MINIMUM ROYALTIES.

On the first day of April, 1882, one E. A. Timlin leased to Thos. Brown and J. L. Hunter a tract in Clarion County for a period of ten years. In the words of the instrument, the tract was leased to the said Brown and Hunter "for the purpose of mining, digging and excavating the coal contained thereon." The lessees agreed "to pay as royalty for coal the sum of one-half cent per bushel for all coal taken from said lease; the said royalty to be paid monthly, each and every month." Further, the lessees agreed "to take out at least ten thousand bushels of coal each and every year, and as much more as they choose." Failing to get out ten thousand bushels, "they agree to pay a royalty on ten thousand bushels each and every year." If the lessees do not fulfil the conditions of the lease, it is to be void, and Timlin may re-enter, etc. In accordance with the lease, coal was mined and royalty paid up to April 1, 1889, at which time the coal had run down to such small proportions as to be unprofitable to work, and no more royalty was paid. Timlin sued in 1892, after the expiration of the lease, to recover the royalties for the past three years. Plaintiff having succeeded in the court below, the defendants appealed, and the Supreme Court affirmed the judgment: *Timlin* v. *Brown*, 158 Pa. 606.

On April 1, 1875, Sarah Steeley *et al.*, leased to Abraham Boyer "for the purpose of carrying on the mining of iron ore, all the timber land" of the parties of the first part, situated, etc. The lessee was given "the exclusive right to dig for, raise, and take away iron ore, and (he,) shall continue to work during the term of fifteen years from the date hereof." The lessee agrees to pay to the lessor, "the sum of sixty cents for every ton of iron ore sold from said premises during said term, to be paid monthly, but the amount to be paid to the said first party shall in no year be less than four hundred dollars, to be paid within the year respectively. But in case the second party should suspend the work for a time or should not mine and sell iron ore in any year sufficient to make the annual sum

due therefrom to the first party four hundred dollars, in such case however, the said second party shall pay the first party the said annual sum of four hundred dollars, and said second party shall have the right to take out and sell iron ore at a future time to make up for the money paid out as aforesaid for ore in advance, . . . but no iron ore shall be taken out after the expiration of this lease for money advanced and no money advanced as aforesaid shall ever be refunded." Abraham Boyer on Sept. 1, 1876, assigned his leasehold to Kate Boyer, and she assigned it to Henry Fulmer. In the assignment to Fulmer, it was provided as follows: "And he (Fulmer) also agrees to pay to the said Catharine Boyer, his heirs and assigns, the additional sum of seventeen and one-half cents for each and every gross ton of iron ore mined and taken away from said premises, to be paid monthly to said Catharine Boyer, said payments to be between the last day of the month and the fifteenth day of the following month" and further, "the said Henry Fulmer shall mine and take away and pay for not less than one thousand tons of iron ore in each and every year. He shall pay to said Catharine Boyer her royalty of seventeen and one-half cents per ton on one thousand tons per annum whether he mines that amount or not." If Fulmer fails to mine and pay for this amount, the assignment to be void, etc.

Fulmer worked the mine for three years; and thus, the iron being practically exhausted, he ceased operation, and paid no more royalty. Mrs. Boyer sued to recover royalty payable after the work had been stopped. She succeeded in the court below, Fulmer appealed, and the judgment was reversed, Mr. Justice Mitchell dissenting: *Boyer* v. *Fulmer*, 176 Pa. 282.

Timlin v. *Brown* was not overruled, and is, therefore, still law. I think counsel would find difficulty in advising a client in a similar case, for the points of difference between *Timlin* v. *Brown* and *Boyer* v. *Fulmer* do not "jump at the eyes," as the French say. I propose to examine them carefully to see where the real distinction, if any, is to be found. Both were cases wherein the parties to whom royalty

was alleged to be due sued to recover it. Both were cases wherein no royalty had been paid during the period covered by the suit.

In *Timlin* v. *Brown*, the particular covenant was: "In case the said Brown and Hunter fails (*sic*) to get out the amount before stated, they agree to pay royalty on ten thousand bushels each and every year."

In *Boyer* v. *Fulmer*, the particular covenant was: "He shall pay the said Catharine Boyer her royalty of seventeen and one-half cents per ton on one thousand tons per annum whether he mines that amount or not."

In both cases the defence was that there had been a practical exhaustion of the mineral before the payment of royalty had ceased.

The reasons for the decision, in *Timlin* v. *Brown*, given by the court, speaking through Dean, J., are.

1. The lease constituted a sale of the coal in place at one-half cent per bushel with a right to a term of ten years in which to mine and remove it. If there were more than one hundred thousand bushels mined in ten years, one-half cent per bushel was to be paid on the excess. That is, it was a sale of all the coal in place at a minimum price of five hundred dollars.

