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Mining Operations - Lateral Support for Adjoining Buildings (Colo Fuel and Iron Corp. v. Salardino)

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CASE COMMENTS

MINING OPERATIONS—LATERAL SUPPORT FOR ADJOINING BUILDINGS (COLO FUEL AND IRON CORP. v. SALARDINO).[1]—Plaintiffs Salardino brought an action against C. F. & I. to recover for damages to improvements on lands owned by plaintiffs. It was alleged that as a result of the mining by the defendant of coal deposits, owned by defendant, under or adjacent to plaintiffs' land, said land subsided and that the improvements thereon were thereby damaged in the amount of $7,500. By amended complaint, the amount was raised to $15,000.

The complaint alleged that the defendant had done its mining in "a careless, wrongful and negligent manner." To this allegation defendant answered with a specific denial of negligence, and with two affirmative defenses, neither of which seems to have been decisive.

The evidence showed that defendant had mined its deposits at a depth of about 80 feet, and that the workings were in the vicinity of plaintiffs' lot lines extended vertically. The evidence also showed that plaintiffs' land had subsided, and that as a result thereof plaintiffs' improvements, including a building, were damaged. There was no direct evidence showing damage to plaintiffs' land in its natural state; all the evidence was introduced with reference to damage to plaintiffs' improvements.

Defendants filed a motion for a new trial on the grounds, in part, that: (1) there was insufficient evidence of negligence to allow the case to go to the jury, and failure to direct a verdict for that reason; (12) the instruction which fixed the liability of the defendant as absolute; and (3) defendant's instructions tendered and refused. The motion was denied, and defendant appealed from the judgment for the plaintiffs.

The Supreme Court determined only the specifications of points which related to the instructions given by the trial court. These instructions were based upon a theory of absolute liability resting upon defendant corporation for damage sustained by plaintiffs' *building* as a result of defendant's mining operation. The Supreme Court held that in order for plaintiffs to recover for damage to improvements, it was necessary for them to prove negligence and that therefore it was reversible error for the trial court to fail to instruct the jury to that effect.

There is probably no Colorado case directly in point. Neither the Supreme Court (apparently) nor the writer has been able to discover any Colorado decision decisive of the issues here involved. In the reported case are a few Colorado cititations which, while

[1] Colorado Fuel and Iron Corp. v. Salardino, ... Colo. ....., ... P. ..... (1952); 1951-52 C. B. A. Adv. Sh. No. 27, p. 367.

not directly in point, serve to illustrate the distinction in the law upon which this case was decided.

It seems to be well settled in Colorado that landowners are under an absolute duty to conduct their mining operations in such a manner that adjoining property will not be damaged.[2] However, this duty extends only to such damage as may occur to adjoining property in its natural state.[3] The duty may be avoided, apparently, by the creation between the parties of a contract, express or implied, by which the adjoining property owner waives his right to support of his property.[4] There seems to have been no such contract here.

One Colorado case, cited by the court, lends to the present decision some color of precedence, although it is by way of dictum.[5] In this case plaintiff's property was damaged by the subsidence of his land. The subsidence was caused by the mining of coal underneath plaintiff's land, the mining being done by defendant's lessee. Defendant had known of its lessee's negligent mining, and defendant had made use of the fruit of the operations. Plaintiff's improvements were damaged, and judgment for defendant was reversed on the theory of negligence. This is a departure from the theory of absolute liability which applies to damage to the land in its natural state, as laid down in the *Evans* case. However, the Supreme Court, in the instant case, relied primarily on foreign case law and text law in reaching its decision.

In a Montana case, *Neyman v. Pincus*,[6] the court, in discussing the distinction between the duty of an excavating landowner to provide lateral support for adjoining land and his duty to provide support for buildings and improvements upon adjoining land, said that the natural right of support extends only to the land itself and not to buildings placed on the land. In Michigan it has been held that the duty which rests upon an excavating owner to protect buildings on adjoining property is that of the exercise of ordinary care.[7] The general rule, therefore, at least outside Colorado, seems to be that expressed by the cases cited by the Supreme Court: The duty of support of buildings is one of ordinary care, and negligence must be the basis of an action brought for damage to buildings and improvements resulting from such excavations. For a general discussion of the rule see 2 C. J. S., p. 6, *et seq.*, and cases cited.

Applying this rule to the case in hand, it is fairly clear that the instructions of the trial court were substantially in error. The error was one of omission rather than commission. The court failed, in its instructions, to present to the jury the issue of negli-

[2] Evans Fuel Co. v. Leyda, 77 Colo. 356, 236 P. 1023 (1925).

[3] Kirchof v. Sheets, 118 Colo. 244, 194 P. 2d 320 (1948); Evans Fuel Co. v. Leyda, *supra* note 2.

[4] Campbell v. Louisville Mining Co., 39 Colo. 379, 89 P. 767 (1907).

[5] *Id.* at 380.

[6] 83 Mont. 467, 267 P. 805 (1928).

[7] Horowitz v. Blay, 193 Mich. 493, 160 N. W. 438 (1916).

gence. The court required the jury to find for the plaintiffs if it found that the damage to plaintiffs' building resulted from the subsidence of plaintiffs' land caused by defendant's excavations. Although negligence was alleged by plaintiffs, and although apparently there was substantial evidence showing negligence, the trial court effectively negated all this work by its instructions, which placed defendant's liability for damage to the building upon the grounds of absolute liability. How often, cry the losers, is such the fate of the hard working trial attorney!

An interesting sidelight is brought out in the report of this case. It has little to do with the issues involved, but it should stand as another of the oft-repeated warnings to trial attorneys to remember that the justices of the Supreme Court are neither present at the trial, nor are they mind-readers, and that as a result of these perhaps unfortunate circumstances, a clear, accurate, and adequate record must be made for appeal purposes. In this case there was only one map of defendant's underground workings presented on appeal. In 19 pages of the record are printed witness' testimony with regard to locations on the map. The words "here" or "there" appear in the record more than 80 times. In no instance was there any indication in the record of the places or locations on the map to which "here" or "there" referred. As a result, to use the language of the Supreme Court, the map was "wholly useless" on review. The map, and the testimony in reference to it, and all the work that had been done preparing the exhibit were largely wasted, because of the failure of the attorneys who attempted to use the map and relative testimony to indicate in the record the places to which reference was made. Whether or not the failure of this exhibit to be of any use on review made any difference in the outcome of the case is uncertain. But whether it did or not, the fact that this effort was wasted, and the fact that the effect, if any, of the exhibit was wholly lost upon review, should serve to caution others against making the same kind of mistake.

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