DEED:
CONSERVATION COMMISSION: Interpretation of mineral reservation in deed.

August 18, 1941

8-18

FILED
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State Park Board
Jefferson City,
Missouri

Attention: Mr. E. A. Mayes,
Assistant Director
of State Parks

Gentlemen:

This will acknowledge receipt of your request to construe the mineral reservation made in a deed wherein Julian Pickles and Laura Pickles, his wife, conveyed the following described property to the State of Missouri: The Northeast ¼ of the Northwest ¼ of Section 8, Township 40, North of Range 1, West of the 5th P.M.

The mineral reservation reads as follows:

> "The said parties of the first part hereby excepting out of the following lands and reserving and retaining unto themselves, their heirs and assigns, all the lead, iron, coal, fire clay, rock and other minerals including the coaloils and natural gas in or on said land or rising or coming therefrom or that may hereafter be found therein or thereon with the right and privilege to mine and remove and take

out the minerals hereinabove referred to, storing the same, together with right of ingress and egress over and on said lands and to and from the public road leading to the most convenient market. The said road which is to be used for ingress and egress to be established over and on the most practical route. The said parties of the first part further reserve such timber as may be needed for mining purposes, and the timber so used to be taken from the lands hereinafter specified only. The said parties of the first part also reserve a water right-of-way to the Meramec River to be used in mining operations only, to wit:

"The North ½ of the Northwest ¼, The Southeast ¼ of the Northwest ¼, and the Northwest ¼ of the Northeast ¼, of Section 8;

"The South ½ of the Southwest ¼, and The South ½ of the Southeast ¼, of Section 5; and

"The Northeast ¼ of the Southeast ¼ of Section 6; All in Township 40, North of Range 1 West of the 5th. P.M.

"TO HAVE AND TO HOLD THE SAME, unto the said party of the second part and to its assigns forever.

"Covenants of Warrant and Defend, excepting taxes for the year 1927 and thereafter.

Julian Pickles SEAL.
Laura Pickles SEAL.

STATE OF MISSOURI, )
) ss.
County of Franklin. )

On this 17th day of February, 1927, before me personally appeared Julian Pickles and Laura Pickles, his wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

My term exp. 9-9-1928. Hermann F. Hansen
Notary Public"

SEAL

The question arises, can the persons herein above named as owners of the mineral in and on this property remove the iron ore by the method known as strip mining? By such method the whole surface is removed down to the ore. This completely destroys all rights the owner of the surface has to the surface and top soil and after such mining is completed leaves the top soil in such condition as to be of no benefit, and leaves the ground in a hazardous condition.

It is our understanding that this kind of mining is now under progress on this property; that a large steam shovel has already located thereon and commenced operations, however, temporarily for some unknown reason such work has ceased.

Obviously, an interpretation of the above mineral reservation in this deed as to the proper method of mining permissible thereunder for iron ore, which is the ore now being taken out, will require the court to try and determine the intention of the grantor and grantees at the time the deed was made.

In Byron vs. Utah Copper Co., 178 Pac. 53, l.c. 56, the court in construing a similar provision said:

"The evidence not being before us for review, we must presume

> that the trial court in construing the deed from Hays to Earl, placed itself in the situation of the parties at the time of the execution and delivery of the deed. It is apparent from the findings of the trial court that, in order to enable it to do so, testimony was received in that regard."

The court in the above case further quoted from L. Lindley, on Mines (3d Ed.), Section 93, page 153; l.c. 56.

> " ' In construing private conveyances it is apparent that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor, if it can be ascertained.'"
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> "If we understand appellant's contention, it is that the words 'mining operations', as used in the reservation, is confined to subterranean mining or operation beneath the surface. Assuming, without deciding, that the language employed in the deed is susceptible of that meaning, standing alone, yet, in a proper case, the trial court may receive testimony to establish that the intention of the parties was otherwise. Daly v. Old, 35 Utah, 74, 99 Pac. 460, 28 L. R. A.(N.S.) 463; 27 Cyc. 685."

