

COMMONWEALTH, EX. REL., EDWARD RODERICK, MINE  
INSPECTOR vs. JONATHAN VIPOND, ET AL.

*In the Court of Common Pleas of Lackawanna County, No. 18,  
September Term, 1893.*

ACT 2 JUNE 1891—ERECTION OF COLLIERIES ON FOUNDATIONS  
DESTROYED BY FIRE—BOILERS—STATUTORY  
RESTRICTIONS.

Where a colliery was erected previous to the passage of the Act 2 June 1891, and is destroyed by fire, leaving foundations and boilers standing. *Held*, that the breaker may be erected on the old foundation, and the boilers maintained as they formally existed, even though they be less than one hundred feet from the breaker.

Statutory restrictions on the enjoyment of private rights are to be strictly construed the intent to abrogate existing rights must be positive and unmistakable.

Bill for injunction.

Submitted on bill and answer.

*Willard, Warren & Knapp*, Solicitors for Plaintiff.

*Jas. H. Torrey*, Solicitor for Defendant.

November 13, 1893, SMITH, J. The bill filed by the mine inspector, sets forth the existence of a drift or opening known as the old Butler mine, "and also some parts of the the stone foundation of what was formerly known as the Butler colliery, long since destroyed by fire, no portion of which is now standing or remaining; and in connection therewith some parts of old boilers and a boiler house, which were formerly connected with the said Butler colliery, and are now immediately adjacent to the ruins of said foundations; the said boiler being incomplete, and not properly set to be used without the construction of a stack, and an entire re-arrangement of their situation and the completion of parts now waiting;" it avers an intention on the part of the defendants "to erect and construct an entirely new breaker upon the said ruins and partial foundations, together with new ones to be

built by them and to make the necessary repairs and additions to the boilers so as to make them fit for use for the purpose of generating steam," and "to use the said breaker in the preparation of their coal;" That such construction will place the boilers within 100 feet of the breaker and directly under it; and that the proposed action of the defendants is in violation of Article 5, Sec. 2 of the Act of June 2, 1891, to provide for the health and safety of persons employed in and about anthracite coal mines &c. and should be restrained by injunction under the provisions of that act.

The answer admits these matters, with certain qualifications; averring that the foundations of the breaker remain intact, except the loosening of a few stones; that the boilers are uninjured, and securely set as originally located, and when the smoke stack, which fell to the ground on the burning of the boiler house is again set up, and new grate bars put in, they will be in perfect condition for immediate use, without other repairs or additions, and that instead of being under the breaker they will be forty-six feet distant. It further avers that the colliery was erected long before the passage of the Act of 1891, and stood unimpaired, with its boilers located as at present, for six months afterward, before its destruction by fire.

The cause having been set down for hearing on bill and answer, the averments in the answer must be taken as true.

The section of the statute cited in support of the bill is the following:

"It shall not be lawful to place any boiler or boilers, for the purpose of generating steam, under or nearer than one hundred feet to any coal breaker or other structure in which persons are employed in the preparation of coal: Provided that this section shall not apply to boilers or breakers already erected."

The plaintiffs contends that the structures which the defendants propose to build are new erections and within the statute. This is denied by the defendants. The determination of the cause must therefore depend on the proper construction of the section cited.

Statutory restrictions on the enjoyment of private proper-

ty are to be strictly construed. The intent to abrogate existing rights must be positive and unmistakable. The section cited exhibits no such intent. On the contrary it expressly excepts such rights from its provisions. By its proviso, boilers and breakers already erected are taken entirely out of its operation. To all intents and purposes they remain as if the restriction had never been enacted. Their freedom from this restriction necessarily extends to subsequent repairs, alterations and renewals; otherwise it might become impossible to carry on the operations for which they were erected. To hold that they may not be restored, replaced or rebuilt, if damaged or destroyed, is to leave the right to continue these operations dependent on freedom from accidents or natural wear, or at the mercy of the elements. The exclusion of boilers and breakers already erected from the operation of the section, by its proviso, logically implies the right to maintain them as they then existed.

The buildings which the defendants propose to construct therefore, cannot be regarded as new and original erections within the purview of the section, but as the restoration of structures already built at the time of its enactment, under a right of maintenance saved by its proviso. In this view the present condition of the boilers is immaterial; the defendants have a right to use them as they are, or with such repairs as may be necessary, or to replace them with new ones, at their discretion.

The injunction is accordingly refused and the bill dismissed.

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DAVIS vs. BRODE.

*In the Court of Common Pleas of Schuylkill County, No. 296,  
September Term, 1893.*

PRACTICE—ERROR IN PRECIPE—EFFECT ON WRIT—AMENDMENT.

An error in the precipe cannot invalidate the writ. The precipe is amendable and may be made to conform to the writ.