

**State Lands, Lease, Lessee—Rights Of, Section 1271 C. C.
Construed.**

Under Section 1271 of the Civil Code, a lessee of State lands may work all mines and stone quarries open at the beginning of his tenancy, and is not liable in an action of waste for the value of any rock removed by him from any quarry, which was opened and worked at the beginning of his tenancy, unless the tenant was a wrong doer by holding over after the termination of his lease, either by its own limitation or by being terminated.

Helena, Montana, June 3, 1905.

State Board of Land Commissioners, Helena, Montana.

Gentlemen:—On the 8th day of May last, your honorable Board at regular meeting, referred to me the matter of the claim of the State for \$400.00 against Senator Paris Gibson of Great Falls, giving me full power to act in the matter, and enclosing for my consideration, all of the files of the land office, including copy of the lease to said Gibson, bearing date of November 13th, 1899.

After careful investigation of the lease, and all other papers transmitted to me by your honorable body, the following may be considered a true statement of the facts:

STATEMENT OF FACTS—(ASSUMED).

On November 13th, 1899, the State of Montana leased to Paris Gibson, for a term of five years from date of sale, S. W. 4 of Sec. 16, T. 20, R. 4. E. The consideration for the lease is an annual rental of \$50.00; the lease is general in its character, and contains no limitation as to the use to which the land is to be put by the lessee. The lease contains no provision against subletting the premises, or any part thereof, but does contain the provision that the lessee shall not assign the lease, and provides that if the lessee violates any of the terms of the lease, the lessor may at his option, declare the term ended, and re-enter into possession of the premises.

The lessee entered into possession at the date of the lease. At that time there was a stone quarry on the land, which had been opened and worked prior to the date of the lease. Subsequently the lessee, for a consideration of \$100.00 per year, permitted other parties to work this quarry for a period of four years, during the term mentioned in the lease.

QUESTION PRESENTED.

Is the lessee liable to the State of Montana in an action of waste or otherwise, for the working of such quarry?

THE LAW.

It is unquestionable that in the absence of statutory provisions, a tenant for life takes a free hold estate, and is entitled to the beneficial enjoyment thereof, and may work out any open mines or quarries upon the land, without being chargeable with waste.

Woods L. & T. (2nd Ed.) page 137.

McCord vs. Oakland, Q. M. Co. 64 Cal. 134.

Reed vs. Reed, 16 N. J. Eq. 248.

Billings vs. Taylor, 10 Pick. 46.

Coates v. Cheever, 1 Cow 450.

Section 1271 of the Civil Code of Montana, provides: "A tenant for years or at will, unless he is a wrong doer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy, etc." This section of the statute, in positive terms, extend to tenants for years, the same privilege with respect to working open mines, that was accorded to tenants for life at the common law.

If the statute limited the right of the tenant for years to quarry only building rock, it might be contended that the rock so quarried was to be used on the premises leased, but the statute makes no qualifications whatsoever; it gives to the lessee the right to work mines, which would include mines producing metaliferous ores, which could not be used on the premises, and the only value of which is in the price obtained on the sale. The right to work quarries is by the statute placed on the same footing as the right to work mines.

It is true in this particular case, the lessee did not operate the quarry himself, but permitted other parties to operate it. This, however, does not change the legal phase of the case. In *Irwin Cavode*, 24 Pa. St. 162, in considering a somewhat similar question, the court used this language: "In virtue of their common law powers the court might doubtless restrain unskillful mining and wanton injury to the inheritance, but not such proper mining as is subject to no other objection than its liability to exhaust the mine."

"The profits of coal mines depend much on expensive preparations for working them, and in order to compensate this necessary investment, as well as to compete successfully with rival operations, a large amount of coal must be mined and sold. To deny a tenant for life the right to mine largely, would be to deny him the right to mine profitably—to shut him up to mining for his own fuel merely. If he cannot be restrained, and that he cannot was settled in *Neel v. Neel*, neither can his alienees. They possess his full right to mine and sell, and for these purposes to make new openings to build railroads, and to supply all ordinary facilities. Nor are such improvements necessarily injurious to the remainder man, for the estate is liable to fall in at any moment, and when it comes to him he takes it with will all that has been added to develop and improve it."

"But it is said that on the western slope of the Alleghanies the seams of bituminous coal are so few and thin, that tenants for life, if permitted to introduce modern facilities for mining, would exhaust lands so held, and leave them ruined on the hands of those in succession. Should this happen, it would be no more than occurs in every life estate in chattels which perish with the using. So long as the estate is used according to its nature—*informam doni*—it is no valid objection that the use is consumption of it, and it is no fault of the tenant that it is not more durable."

Cosgriff, vs. Dewey, 164 N. Y. 1, 79 Am. St. Rep. 620, was an action between co-tenants, and the doctrine therein announced is not applicable to the case at bar.

It is apparent from these considerations that no action can be maintained against the lessee for the value of the rock quarried by him or by other parties by his permission, during the term of his lease.

I herewith return all papers by you transmitted to me.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.