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Mines and Minerals - Mineral Reservation in Deeds - Is Subsurface Water a Mineral

J. D. Schlosser

man to search out and disclose.[5] The courts seem to be in agreement that where the defect is patent, the landlord is under no duty to disclose.[6] As stated in the instant case,[7] a guest or a member of the family of a tenant has no higher rights against the landlord than the tenant has.[8]

It is noteworthy that the courts are split as to whether a landlord has any tort liability even when there is a covenant to repair. The absence of occupation and control[9] or that the tenant merely has an action *ex contractu*[10] are the main objections to imposing tort liability.

The result of the instant case would not be reached in North Dakota, since the landlord has no duty to disclose latent defects he has no knowledge of and is not required to inspect the premises before transferring possession to the tenant.[11] The landlord does, however, owe a duty to the tenant to exercise ordinary care in maintenance of portions which are used in common by the tennants and over which he has control.[12]

To hold the landlord liable for an injury to a tenant's guest where he does not have control over the leased premises – as it was used exclusively by the tenant, who must have had knowledge of the obvious defect – is stretching his duty to incidents over which he has no control and would require him to warn someone of a patent defect in the premises.

CHARLES R. HUDDLESON.

MINES AND MINERALS – MINERAL RESERVATIONS IN DEEDS – IS SUBSURFACE WATER A MINERAL? – In 1935, F. C. Le Derer leased certain land to Texaco Inc. for the purpose of drilling for and producing water. Le Derer had secured the land in 1952 from Oscar Killian who included an "oil, gas and other minerals" reservation. Killian had obtained only the surface of said land with an identical reservation from the Fleming Foundation, plaintiff. The plaintiff had bought the land from the individual plaintiffs, who had reserved one-half interest in all oil gas and other minerals. Texaco drilled several water wells and used considerable water therefrom. The individual plantiffs and Fleming brought an action against the Texaco Co. for damages for wrongfully producing, converting and appropriating the water. The lower court found reservations of "oil, gas and other minerals" in the three deeds did not include water. Fleming appeals on the basis that if "mineral" does not include sub-surface water, then the individual appellants have no interest in such water as Fleming deeded only the surface to Kallian, retaining everything below the surface. Therefore, Fleming would own all subsurface water. The

5. Harrill v. Sinclair Refining Co., 225 N.C. 421, 35 S.E.2d 240 (1945); Robinson v. Tate, 34 Tenn. App. 215, 236 S.W.2d 445 (1950).

6. Harrill v. Sinclair Refining Co., *supra,* Corcione v. Ruggieri, 139 A.2d 388 (R.I. 1958); Stewart v. Raleigh County Bank, 121 W.Va. 181, 2 S.E.2d 274 (1939). See generally 32 Am. Jur. *Landlord and Tenant* § 671.

7. Johnson v. OBrien, 105 N.W.2d 244, 246 (Minn. 1960).

8. Wilson v. Lamberton, 102 F.2d 506 (3d Cir. 1939); State v. Feldstein, 207 Md. App. 20, 113 A.2d 100 (1955); McDermott v. Merchants Co-op Bank, 320 Mass, 425, 69 N.E.2d 675 (1946); Hahnken v. Gillespie, 329 Mo. 51, 43 S.W.2d 797 (1931).

9. Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N.W. 288 (1937); Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931); Ripple v. Mahoning Nat. Bank, 143 Ohio St. 614, 56 N.E.2d 289 (1944).

10. Mahan-Jellico Coal co. v. Dulling, 282 Ky. 698, 139 S.W.2d 749 (1940); Busick v. Homeowners Loan Corporation, 91 N.H. 257, 18 A.2d 190 (1941); Leavitt v. Twin County Rental Co., 222 N.C. 81, 21 S.E.2d 890 (1942).

11. Newman v. Sears, Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950).

12. State v. Columbus Hall Ass'n, 75 N.D. 275, 27 N.W.2d 664 (1947).

Texas Civil Court of Appeals, affirming the lower court, interpreted surface ownership as meaning the underground water supply and defined the term "other minerals" as not including water. *Fleming Foundation* v. *Texaco,* 337 S.W.2d 846 (Tex. Civ. App., 1960).

The Fifth Circuit Court of Appeals feels the meaning of "minerals" in conveyances and reservations is to be determined from the surrounding circumstances and language of the reservation.[1] Other jurisdictions are in accord with this decision.[2] In doubtful cases, minerals may be restricted by the custom of the country in which the contract is to operate.[3] It has been held that "minerals" include all substances, other than the agricultural surface of the ground;[4] every inorganic substance that can be extracted from the ground for profit;[5] any inorganic substance, whether solid or liquid.[6] The term is usually not restricted unless there are words qualifying or limiting its meaning.[7]

Certain jurisdictions have viewed water as a mineral,[8] others a mineral farae naturae.[9] It has been conceded water is a mineral in the technical sense, however not a mineral under ordinary mineral deeds.[10] Along with gas and oil, water has been considered a mineral in the "broader sense of the word."[11] One court looked to Webster's Dictionary for assistance and concluded water is a mineral.[12] Subterranean waters are regarded as a "mineral" in respect to their use and enjoyment.[13] Since the reservation in the deeds by implication retained the right to use the amount of water from the land reasonably necessary for mineral rights, one court felt it unnecessary to determine if water is a mineral.[14] It is doubtful that the exclusion of water as a mineral in the *Fleming* decision[15] indicates a definite restrictive definition for minerals by the courts. The more realistic approach adopted by the Texas Court and other jurisdictions appears to consider in each instance the language, the surrounding circumstances, and the intention of the parties.

