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OWNERSHIP OF OIL AND GAS IN PLACE

The unprecedented development in recent years of oil and gas properties in the United States has brought before our courts of last resort many intricate problems for decision, and on no subject are the authorities more at sea than when the courts come to consider the question of ownership of oil and gas in place. A few early English decisions established, or rather attempted to establish, that the owner of realty owned as high as the heavens and down to the center of the earth. If this was the law it would logically follow that in making a flight in an airship a technical trespass would be committed on every piece of property over which the airship flew; yet the tendency of the recent cases is that the owner of realty only owns up to such a distance as will give him a reasonable enjoyment of his property. A few of our courts, influenced by the rule of law that the owner of land owns down to the center of the earth, have held that the owner of the land upon which oil and gas are found has absolute title to such oil and gas in place, but this view is not entertained by the overwhelming weight of American authority.¹

To get a proper concept of this subject it is absolutely essential that we arrive at a proper definition of the word owner. In Turner v. Cross, 83 Texas 218, the word owner is defined as follows: "He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to do with as he pleases, even to spoil or destroy it as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right." The word owner when used alone imports absolute owner, and will be so considered for the purpose of this discussion.

All the courts agree that coal and other solid minerals, the status of which is fixed and which are not of a fugitive nature, are owned by the owner of the land on which they are found. This is a too well settled principle of law to require citation of authorities. When, however, we come to consider the ownership of oil and gas, an entirely different situation arises. In the first place, these minerals are of a fugacious nature, have no fixed

¹This subject is of so great importance in this state that it has seemed fitting to quote freely from an article by Mr. D. Edward Greer, published in 1 Texas Law Review, 162.
status and are likely to escape at any time. In the second place, it is never known where they are located. Today they will be under one piece of property, tomorrow they may be found on adjoining property. Therefore, there can be no analogy between the ownership of coal and that of oil and gas in place, and recognizing this distinction a majority of the courts of the United States have uniformly held that oil and gas are incapable of absolute ownership, but that title is acquired when they are reduced to actual possession.

The leading case advocating the non-ownership doctrine is Ohio Oil Co. v. Indiana, 177 U. S. 190. In that case the State of Indiana passed a statute making it unlawful for any person, firm or corporation, having possession or control of any oil or gas well, to allow the flow of oil and gas from any well to escape into the open air without being confined, for a longer period than two days next after gas or oil should have been struck. The defendants violated this statute and the State brought a bill in equity to enjoin them from wasting the oil and gas. The defendants contended that the statute was unconstitutional as it violated the 14th amendment in that it resulted in the taking of private property without adequate compensation. In upholding the constitutionality of the statute the court held that although the owner of the surface has the exclusive right to bore wells on his land for the purpose of extracting these minerals he does not acquire title to them until he has actually reduced them to his possession. Nor will a court of equity grant an injunction to prevent the shooting of a gas well with nitroglycerin on the sole ground that this will have the tendency to attract all the gas from adjoining property. Peoples Gas Co. v. Tyner, 131 Indiana 277. It can be safely said that the Supreme Court of the United States is committed to the non-ownership doctrine. Walls v. Midland Carbon Co., 254 U. S. 300; Lindsley v. Natural Carbon Gas Company, 220 U. S. 61.

In Kentucky the court is no less positive in upholding the non-ownership doctrine. In Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, it is held that while gas is not subject to absolute ownership, yet each operator will not be allowed to waste the common supply, and that independent of statutory regulation the court will enjoin such waste. If equity can en-
join wasting of natural gas it is clear that there can be no abso-
lute ownership of such an article, because at common law the
owner of property has an undoubted right to do with his prop-
erty as he pleases, even to destroy it if this is not in violation of
some statutory provision. In *Louisville Gas Co. v. Kentucky
Heating Co.*, 132 Ky. 435, the court again adheres to the non-
ownership theory in no uncertain language.

Until the recent case of *Scott v. Laws*, 185 Ky. 440, the law
seemed to be well settled in Kentucky that oil and gas were in-
capable of absolute ownership in place. There was dicta in that
case to the effect that oil and gas belonged absolutely to the
owner of the land on which they were found. In that case
Gearheart, through whom plaintiff claimed, deeded to Laws,
through whom defendant claimed, all the mineral rights and
coil privileges on his land with the right to search for all un-
disclosed minerals on the land. Plaintiff contended that de-
fendant’s title was lost by failure to develop the property for
more than thirty years. The court held that the fact the grantor
conveyed the privileges above mentioned to Laws forever, with
a covenant of general warranty, indicated a clear intention to
convey to the grantee the exclusive right to all the minerals,
and thereby invested him with title to the minerals themselves.
Here the deed operated as a conveyance of the understrata in
which the oil and gas are included, and therefore this decision
can not be cited to show that Kentucky follows the ownership
doctrine. This case does not expressly or by implication overrule
the early Kentucky cases which unequivocally announce the
non-ownership doctrine.

