MURDOCK *v.* REYNOLDS.

Opinion delivered December 23, 1929.

1. MINES AND MINERALS—CONSTRUCTION OF CONTRACT.—Where an oil well drilling contract only gave the owner and an oil company the right to request tests of the formations and the oil sand, an instruction, in an action thereon, that under the contract and evidence the contractor was required to drill the well under the direction and supervision of the oil company as well as the owner, and the latter was bound by any requirements made by the oil company, *held* an erroneous interpretation of the contract.
2. TRIAL—INSTRUCTION ON WEIGHT OF EVIDENCE.—It was error to give an instruction on the weight of the evidence.
3. CONTRACTS—DUTY OF CONSTRUCTION.—In an action on an oil well drilling contract, if the contract was free from ambiguity and provided who should furnish the necessary casing, it was the province of the court to construe it and tell the jury upon whom the duty rested, and the liability for failure to perform it.
4. EVIDENCE—PAROL EVIDENCE TO EXPLAIN CONTRACT.—If a provision in an oil well drilling contract that it should be a "turnkey job" rendered the contract ambiguous, the court erred in refusing to permit introduction of parol testimony as to the customary local meaning of "turnkey job."
5. MINES AND MINERALS—COST OF CASING.—Where an oil well drilling contract required the driller to furnish surface casing and the owner to furnish test casing if test was requested, but made no provision as to casing necessary to keep out water, the contractors was bound to furnish it under a provision requiring him to furnish all materials and labor.
6. MINES AND MINERALS—INSTRUCTION AS TO FURNISHING CASING.—In an action on an oil well drilling contract requiring the contractor to furnish surface casing and providing that if the owner required a test he should furnish the necessary casing, an instruction that the test casing for which the owner was liable included all casing other than surface casing was erroneous, and was not cured by an instruction allowing the jury to determine whether casing to keep out water was required for a test.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought this suit upon a written contract providing for his drilling a test oil well in wild-cat territory belonging to appellant, for the value of extra casing

alleged to have been required put into the well by appellant, for which he was bound to pay, and for damages resulting from delay in the furnishing of the casing. A copy of the contract was exhibited with the complaint.

The answer admitted the execution of the contract, denied the allegations of the complaint, denied that the casing had been required to be furnished by him, and any obligation under the contract to pay for it, denied that he was indebted in any manner or sum to the plaintiff as alleged, having paid the entire contract price specified on completion of the well, and alleged that any damage caused from delay in the drilling resulted from appellee's own negligence and carelessness in not carrying on the work in a workmanlike manner, and in accordance with the contract. An amendment to the answer was filed, alleging that the two strings of extra casing were used at the depth alleged in order to shut out the artesian water encountered, and that the necessity for doing this was brought about by plaintiff failing to use proper equipment to drill the well, according to the terms of the contract, and negligently failing to continue to operate the drill, keeping in circulation the mixture of mud in the well, and also to keep the well filled with a proper mixture of mud to protect the walls against water flows, and that if plaintiff found it necessary to use the oxide of iron the necessity arose through his negligence, as alleged, and that defendant was in no wise liable for the two strings of extra casing, and the use and handling of the oxide of iron therein; also denied any liability for damages alleged to have resulted from shutting down the operation of the rig while waiting for the purchase and setting of the extra casing; denied authorizing the plaintiff to pull the 10- and 12-inch extra casing out of the well and stack it on the location site.

The contract provides that the well should be drilled to a depth of 3,000 feet, unless oil producing sand was sooner found; that it was to be drilled in a certain dimension in a workmanlike manner to the first casing seat, or depth of 2,300 feet. It was agreed that, if the well was

completed as a producer of oil or gas in commercial quantities, at a depth of 2,500 feet or less, the consideration to be paid was $7,500, and, if completed at 3,000 feet, or a point beyond 2,500, the price was $9,000; the driller or contractor to furnish all labor and materials necessary for the drilling and completion of the well. The contract provides, relative to the casing, as follows: "Should, and when, the owner requires a test and the setting of casing, exclusive of surface casing, which the contractor agrees to buy and set at his own expense, the owner hereby agrees to purchase and furnish the contractor with the casing required by the owner, to be set by the contractor, and all labor and fuel incident to the setting of said casing at any given point shall be borne by the contractor, and is included in the contract price mentioned herein."

The contractor procured and furnished the casing to shut out the artesian water, protesting that it was not his own but the duty of the owner to supply it, and the well came in a dry hole, with no test made at its completion, and the contractor was paid the amount specified in the contract for its completion, bringing suit for the price of the casing and the damages resulting from delay in its being furnished.

The court refused to allow certain oral testimony explaining the terms of the contract to be introduced, and gave certain instructions over appellant's objections and exceptions, and from the judgment against him the appeal is prosecuted.

Jno. E. Harris and *Compere & Compere,* for appellant.

Gaughan, Sifford, Godwin & Gaughan, for appellee.

KIRBY, J., (after stating the facts). It is insisted for reversal that the court erred in refusing to allow the parol evidence introduced, explaining the terms of "a turnkey job" under the provisions of the contract, and in giving instructions Nos. 1, 2 and 3 for the plaintiff, and refusing to give requested instructions Nos. 8 and 10 for the appellant.