From the fact that there had been a prior contract with Brown at a less royalty, for which the one sued on was substituted, and the additional fact that Brown was already working an adjoining tract, the court draws the conclusion that neither party doubted that coal existed under the tract leased, —so

2. This is not a case of mutual mistake—and

3. The defendants having contracted to pay could not escape because the mines gave out.

In *Boyer* v. *Fulmer*, the court speaking through Green, J., gave as reasons for its judgment:

1. The agreements did not constitute a sale of the coal in place—the tract leased was timber land and arable land under which the existance of ore was a matter of conjecture—so

2. The defendants' covenant to pay whether he mined or

not was merely a covenant to pay for iron which he could have mined if he had chosen.

One day some years ago, when the late Judge Ludlow was presiding in the Court of Common Pleas No. 3, Philadelphia, a young gentleman came into court just as the judge had completed a call of the trial list. He said to the court, "If your Honor pleases, the case of *Snooks* v. *Brown* may be stricken from the list." The judge ran his eye down the list, and looking up, said: "Did you say Snooks and Brown?" "No, sir; Snooks *versus* Brown."

I must honestly confess that I can see very little more distinction between these two cases. The question of the amount of uncertainty in the minds of parties to a mining lease as to the existence of the mineral at all in paying quantities is so impossible of determination that it is a most unsatisfactory test by which to adjudge their rights and duties. It may safely be said that no lease is ever entered into without at least very strong belief in the existence of the mineral—no one would execute a mining lease for coal in Philadelphia County, for example—so that it must be assumed that as reasonable beings and business men it is their confident expectation, however mistaken, that the terms of a lease can be practically carried out. And to say that because the reasons for the belief may have been stronger in the one case than in the other, the obligation of the contract is not the same, is against common sense. Besides, admittedly the amount of coal or iron in place is not positively ascertainable beforehand—so that there is always uncertainty as to just how much will be available. Now, in Case A. there are strong reasons for believing in the existence of the mineral. In Case B. the reasons are still stronger. Yet in both cases the mineral gives out, contrary to expectations. Is the man who deliberately entered into a contract in Case A. to be excused from its performance because he did not wait for stronger reasons before he did so, while the man in Class B. who did have stronger reasons, is held to a strict accountability? Common sense, legal principles, revolt against any such doctrine. The two cases which we have been analyzing are absolutely indistin-

guishable upon any recognizable principle—or at least one capable of practical application—and unless a lawyer should be "so skilled in argument, he could divide a hair twixt South and Southwest side," he could find it impossible to advise if both are to stand. We are now brought face to face with the question, what is and should be the law? Let us see whether *Timlin* v. *Brown* or *Boyer* v. *Fulmer* is most in accord with the weight of authority?

The trend of the decisions, which are not numerous in Pennsylvania, has been to relieve the lessees from payment of royalty for minerals which have no existence. The case immediately prior to *Timlin* v. *Brown* was *McCahan* v. *Wharton*, 121 Pa. 424. In that case there had been a lease giving the exclusive right to "prospect for, dig, mine and ship iron ore," and "just as soon as iron ore is found in sufficient quantities to justify the shipping of the same, then the parties of the second part agree to work the said mines to their utmost capacity," and they agree "to pay the sum of fifty cents per ton for each and every ton of iron ore mined and shipped," and "in case sufficient iron ore be found, that, then, the mining and shipments of iron ore shall not be less than twenty-five hundred tons per year; and that the royalty, if sufficient iron ore be found, shall in no event be less than twelve hundred dollars for each and every year." "It is further understood that if the parties of the second part do not quit possession of said premises, and surrender and give up all interest, they may have in this lease, on or before the first day of July, 1884, the very act of their refusing or neglecting to quit possession and surrender the lease is hereby agreed on their part that there is a sufficient quantity of iron ore in said property to pay the royalty of twelve hundred dollars on the first day of February, 1885."

Suit was brought to recover this royalty due, on February 1, 1885. There was some evidence of a surrender of the lease. But the court said that the agreement as to the effect of remaining in possession after July 1, 1884, only threw upon the defendants the burden of proof that no ore existed, that it was not an absolute agreement to pay royalty whether

or no. What became of the principle of estoppel is not mentioned, but the case is another strong indication that exhaustion or non-existence of minerals is a defence which the courts strive hard to sustain.

