land. Hill v. Clark, etc., 106 S. W. 805, 32 Ky. Law Rep. 595; Sewell v. Nelson, 113 Ky. 171, 67 S. W. 985, 23 Ky. Law Rep. 2438; Potter v. Benge, 67 S. W. 1005, 24 Ky. Law Rep. 24.

Judgment affirmed.

CRENSHAW v. WARE'S EX'R.

DULIN v. SAME.

(Court of Appeals of Kentucky. May 7, 1912.)

1. FRAUD (§ 58*)—FRAUDULENT REPRESENTATION—EVIDENCE.

In an action in which the fraud of the defendant, inducing a purchase of shares of stock, was in issue, evidence *held* to show that the plaintiffs in making a purchase did not rely on any representations of the defendant.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. § 58.*]

2. PRINCIPAL AND AGENT (§ 23*)—ESTABLISHMENT OF RELATION—DECLARATIONS OF AGENT.

A person's declarations that he was the agent of another in selling shares of stock are insufficient to establish his agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

3. EXECUTORS AND ADMINISTRATORS (§ 158*)—CONSTRUCTION—DISCRETION IN TRUSTEE.

Though a will states that the testator considers certain stocks and bonds held by him good property, and "suggests" to his executor that they remain just as they are, where defendant also made the executor the guardian of the testator's children with the right to hold the estate and manage it and turn it over to them when they were 25 years of age, and expressly authorized a sale of land, the provision as to stocks must be held to be merely advisory and not to preclude a sale of such stocks and bonds.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 634, 635; Dec. Dig. § 158.*]

4. EXECUTORS AND ADMINISTRATORS (§ 158*)—SALES—NECESSITY OF ORDER OF COURT.

Ky. St. § 4707, which provides that no administrator or executor shall sell any dividend paying securities which the decedent owned at his death until so ordered by court of general equity jurisdiction, etc., will not require an executor, who was also made guardian of the testator's minor children and given discretionary power to make sales of stocks and bonds, to obtain an order of court as a condition precedent to a sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 634, 635, 646½; Dec. Dig. § 158.*]

5. EXECUTORS AND ADMINISTRATORS (§ 158*)—SALES—NECESSITY OF ORDER OF COURT.

Ky. St. § 4707, which provides that "any administrator or executor" shall not sell dividend paying securities without an order of court, obviously does not include a trustee or guardian, and where a will made an executor the guardian of the testator's minor children until they should reach the age of 25 years, his sale of stocks and bonds belonging to the estate without an order of court was proper.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 634, 635, 646½; Dec. Dig. § 158.*]

Appeal from Circuit Court, Christian County.

Actions by M. F. Crenshaw and by M. V. Dulin against J. D. Ware's executor. From a judgment for the defendant in each case, plaintiffs appeal. Affirmed.

Downer & Russell and C. H. Bush, all of Hopkinsville, for appellants. Douglas Bell and Trimble & Bell, all of Hopkinsville, for appellee.

HOBSON, C. J. These two actions, which are similar in their facts, will be disposed of together. M. F. Crenshaw and M. V. Dulin brought the suits against E. B. Long, as executor of J. D. Ware. Each alleged in his petition, in substance, that he had bought of Long, as executor, 25 shares of stock in the Acme Mill & Elevator Company, at $80 per share; that the stock was sold them by R. W. White as agent of the executor; that White fraudulently represented to them that the stock was worth par, that the company had a surplus of $20,000, and that he had examined the books and knew these to be the facts, when in truth the company had no surplus and was insolvent, and White and Long knew this. The executor filed an answer traversing the allegations of the petition. Proof was taken, and on final hearing the circuit court dismissed the actions. The plaintiffs appeal.

[1] Long was paralyzed not long after the suits were filed and died before the hearing of the actions. His deposition was not taken, nor the deposition of White. The plaintiffs each testified that White made to them the representations as alleged in their petitions, and stated at the time he was selling the stock as agent of Ware's executor. The facts as to the transactions are about these: White was a director in a bank in Hopkinsville, where the parties resided, and sold machinery as agent and also dealt in stocks and bonds. R. H. Detreville, who owned a large block of this mill stock, had failed a short time before, and his stock which was placed upon the market had been sold through White, or by him. He then proposed to get up a pool, to buy the Ware stock

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ASSIGNED FOR PRE-TRIAL CONFERENCE AT PIKEVILLE, KENTUCKY

ON SEPTEMBER 23, 1982 AT 9:00 A.M.