It is also settled in this state that oil leases are taxable.
*Wolfe County v. Beckett*, 127 Ky. 252; *Mount Sterling Oil and
Gas Co. v. Ratliff*, 127 Ky. 1. This is authorized under Ken-
tucky Statutes, 4039, making it the duty of any person owning
any real or personal property, or any coal, oil or gas privilege,
to list the same for taxation, and hence can not be cited to prove
that Kentucky follows the absolute ownership theory. In this
connection it should be noted that the statute referred to uses
the words “coal, oil or gas privilege,” indicating the legis-
lators understood that oil and gas were incapable of absolute
ownership in place.

In Pennsylvania the cases are in hopeless conflict. The early
cases were all positive in declaring for the non-ownership doc-
trine. *Funk v. Haldeman*, 53 Pa. State 229; *Dark v. Johnson*, 55 Pa. State 164; *Brown v. Vandergrift*, 80 Pa. St. 142; *Jones v. Forrest Oil Co.*, 194 Pa. St. 379. In the last mentioned case a landowner filed a bill to enjoin an adjoining landowner from using in a gas well on his property, a pump which was asserted to have such power that its operation would result in the drawing away of the oil and gas from the well of plaintiff to that of defendant. In dismissing the bill the court says: "Possession of the land is not, therefore, possession of the gas. If an adjoining, or even a distant owner, drills his own land so that it comes under his control it is no longer yours, but his. Property of the owner of lands in oil and gas is not absolute until it is actually within his grasp and brought to the surface."

In *Barnsdall v. Bradford Gas Co.*, 225 Pa. 338, the court holds that a lessee of an oil and gas lease can maintain ejectment. The lease in this case operated as a lease of the land and hence the court is consistent in holding that ejectment can be maintained. This case is followed in Kentucky. This can not be cited to prove the ownership doctrine because the form of the lease controls. In *Kelly v. Keys*, 256 Pa. 121, the court apparently holds that the landowner owns all the oil and gas under his land.

In the following cases the non-ownership doctrine is adhered to: *Rich v. Doneghey*, 177 Pacific (Okla.) 86; *Frost Johnson Lumber Co. v. Sallings*, 91 Southern 244; *Watford Oil and Gas Co. v. Shipman*, 233 Ill. 9; *Wagner v. Mallory*, 169 N. Y. 505; *Kelley v. Ohio Oil Co.*, 57 Ohio State 317.

The leading case advocating the ownership doctrine is *Preston v. White*, 57 West Virginia 238, where it is held that the owner of land is the owner of the oil and gas in place. The question before the court was whether a reservation of all the oil and gas in a tract of land created a severance so that the grantor could convey the oil and gas separate from the surface, and the court in holding that it could, seems to commit itself to the ownership doctrine. However, in the case of *Hall v. Vernon*, 34 S E., a West Virginia case, the court holds that oil and gas can not be owned until they are reduced to possession. This was a case where three parties owned the minerals on a certain tract of land. The land previously had been divided under a decree of partition and it was alleged that defendants were
taking from the lot of plaintiff oil and gas. An injunction was asked for. In holding the partition void, the court says:

"Oil and gas are fugitive, and co-owners of them, not owning the surface, have a mere right to explore, and it is impossible to partition the same in kind owing to the nature of oil and gas." This decision clearly establishes that oil and gas are incapable of absolute ownership in place, and yet the West Virginia cases which cling to the doctrine of ownership make no attempt to reconcile this case with their decisions. This suffices to show that the West Virginia decisions are in great confusion on the subject, and it is possible that the court there will join with the majority, but at present it is not to be denied that the tendency of that court is to follow the ownership doctrine.