Also in Kinder v. La Salle County Carbon Coal Co., 141 N. E., l.c. 540, the court likewise held to the same rule in construing such provisions and said:

> "That language is quoted substanially in 18 R. C. L. 1094, in discussing the interpretation of grants of

minerals, and the author says:

> "'The most reasonable rule is that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor if it can be ascertained.'
>
> "We think that the reasonable rule, and it is supported by an abundance of authority.
> * * * * * * * * * * * * * * * * *
> "It is also proper to consider the construction the parties themselves have placed on the deed. Hollenbeck v. Hollenbeck, 232 Ill. 348, 83 N. E. 926; 18 Corpus Juris, 262."

In 40 C. J. Section 572, page 985, provides in part that the owner of mineral rights shall not use the surface in such a way as to destroy or injure the surface.

> "The surface rights of a mineral owner are limited to so much of the surface and such uses thereof as are reasonably necessary properly to mine and carry away the minerals, and are also subject to the limitation that he does not use the surface in such a way as unnecessarily to destroy or injure it. But he is not limited by the fact that his acts may cause inconvenience to the surface owner. In the absence of an express grant or license, the mineral owner has no right to use appliances or facilities belonging to the surface owner, even though such use will cause the latter no inconvenience. Ordinarily a mine owner cannot justify the use of the surface for the lengthened keeping

> of his mineral products, the long continued deposit of rubbish from the mine, the erection of buildings for the storage of materials, the housing of animals, or the use of artisans, unless such right is expressly granted; nor has he the right to use the surface of grantor's land for the transportation of minerals from adjacent lands, or to pollute a watercourse on the land.
>
> "A right to construct and use a mining tunnel does not include the right to dump waste, rock, and debris on the surface of the grantor's land or claim, except to the extent that dumpage is required by the reasonable necessities of the situation, the reasonableness of the necessity for such dumping being a question of fact to be determined from the circumstances of the case."

In Korneman v. Davis, 219 S. W. 904, 281 Mo., 242-243, a fundamental rule in construing a deed is that all of the words within the four corners oof the instrument must be considered together and given effect.

> "It is true that when there is a latent ambiguity in a description of land, the circumstances and situation of the parties, and the construction they have put upon the deed by their acts, are admissible in evidence. (Tetley v. McElmurry, 201 Mo. 382; Gas Co. v. St.Louis, 46 Mo. 121; Union Depot Co. v. Railroad, 131 Mo. 291) * * * * * * * * *
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> "It is also ruled that in construing a deed all the words of the deed within its four corners

> must be considered together and given effect and that words stating the estimated quantity or area are part of the description of the land and must be so considered in fixing the identity of the tract conveyed. In Davis v. Hess, 103 Mo. l.c. 36, Black, J., said: 'The rule of law is well settled that the call for quantity may be resorted to for the purpose of making that certain which otherwise would be uncertain.* * * In deeds as well as in wills and contracts, we are to determine the intention of the parties thereto, and this is done by taking the instrument as a whole.'"

In Kinder vs. La Salle County Carbon Coal Co., 141 N. E., l.c. 540, a mineral reservation was made in a deed and the court construed same to mean only such mining as could be done by underground method and not destroy the surface. In this case the appellants contended they had the right to mine the minerals even though such operation did destroy the surface. In so holding the court said:

> "When Cowey conveyed to the Chicago Coal Company he was engaged in mining coal in the immediate vicinity of appellees' land, then owned by him. Coal was the only known mineral under the surface which had any commercial value. Cowey knew appellees' land was underlaid with some gravel and limestone. On parts of the land the limestone was on the surface, and on the rest of it was covered with loam, sand and gravel from a few inches in depth to a depth, in places, of 50 or 60 feet. Where the loam was of sufficient depth, the land was available for cultivation in

crops and was productive. Cowey knew the limestone was so near the surface that it could not be mined by underground methods without the practical destruction of the agricultural surface. To our minds it would be unreasonable to say his intention was to reserve only the agricultural surface above the limestone and convey to the grantee the limestone, with the right to remove it, and thereby destroy all he had reserved. The granting clause of the deed conveys only the coal, 'together with right to mine the same,' and the quit-claim clause of 'all minerals of every description' underlying the land described cannot reasonably be construed to embrace minerals other than such as could be removed by mining operations underground, which would not destroy the surface for agricultural purposes. It is altgether reasonable to presume that Cowey and his grantee had no thought of limestone, sand, and gravel as minerals. They knew those were on or near the surface and were of an entirely different nature from coal and oil-the minerals specifically mentioned in the deed and which could be mined by underground methods. Two years after Cowey made the deed to the Chicago Coal Company he conveyed the land in controversy to Kinder and Burrell, reserving 'all bituminous or stone coal and other minerals, as well as all petroleum oil, in, upon, or underlying said premises above described, together with the right to mine and raise the same.' By that reservation the grantor meant and intended to

> except from the grant what he had conveyed to the Chicago Coal Company, and the words 'the right to mine and raise the same' show the reservation was intended to be limited to minerals which could be mined and raised by underground workings without destruction of the surface."

In Brady vs. Smith, et al., 73 N. E. , 963, a deed was made with the following proviso reserving certain mineral rights which in part reads as follows:

> "Excepting and reserving therefrom unto the parties of the first part, their heirs and assigns forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away."

In construing the mineral reservation, the court said:

> "Among other conclusions the trial court held and the judgment appealed from adjudges, that the defendant Louise J. Smith is the owner of four-thirty-fifths of the limestone bed on the 20.04 acres and that the defendant John J. Sullivan, by virtue of the agreement made by him with the defendant Smith, has the right to take and remove the limestone in question by means known as open quarrying; that the land may be sold subject to such rights. It is from this portion of the judgment that the appeal was taken to the Appellate Division, which resulted in an affirmance of the judgment of the Trial Term.

"We are of opinion that the construction placed upon the exception and reservation in question cannot be sustained.

"The case of Armstrong v. Lake Champlain Granite Co. (147 N. Y. 495) is relied upon by both parties, to some extent, on this appeal. The case cited involved the construction of a deed which conveyed 'All the mineral and ores (on the same premises), with the right to mine and remove the same; also the right to sink shafts and sufficient surface to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores; also the right of ingress and egress for mining purposes, and to make explorations for minerals and ores, saving reservations to the State of New York.'

"The question involved in that case was whether a bed of granite, overlaid by soil from four to six feet deep on land that was thickly wooded, could be removed by open quarrying. Andrews, Ch. J., reviewing the English and American cases, reached the conclusion that under the form of conveyance already quoted open qyarrying was not permissible. The learned judge said: 'Upon the authorities we think we should not be justified in holding that granite was not embraced in the reservation or grant of "mineral" in the absence of qualification.* * *But the words do not stand alone, but are connected with the context which clearly indicates, in our judgment, that the parties had in view only such minerals as are to be got by mining in the ordinary sense of that term; that is, by underground and not by open workings.'* * * * * * * * * *

"It may be well enough to quote once more the reservation to be construed: 'Excepting and reserving therefrom unto the parties of the first part, their heirs and assigns forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away."

"The first point to be observed is that the word 'minerals,' as used in this reservation, is coupled with 'mines' by the conjunctive- 'all mines and minerals.' This shows that the grantor had in mind the reservation of mines and their contents, to wit, 'minerals.' This is further emphasized by the word 'found'- 'which may be found on the above piece of land'. It appears in the findings that immense boulders and ledges of limestone crop out on the surface of these premises, and it would be a strained and unnatural construction to assume that the language commented upon above refers to stone lying open to the view, and that the same may be removed by open quarrying and blasting, destructive of the surface, under the reservation of 'All mines and minerals which may be found.' We have here qualifying words quite as persuasive and controlling as those that influenced the court in Armstrong v. Lake Champlain Granite Co. (supra)."