PIKEVILLE CIVIL ACTION NO. 78-137

MATTHEW NEELEY and
DOROTHY NEELEY

Klein

JOSEPH P. MOORE
JAMES B. TODD

VS:

MIDDLE STATES COAL CO., INC.

Turner

WALTER W. TURNER
RICHARD J. BOLEN

PRE-TRIAL CONFERENCE TRIAL DATE SET FOR 11/4/82 at 9:00 A.M.

1/30/78 #1 COMPLAINT, fil

6/20/78 RECORD RECEIVED FROM SOUTHERN DIST. OF OHIO

6/26/78 #15 ANSWER, of deft Middle States Coal Company

8/15/78 #19 AMENDED COMPLAINT

8/17/78 #20 ANSWER, of deft, Middle States Coal Co., Inc. to amended comp.

5/5/82 #46 STATEMENT OF AGREED FACTS, STATEMENT OF FACTS IN CONTROVERSY of plff

#47 STATEMENT OF AGREED FACTS, STATEMENT OF FACTS IN CONTROVERSY of deft, Middle States Coal Company

Grantor Nireman - Kaufman

① - agreement to make deed containing reservation

1906 - 20 acres on right side of branch around home place

Litigation Magoffin Circuit Court

① Grantor - made mineral deed to successor of

Δ's. - didn't cover 20 acres

(deed did not contain reservation

Π's.

Nireman to Lowther 1912/1913

1919 deed made for 20 acres

1920's Def's mined property

1/4 Trustee for Fitch
1/4 Yost Kaufman
1/4 Trustee for Kaufman

1/4 Kaufman ←→ [illegible] → Lowther — Rice 1/4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT SCHEDULE FOR SEPTEMBER 20 ,19 82 - HONORABLE G. WIX UNTHANK

9:30 CIVIL 82-119 - PRELIMINARY CONFERENCE - Harrison Combs, et al vs: Middle States Co.,

10:00 CIVIL 81-254 - PRE-TRIAL CONFERENCE - Wolf Creek Collieries Co. vs: Dino Cerrara Investment Corp.

1:00 CIVIL 81-181 - STATUS CONFERENCE - Jacqueline Potter vs: A. H. Robbins Co.

PLEASE NOTE:

WHEN MORE THAN ONE CASE IS SCHEDULED FOR THE SAME HOUR, THE CASES WILL BE CALLED BY THE CLERK IN NUMERICAL ORDER, UNLESS OTHERWISE DIRECTED BY THE COURT.

STANDING ORDERS OF THE COURT ARE AVAILABLE FROM THE CLERK IN RE:

A. Motions in the Pikeville Division of this Court- CIVIL
B. Format of briefs in the Pikeville Division of this Court.
C. Pre-trial conferences for civil actions-Pikeville Division
D. Motions in the Pikeville Division of this Court- CRIMINAL
E. Preliminary Conference Procedure-CIVIL

ALL PLEADINGS ARE TO BE FILED WITH THE CLERK'S OFFICE, DO NOT SEND PLEADINGS DIRECTLY TO JUDGE UNTHANK

MESSAGES- It is the policy of the Clerk's Office to take necessary messages for attorneys while they are in attendance at our Court. These messages will be placed on the Counter of the Clerk's Office, please check this pad at frequent intervals for any incoming calls.

CIVIL COVER SHEETS, MARSHAL'S 285 FORMS, ETC. ARE AVAILABLE UPON REQUEST FROM THE CLERK'S OFFICE.

1906 1. Agreement. — Reserving household & domestic coal right.

1 No 90 acres
- Abstract & Covenants of Gen Warr.

On North by land of Susan Wireman
On East . . . . . John Shepherd.
On South, Sam Bailey
On West Abe Wireman

20 acres on right hand side of Creek as you go around the Bldg.