Going backward chronologically, we come next to *Muhlenberg* v. *Henning*, 116 Pa. 138, a leading case. We find there an instrument in which the plaintiff "granted, bargained and sold" to the defendants for five years all the iron ore in a certain tract of fifty acres in Berks Co. The lessees (so called in the instrument) agreed to pay "for every ton . . . mined and taken away . . . the price of thirty-five cents per ton," and further "to raise, mine, carry away and sell at least fifteen hundred tons annually . . . or in default thereof to pay a royalty of five hundred and twenty-five dollars annually." Suit was brought to recover the sum, and an affidavit of defence alleged that in spite of efforts no iron was found of sufficient quality or quantity to enable the defendants to comply with the contract. The court below refused judgment for want of a sufficient affidavit of defence, the plaintiff appealed, but unsuccessfully. Mr. Justice Clark says, in delivering the opinion of the court, that the transaction was a sale of the ore in place, and, as no ore was found, the subject-matter of the contract failed, and the price could not be recovered. He considers it a case of mutual mistake, both parties having supposed that ore existed, and while, under *Harlan* v. *Lehigh Coal Co.*, 35 Pa. 287, it could not be said that the lessors had warranted the existence of ore, or that its mining would be profitable, and so the lessees could not recover from the lessors the expenses of their vain search, still equity would not permit the recovery of royalty in such a case. And this ruling would seem to be borne out by *Kemble Coal Co.* v. *Scott*, 15 W. N. C. 220; see also *Johnston* v. *Cowan*, 59 Pa. 275. The apparent rule, then, both of authority and common sense, is: The lessors do not warrant the existence of the mineral or its quality or profitable working, and the lessees cannot, therefore, recover sums expended in an endeavor to find and work it. And they are bound to use all reasonable effort to perform the contract. But if, in

spite of these efforts, the mineral is insufficient in quantity or quality to be worked so as to pay the royalty, such facts may be shown by the lessees, (upon whom is the burden of proof) in an action for its recovery. *Timlin* v. *Brown* is hardly reconciliable with this view, but it seems to me to stand alone.

Another most interesting case has been decided very recently. I refer to *Lehigh and Wilkesbarre Coal Co.* v. *Wright*, 177 Pa. 387. In this case the lessees were plaintiffs, and filed a bill in equity to restrain the lessors from enforcing at law the forfeiture clause of the lease, and also from re-entry under the power of attorney to confess judgment, etc. The material provisions of the lease were: Lessors leased to lessees "all the coal upon and under" the tract "for and until such time as all the merchantable anthracite coal shall have been mined or removed," the lessees to pay twenty-five cents a ton, the "rent or royalty" to be paid quarterly. Section 2 was as follows: "And the said party of the second part, its successors and assigns, whether coal be mined or not, shall pay to the said parties of the first part, their executors, administrators and assigns, in the proportions aforesaid, an annual minimum rental of not less than four thousand dollars, payable in quarterly instalments, . . . and if the said party of the second part, its successors and assigns shall fail in any year to mine coal to amount to the said minimum, which it or they shall have paid, the deficiency may be made up in any subsequent year during the the time of this lease without any payment therefor. And should the breaker of the said party of the second part, its successors or assigns be destroyed by fire or other unavoidable cause, the rent may be postponed for the time which may be necessary to erect a new breaker, not however, to exceed three months." By Section 11, it was agreed that in default of any quarterly payment all the right of the lessees under the lease should be forfeited at the option of the lessors; or they might issue a landlord's covenant and distrains for rent in arrears; or, in case of forfeiture then by authority of a power of attorney thereby given, judgment in ejectment might be confessed and possession taken of the premises.

Up to July, 1888, payments of royalty were regularly made. And, then, the plaintiffs notified defendants that they would pay no more, because the sums already paid more than paid for the coal mined and all that remained in place. It is stated in the opinion of the court that the right to timber or other material in the surface was granted to plaintiff along with the coal. So that, apparently, they sought to remain in possession without further payment and take their own time to remove the balance of the coal. In the opinion of the Master several years would be necessary to remove the coal, using reasonable diligence, and, as it had all been paid for, the forfeiture of the lease before its removal would be unconscionable. But the Supreme Court, agreeing with the court below, and disagreeing with the Master, held, in an opinion by Mr. Justice Dean, that the company could not remain and exercise its surface rights without paying the annual rental.

Since the whole amount which the plaintiffs would have paid had they taken out every pound of coal had been paid; and since several years were stated to be reasonably necessary to take out what remained, it is difficult not to agree thoroughly with the dissenting opinions of Green and Williams, JJ. No cases are cited in the opinion of the court, but a startling allusion to them is made in these words: "It is useless to go over them, because to be in point, they should be *in verbis ipsissimis* concerning the same subject and parties in the same situation." If cases to be in point must be "*in verbis ipsissimis*," counsel need hardly be at pains to search for precedents; they will not be likely to find any.

It is much to be regretted that there is no clear light by which to guide one's footsteps in cases of this kind. The only solution of the difficulty for the future, which is at all obvious, is greater care and more distinct and unambiguous expression in the preparation of mining leases. It may not be an easy task to draw an instrument which will be satisfactory to both parties and unmistakably express their views—but surely in this age of business-like methods, it ought not to be possible for questions such as we have been discussing, to arise, especially after repeated warnings like these cases. I remember

upon one occasion hearing the learned and distinguished senior counsel for the appellees in *Lehigh Co.* v. *Wright*, remark, *arguendo*, that the days were past when courts sat for the purpose of perpetrating injustice under the forms of law—that Grose, J., and his contemporaries were never better pleased than when their ingenuity had discovered some way of legally inflicting undeserved loss upon some unfortunate suitor, but that, happily, we had changed all that! After *Lehigh Co.* v. *Wright*, one does not feel so sure.

Lucius S. Landreth.

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