Tennessee is claimed by the advocates of the ownership doctrine, and the case of Murray v. Allard, 100 Tenn. 100, is cited. In that case A conveyed the land to B, reserving to himself all mines, minerals, and metals in and under the premises in question. The title came to D through a deed without the mention of any reservation. C purchased at a judicial sale all the interest which A had in the premises. The question before the court was whether C or D was entitled to develop the land for oil and gas purposes. In holding in favor of C, it is said in the opinion: "In addition, it is well settled that one person may own the surface or soil, and another the minerals, and mines, and metals, and there may be different owners for the several different strata under the earth." This statement is purely dictum and was not necessary for the proper decision of the problem before the court, for the main and only question for the court to decide was whether or not oil and gas in legal contemplation are regarded as minerals, and the law is everywhere settled that oil and gas are minerals. Kelly v. Ohio Oil Co., 57 Ohio State 317; Peoples Gas Co. v. Tyner, 131 Indiana 277.

Kansas is also claimed to adhere to the ownership doctrine, and the case cited to establish this proposition is More v. Griffin, 72 Kansas 164, where the court said: "Different estates may be created in the surface and soil of lands and the underlying strata in which minerals, oils and gas may be found." Here again the question before the court was whether oil and gas were included in a reservation which reserved all the oil and gas privileges in the land in question. The fact that the reserva-
tion uses the words "all the oil and gas privileges," is a clear indication that no attempt was made to reserve the title to the oil and gas, and considered in this light, the statement of the court on which the ownership advocates rely, becomes a mere dictum.

The case of Osborne v. Arkansas Territorial Oil Co., 146 S. W. 122, is cited to establish that the Supreme Court of the State of Arkansas is committed to the ownership doctrine. In that case A owned a certain tract of land which he leased for oil and gas development. Later he sold the land in three different parcels to three different purchasers. Gas was only produced from one of the tracts, and the question arose whether the royalties were to be paid exclusively to the purchaser of the tract on which the gas was being produced, or whether the royalties should be apportioned. In holding that there can be no apportionment the court seems to think that oil and gas belong absolutely to the owner of the land on which they are located. However, the same result arrived at in the present case has been reached in the following jurisdictions which follow the non-ownership doctrine: North Western Ohio Natural Gas Co. v. Ullery, 68 Ohio State 259; Kimberly v. Zucke, 179 Pacific (Okla.) 928; Fairbanks v. Warren, 56 Indiana Appeals, 337.

The true test of absolute ownership on legal principles is whether the party claiming to have absolute ownership has such a right or title to the thing that no one can lawfully take it from him without his consent. For example, if I am the owner of a hat, and have title thereto, no one has the lawful right to take it from me without my consent, and if it escapes from my possession, I have the right to go on another man's property for the purpose of retaking it. Of course, I will be liable in trespass if I do any damage while retaking the hat, but that fact does not destroy my right. Now if oil and gas can be owned in place it logically follows that the person who holds the title will be allowed to retake them in case they escape to adjoining property, but all our courts agree that the title of the owner is gone as soon as the minerals escape. Kelly v. Ohio Oil Co., 57 Ohio 317; Coffindaffer v. Hope Natural Gas Co., 74 W. Va. 107; Peoples Gas Co. v. Tyner, 131 Indiana 217; Jones v. Forrest Oil Co., 194 Pa. 379. It should be noted in this connection that West Virginia, though advocating the ownership
doctrine, admits that if the oil and gas escape, the title of the former owner is gone. This is a new method of transferring title, and is wholly unauthorized on strictly legal reasoning.

From this review of the cases on the subject we see that the view that oil and gas are incapable of absolute ownership in place is entertained by the majority of the courts of our land. The Supreme Court of the United States, the Federal Courts, the Courts of Indiana, Illinois, Louisiana, New York and Ohio are committed to the doctrine. In Pennsylvania the decisions are in hopeless confusion. The early decisions all favored the non-ownership doctrine, but several recent Pennsylvania cases have intimated that the ownership doctrine is the law in that state. In West Virginia the cases are also in conflict, but it can be safely said that West Virginia is one of the few jurisdictions where the ownership doctrine is adhered to. In Kansas, Arkansas and Tennessee there is dicta to the effect that oil and gas belong absolutely to the owner of the land on which the oil and gas is found. However, the question has never been squarely presented to the courts of these three states, and these three courts can join the ranks of the majority without violating the rule of stare decisis. There are few decisions on this question in Kentucky. As late as 1909 the Court of Appeals of Kentucky was committed to the non-ownership doctrine. There was dicta in a recent case to the effect that the owner of the land had absolute title to the oil and gas. That case did not overrule the prior cases either expressly or by implication. Therefore, the writer submits that Kentucky is definitely committed to the proposition that oil and gas are not capable of ownership in place.

JOE HOBSON.