1912 2. Wireman vs. Kaufman

~~Lease~~ Mineral deed

Reserve personal & domestic Coal.

Bond

Desc. Some land Contained in deed book 45 4-533.

Specific desc.

1919 (3) Conveyance of tract.
Don Wireman to Martha Healey.

63 (4) Martha Healey

ASSIGNED FOR PRELIMINARY CONFERENCE AT PIKEVILLE JUDGE UNTHANK

DATE September 20, 1982 AT 9:30 A. M.

PIKEVILLE CIVIL ACTION NO. 82-119

HARRISON COMBS; JOHN J. O'CONNELL; and PAUL R. DEAN, as Trustees of the UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS

Bruce A. Levy
William H. Hanrahan
Walter P. O'Connell

VS:

Walt Turner

MIDDLE STATES COAL COMPANY, a corporation

PRELIMINARY CONFERENCE

5/3/82	#1		COMPLAINT
5/28/82	#2		SUMMONS, w/Marshal's return served on Richard D. Johnson, (Agt. Service of Process) on 5/25/82
6/21/82	#3	*	MOTION of deft for ext. of time (20 days) n/which to fil Ans. (REF# 4)
			~~ANSWER of deft TENDERED 6/30/82~~ REF# 4
7/6	#5		ANSWER of deft.
7/16/82	#6		STIPULATION, of deft to FED. MAG. ACT
8/26/82	#7		REQUEST FOR PRODUCTION OF DOCUMENTS, of plffs
9/7/82	#8		PRELIM. TRIAL MEMORANDUM, of deft.
	#9		PRELIM. MEMORANDUM, of plffs
9/9/82	#10		OBJECTION, of deft to request for production of documents

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT SCHEDULE FOR SEPTEMBER 23, ,19 82 - HONORABLE G. WIX UNTHANK

9:00 CIVIL 78-137 - PRE-TRIAL - MATTHEW NEELEY VS: MIDDLE STATES COAL

11:00 CIVIL 82-96 - PRELIMINARY CONFERENCE - Gwendolyn Castle vs: The Huntington Hospital Inc.

11:30 CIVIL 82-86 - PRELIMINARY CONFERENCE - Pine Mountain Paving Co., Inc. vs: Medusa Aggregates

*1:30 P.M. CATLETTSBURG CIVIL 78-128 - PRELIM. PRE-TRIAL - Mack Tackett et al vs: The Chesapeake & Ohio Railway Co. d/b/a Chessie System

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CIVIL COVER SHEETS, MARSHAL'S 285 FORMS, ETC. ARE AVAILABLE UPON REQUEST FROM THE CLERK'S OFFICE.

ASSIGNED FOR PRE-TRIAL CONFERENCE AT PIKEVILLE JUDGE UNTHANK
(Hearing on all pending motions)

DATE September 20, 1982 AT 10:00 A. M.

CIVIL ACTION NO. 81-254

WOLF CREEK COLLIERIES COMPANY Gary W. Barr

VS:

DINO-CERRARA INVESTMENT COMPANY J. K. Wells
formerly
FIRST COLONY CORPORATION

PRE-TRIAL CONFERENCE

4/16/82	#11	MOTION, of deft for leave to fil amended answ.
		AMENDED ANSWER, of deft - TENDERED 4/16/82
	#12	MOTION, of deft to Strike all allegations in Complt which relate n/any way to clean coal silo
	#13	MOTION, of deft, in Limine
5/12/82	#19	MOTION, of ptys for agreed order for est. of time w/in to fil respomses to pending Interrog., Reques for admissions, & request for production of documents.
		ANSWERS, of plff to suppl interrog. - TENDERED 6/28/82
7/12/82	#26	MOTION, of deft for S/J
	#27	MEMORANDUM, of deft n/suppt of mot for S/J
7/26/82	#28	JOINT MOTION, of ptys for order ext. time for discv & to continue trial date of 10/5/82
	#29	joint AFFIDAVIT, Charles E. Schivel, Jr. n/suppt of mot for continuance
9/14/82	#33	MEMORANDUM, of plff n/opposition deft, Dino-Cerrara mot for S/J w/affidavit attached.