In the same case the court quoting approvingly from

Countess of Listowel v. Gibbings (9 Ir. C. L. Repts. 223), said in part:

> "Usually, 'mine' imports a cavern or subterraneous place, containing metals or minerals, and not a quarry; and 'minerals' mean ordinarily metallic fossil bodies, and not limestone."

Also the court quoting from Darvill v. Roper (3 Drewry, 294) said in part:

> "* * * under a reservation of 'mines of lead and clay and other mines and minerals,' it was held that limestone was not included within the reservation; it was further held that minerals meant substances of a mineral character, which could only be worked by means of mines, as distinguished from quarries.* * *"

In Murray vs. Allard, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A., 249, l.c. 251, the court said:

> "'In the most general sense of the term 'minerals' are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metal ores of all kinds, clay, stone, slate, and coprolites. 'Surface' means that part of the land which is capable of being used for agricultural purposes.' * * * 'Mineral' originally signified that which is obtained from a mine; from underground workings, as distinguished from that which is quarried. The term is not limited to metallic substances, but includes salt, coal, paint-stone and similar substances. Citing on the last point Hartwell v. Camman 10 N. J. Eq. 128, 64 Am. Dec. 448."

It is our opinion that there is some ambiguity contained in this mineral reservation, in so far as by what method iron ore shall be removed from said property. As stated in Dunham vs. Kirkpatrick, supra, if the grantor had intended to reserve in the deed to the State a right to remove said minerals by strip mining then it would have been comparatively easy to have so stated in this deed that fact. We base our contention that the deed never did contemplate that these minerals should be taken out by the strip mine method for the following reasons: First, on the face of the deed in the reservation of minerals it specifically reserves the right to certain timber on certain lands for mining purposes. It is common knowledge that under the tunnel or subterranean method of mining at the time the deed was executed, which was practically the only method of mining within this State, that timber was as a rule reserved in deeds to reinforce the surface and permit the mining operations underground. But it will be conceded that little if any timber is used in the so-called strip mining operations.

Therefore, why would there be any need for making such a reservation. We think the court will take judicial knowledge of this fact. Furthermore, there is another provision included in this mineral reservation in this deed, and that is that a water right-of-way was reserved to the Meramec River for mining operations. Again, we think the court will judicially notice that in operating a steam shovel, as is now placed on this land, the water required for operations is practically nil. Usually, water for such purposes is taken from a pond or well since it only requires a very small amount of water. Therefore, there would have been no reason for reserving a water right-of-way to the Meramec River.

Another reason which we think important and the court can infer from the deed that the State of Missouri was purchasing this acreage for a State Park. While the deed does not so state it was purchased by the State Park Board for a State Park, it is now a part of the Meramec State Park. No one can reasonably believe that the State would ever purchase such land for such a purpose and with any reservation whereby strip mining should be permitted to any extent whatsoever. It would destroy the beauty of the park, be hazardous, and result

in finally segregating such land covered by these minerals from the rest of the park. It is not logical to even think the State would enter into any such agreement, or that either party would think such an agreement could be entered into at that time under the circumstances.

While the deed nowhere shows this, we think it important that this particular land has for sixty years been mined by underground tunnels and subterranean methods. This mining operation has been going on up to one year ago when this tunnel caved in.. Furthermore, in this case one of the owners of the mineral rights was the owner of the surface and was the grantor to the State in this deed. Therefore, while the terms used in this reservation are very broad it is the opinion of this department that such mineral reservation will not permit the removal of iron ore by the strip mine method. But such reservation only contemplated, at the time same was executed, mining by underground method which was in force on the land at that time.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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