Instruction No. 3, complained of, told the jury that, "under the terms of the contract and under the evidence herein," that the plaintiff was required to drill the well under the direction and supervision of the Lion Oil and Refining Company, as well as the defendant, and the defendant was bound by any requirements made by a duly authorized representative of the Lion Oil and Refining Company. This instruction was a direct contradiction of the terms of the contract relative to the authority of the representative of the Lion Oil and Refining Company, and the right of the defendant, neither of them having the right to the direction or supervision of the drilling of the well, but only to request the making of a certain test of the formations and oil sand as the drilling proceeded, and, certainly, it was an instruction on the weight of the testimony directing the jury that they were required to find from it that the plaintiff was required to drill under the direction and supervision of said oil company, as well as of the defendant, and was bound by any requirement made by a duly authorized representative of the Lion Oil and Refining Company. This instruction was not only an incorrect interpretation of the contract, but there was no evidence upon which to base it, and it amounted, in effect, to a peremptory direction, and was necessarily erroneous.

If the contract, by its terms, was free from ambiguity, and provided whose duty it should be to furnish the necessary casing in the drilling and completion of the well, then it was the province of the court to construe it, and tell the jury upon whom the duty rested, and his liability for failure to perform it. Under the terms of the contract, it is clear that the parties only contemplated the necessity for using two kinds of casing, surface casing, which was to be furnished by the contractor, who was also to set any other string of casing necessary to be used by the customary methods employed for cementing the same, and to reset same at his own expense, if it should fail to hold. It is equally clear that if oil or gas was encountered at any depth under 3,000 feet in paying

quantities, he was required to complete the well in a workmanlike manner with casing set, cemented, drilled in and bailed at his own cost and expense. When a test was required and the setting of casing, exclusive of surface casing, which the contractor agreed to buy and set at his own expense, the owner was bound to purchase and furnish the contractor with the casing required by the owner to be set by the contractor, who was to pay for all labor and fuel incident to the setting of said casing at any given point, such consideration being included in the contract price. The contract was termed to be "a turnkey job," with the exception of its terms applicable to the different depths of the well, and the prices to be paid at the completion of the well for the different depths, "less and except the cost of all casing except the surface casing, which is to be furnished by the owner."

Each of the parties insist that it was the duty of the other to furnish the casing for shutting off the flow of the artesian water, the contractor, that such casing could not be termed surface casing that he was required to furnish, and the owner, that it was not test casing, the only kind he was required to pay for. The well was a dry hole, and no test casing, as provided by the contract, was required to be furnished, since neither oil nor gas was discovered in sufficient quantities before the well was completed, at the depth required by the contract, to indicate that a test should be made, and none was made. The contractor testified that no test for oil or gas was made when the 12½-inch casing was set in boring down at that point, nor any test by the drill stem, that no oil sand was encountered there, and that the 12½-inch casing, set at 560 feet, and the 10-inch casing, set at 700 feet, was not set for the purpose of making an oil or gas test, "but to cut off water." Under the plain provisions of the contract, unambiguous in the opinion of the writer, the court should have directed the jury that no test casing, within the meaning of the contract, was required or attempted to be set, and that the owner was not liable to the payment of the price of any other casing set for the

purpose of shutting off the artesian water flow, without regard to whether such casing could be classified as surface casing, which the contractor was also obligated to supply. But if the last sentence of the contract quoted, providing that the contract should be "a turnkey job," with the exception of its terms applicable to the different depths of the well, and the prices to be paid at the completion of the well for the different depths, "less and except the cost of all casing, except the surface casing, which is to be furnished by the owner, be regarded as making the contract ambiguous, then the court should have permitted the introduction of parol testimony, explaining the customary local meaning of the words, "a turnkey job," under the terms of the contract, to show who was obligated to pay for the casing, and erred in not doing so. *Batton* v. *Jones,* 167 Ark. 478, 268 S. W. 857; *Alexander* v. *Williams-Echols Co.,* 161 Ark. 363, 256 S. W. 55; 27 R. C. L. 170 (19); *McCarthy* v. *McArthur,* 69 Ark. 313, 63 S. W. 56; *Paepcke-Leicht Lumber Co.* v. *Talley,* 106 Ark. 400, 153 S. W. 833.

If the contract made no provision for payment by the owner for casing necessary to be used in shutting off the flow of artesian water, and, under its terms, the owner was required only to pay for the casing necessary for making a test of the well at its completion or on discovery of oil or gas signs before that depth was reached, warranting the making of such a test, as appears to be the case, then necessarily the payment for any other casing than that for which the owner was bound under the terms of the contract—the test casing—would have to be made by the contractor, who was to furnish all materials and labor and complete the well in a workmanlike manner for the amount stipulated in the contract, in accordance with his agreement. *Ingham Lumber Co.* v. *Ingersall,* 93 Ark. 447, 125 S. W. 139, 20 Ann. Cas. 1002; *Kelly* v. *Zenor,* 150 Ark. 466, 252 S. W. 39; *Smith* v. *Dierks Lumber & Coal Co.,* 130 Ark. 9, 11, 196 S. W. 481; *Polzin* v. *Beene,* 126 Ark. 46-50, 189 S. W. 654; 6 R. C. L., § 364, p. 997.

Instruction No. 2 was abstract and not supported by the testimony. It appears undisputed that no test casing was required to be furnished by the owner. Instruction No. 1 was also erroneous in defining test casing for which appellant was bound to pay under the contract, as all casing necessary to be used in the well other than surface casing, and the error was not cured by giving appellant's requested instruction No. 5, allowing the jury to determine whether the extra casing used and sued for was required for a test for oil or gas, etc., which is in conflict with and contradictory thereof.

Instructions Nos. 8 and 9, requested by the appellant, ought to have been given.

It follows that, because of the errors designated, the cause must be reversed, and will be remanded for a new trial.

It is so ordered.