Manila:

(1) Judge Hermans doc'y.

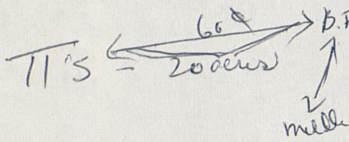
(2) Bill Baird

(3) Henry R. Stratton

TO: Judge
FROM: Maggie
DATE: 4 May 1982
RE: Civil action #78-137

NEELY v. HOLBROOK

PLAINTIFFS contend that they own surface and mineral rights to 20 acres.
that they had an agreement w/ B.F. Holbrook, whereby he could mine the land and pay them 60 cents/ton,
that someone's been mining the land,
that Holbrook assigned his right to mine the land to Middle States Coal Co., and
that, although they've been paid 10 cents/ton, either Holbrook or Middle States should pay 50 cents/ton more.



DEFENDANT RAY HOLBROOK was granted a summary judgment because he showed that he's not the "B.F. Holbrook" who had the agreement with the plaintiffs.
His brother is B.F. Holbrook.
So, the only remaining deft is Middle States

DEFENDANT MIDDLE STATES COAL CO.

admits that plaintiffs hold surface title
that Middle States has stripped coal from the land
that it paid plaintiffs 10 cents/ton
denies that plaintiffs hold mineral title ?
that the Neely-Holbrook agreement was assigned to Middle States ???

(1) Δ's own mineral rights - how ???
(2) 20 acres reserved not 20 acres being mined ???

As briefly as is possible, here's what's going on:

Plaintiffs own some interest in 20 acres in Magoffin Co. They say that, when mineral rights in a certain larger tract were severed from the surface rights, 20 acres were reserved, for which mineral title was not conveyed, and which they now own, surface & sub-surface.

The defendant coal company, which has been mining the land, says that it holds mineral rights, by reason of a sub-lease and an unrecorded lease, as a successor to a broad form grant of mineral rights traced back to the original severence of mineral from surface rights. It says that plaintiffs' 20 acres aren't the reserved 20 acres.

Although plaintiffs say that Middle States is successor to the agreement they had with B.F. Holbrook, deft Ray Holbrook says there was never any agreement or relationship at all between the Holbrooks and Middle States.

AT THE CONFERENCE:

A. You should make sure that, by now, everybody has a copy of everybody else's chain of title. There was a hitch in the exchange of them earlier.
B. You could ask the parties to sign a joint statement of agreed & disputed facts. They've each tendered their own.
C. Just for some house-cleaning, you could order clerks to file deft Ray Holbrook's answer. It was ordered filed earlier, but was never filed.

My question: If Middle States believes that it has mineral rights through the broad form grant of same, and if Middle States believes that plaintiffs hold only surface title, and if Middle States says it has no agreement w/ plaintiffs, why did they pay the 10 cents/ton to plaintiffs?

alternative defense.

12-2-80
3:00 p.m.

CIVIL ACTION NO.78-137

NEELEY V. HOLBROOK & MIDDLE STATES MINING

++++++++++++++++++

1. This is an action upon a lease to mine coal. The plaintiff alleges that the defendant Holbrook has failed to pay royalties as required by the lease. The defendant Holbrook alleges that he is the wrong party, and that it is his brother that the plaintiff wants. The plaintiff alternatively pleads against the company for failure to pay royalties, but the company asserts a claim of title to the mined property. The company therefore alleges no liability for royalties.
2. The action was originally brought in Cincinnati federal court, but was transfered here.
3. There is no contest of jurisdiction.
4. All parties have filed memo's.
5. The company claims title to the minerals by virtue of a broad form deed. The company alleges that no assignment of the Holbrook lease ever occured, and that no liability for the Holbrook royalty agreement ever bound to them.

ISSUES:

- who owns the mineral interest in question
- are broad form deeds still valid in Ky.
- who is the proper defendant Holbrook
- did the Holbrook defendant perform any mining such they therefore became liable for royalties
- was there any contractual relationship between Holbrook and the company

You need to set a cut-off for discovery, pre-trial date, trial date

There are no pending motions.