North Dakota holds that a "mineral" is not a definite term susceptible to a rigid definition applicable in all cases.[16] It should be construed within the ordinary and natural meaning of the word as used in ordinary trading transactions.[17] Recent North Dakota legislation has not included water in a definition of minerals in a lease of mineral rights on "public lands."[18]

1. United States v. Harris, 115 F.2d 343 (5th Cir. 1940) (gravel).
2. Kinder v. LaSalle, 310 Ill. 126, 141 N.E. 537 (1923) (coal); Hans v. Great Bend Brick & Tile Co., 172 Kan. 478, 241 P.2d 475 (1952) (clay); Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 83 W.Va. 20, 97 S.E. 684 (1918).
3. Beury v. Shelton, 151 Va. 28, 144 S.E. 629 (1928) (limestone).
4. Rock House Fork Land Co. v. Raleigh Brick & Tile Co., *supra,* note 2.
5. Robinson v. Wheeling Steel & Iron Co., 99 W.Va. 435, 129 S.E. 311 (1925).
6. Horsecreek Land & Mining Co. v. Midkiff, 81 W.Va. 616, 95 S.E. 26 (1918).
7. Federal Gas, Oil & Coal Co. v. Moore, 290 Ky. 284, 161 S.W.2d 46 (1941); Wough v. Thompson Land & Coal Co., 103 W.Va. 567, 137 S.E. 895 (1927).
8. Erickson v. Crookston Waterworks, 100 Minn. 481, 111 N.W. 391 (1907); see Ridgeway Light & Heat Co. v. Elk County, 191 Pa. 465, 43 Atl. 323 (1899).
9. Westmoreland & Combria Nat. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724 (1889).
10. Vogel v. Cobb, 193 Okla. 64, 141 P.2d 276 (1943).
11. Hollingsworth v. Berry, 107 Kan. 544, 192 Pac. 763 (1920).
12. Corwell v. Buck & Stoddard, Inc., 81 P.2d 516 (Cal. App. 1938).
13. Hathorn v. National Carbonic Gas Co., 194 N.Y. 326, 87 N.E. 504 (1909).
14. Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649 (Tex. Civ. App. 1941).
15. Fleming Foundation v. Texaco, 337 S.W.2d 846 (Tex. Civ. App. 1960).
16. See Adams County v. Smith, 74 N.D. 623, 23 N.W.2d 873 (1946).
17. See Salzeiender v. Brunsdale, 94 N.W.2d 502 (N.D. 1954).
18. N.D. Cent. Code § 38-11-01. "Mineral" shall include uranium, thorium, vanadium, malybedenum, germonium and fissionable and nonfiissionable metals and minerals mined therewith, including gravel where necessary to produce the minerals included herein except

Construing North Dakota's "public water" law[19] literally would imply that a determination of water as a mineral is unnecessary, as all water in North Dakota belongs to the public. However a recent District Court decision in North Dakota recognized a definite conflict between this construction and Sec. 47-01-13 of the Century Code which asserts that private ownership of land includes water.[21] The court reconciles the statutes by applying Sec. 47-01-13 as to rights that were vested prior to March 1, 1905, the date the "public water" law was enacted.[22]

J. D. SCHLOSSER.

REAL PROPERTY — FIXTURES — VENDEE'S RIGHT TO RECOVER VALUE OF SCALES UPON LAND AT TIME OF CONVEYANCE. — The plaintiff brought this action to recover the value of a set of platform scales that were on a ten acre tract of land purchased from the defendant. The trial court found the scales were a part of the realty and awarded plaintiff $500 as damages for the wrongful removal of the property. On appeal the Supreme Court *held,* one justice dissenting that where the scales were used in connection with a scale house containing indicating mechanism and the removal of the platform left the land burdened with a large, useless, concrete-lined excavation, the scales were a 'fixture' as between vendor and purchaser. *Hinton* v. *Bryant,* 339 S.W.2d 621 (Ark. 1960).

A fixture[1] is a possessory article which lies between real and personal property.[2] Whether it is a part of the realty or a mere chattel is generally a mixed question of law and fact which is usually determined by the jury.[3] The criteria applied to determine the position a chattel has assumed are annexation, adaption and the intention of the person affixing the article to the realty.[4]

Annexation is the physical attachment of an object to the land and can be either actual or constructive.[5] The general rule is, absent any agreement be-

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that it shall not mean oil and gas nor shall it mean coal which does not contain uranium, thorium or other fissionable metals or minerals in commercial quantities unless the mining of such coal is reasonably essential to production under the lease.

19. N.D. Cent. Code § 61-01-01.

20. Volkmann v. City of Crosby (N.D. Dist. 1960).

21. The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there, but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

22. N.D. Cent. Code § 61-01-01.

1. N.D. Cent. Code § 47-01-05, "Fixtures" defined. — A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

2. Rogers v. Prattville Mfg. Co. No. 1, 81 Ala. 483, 1 So. 643 (1887).

3. Neely v. State, 35 Ala. 315, 48 So.2d 563 (1950); First Nat. Bank v. Nativi, 115 Vt. 15, 49 A.2d 760 (1946).

4. Gray v. Krieger, 66 N.D. 115, 262 N.W. 343 (1935); Ozark v. Adams, 73 Ark. 227, 83 S.W. 920 (1904).

5. Doll v. Guthrie, 233 Ky. 77, 24 S.W.2d 947 (1930); United Pacific Ins. Co. v. Cann, 276 P.2d 858 (Cal. App. 1954), which holds that portions of equipment not attached to the land but which are used with and essential to the other portions attached to the land constitute a unit and are constructively annexed. Moller-Vandenboom Lumber Co. v. Boudreau, 231 Mo. App. 1127, 85 S.W.2d 141 (1935) stating that immovability of the object is not the sole test of whether it is or is not a fixture.