



1920

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## Recommended Citation

Summers, W. L. (1920) "Property in Oil and Gas," *Kentucky Law Journal*: Vol. 9 : Iss. 1 , Article 2.

Available at: <https://uknowledge.uky.edu/klj/vol9/iss1/2>

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# Kentucky Law Journal

Vol. IX

LEXINGTON, KY., NOVEMBER, 1920

No. 1

## PROPERTY IN OIL AND GAS\*

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In determining the true nature of the rights of the owner of land in the oil and gas beneath the surface, the courts have been confronted with a problem of considerable difficulty. To say that no sound principle regulating such rights has been determined upon may be putting it too strongly, but it can be safely said that as the decisions stand to-day they are very inconsistent in theory, and not altogether just in application. To appreciate fully the nature of the problem it seems necessary to recall some fundamental conceptions as they have developed in the law of property.

Until comparatively recent time, man in his existence upon the earth has been primarily concerned with its surface. Upon the surface he lived, found or produced his food, and fought his enemies. In his nomadic stages the earth and its fruits were no doubt considered free, but as the wandering instinct gave way to the desire for a fixed place of abode, and the individual, family, or tribe, sought by force to control a particular part of the earth, such control was, no doubt, both by reason and necessity, limited to a dominion or control of the surface only. It must have been at a later period, when the practice of mining and quarrying the solid minerals of the earth had become common, that the maxim "*cuius est solum, eius est usque ad caelum ad inferos*," was given expression to, and the surface was presumed to be the measure

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\*This article was published in the Dec., 1919, number of the Yale Law Journal. It is re-published here by permission of the author and of the Yale Law Journal Co.

and not the extent of man's dominion. This maxim that the owner of the surface owns everything from the center of the earth to infinity above may, at the time of its conception, have been perfectly true, but experience has taught that its qualification was necessary. It has been qualified by another maxim, "*sic utere tuo ut alienum non laedas*," so as to give a just and equitable right to the landowner in respect to lateral support, light, air, and water on the surface. When rights as to subterranean substances such as water, oil and gas came before the courts for determination their problem was to decide what qualification, if any, should be made of this principle of absolute ownership.

Since underground waters and oil and gas are alike minerals of fugitive and wandering nature, and since the question as to water arose first, it seems not out of place to make brief mention of the development of the law relative to that species of property. It is to be noted that up to this time the law had dealt only with substances of wandering nature as exist above the surface of the earth, and as to these the qualification of the absolute ownership doctrine had been such as practically to deny the idea of ownership.

The landowner's right to underground percolating water is said to have first arisen in the well known case of *Acton v Blundell*.<sup>1</sup> The plaintiff there brought an action for alleged interference with water which was flowing underground to his spring by the operation of a coal mine on adjoining land. The rules of law governing surface streams were urged as a solution, but the court refused so to hold and made the following statement, which has been much cited and quoted as laying down the correct principle.<sup>2</sup>

"We think the present case, for reasons given above, is not to be governed by the law which applies to rivers and flowing

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<sup>1</sup> (1843, Exch.) 12 M. & W. 324.

<sup>2</sup> *Chasemore v. Richards* (1859) 7 H. L. Cas. 349; *Grand Junction Canal Co. v. Shugar* (1871) L. R. 6 Ch. App. 483; *Wheatley v. Baugh* (1855) 25 Pa. St. 528; *Hanson v. McCue* (1871) 42 Calif. 303; *Frazier v. Brown* (1861) 12 Oh. St. 294; *New Albany & Salem R. R. v. Peterson* (1860) 14 Ind. 112; *City of Greencastle v. Hazelett* (1864) 23 Ind. 186; *Ryan v. Quinlan* (1912) 45 Mont. 521, 124 Pac. 512; 30 *Am. & Eng. Cyc.* (2d ed. 1905) 310ff.

streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action."<sup>3</sup>

Although this theory of absolute ownership as governing rights of landowners in subterranean waters has been retained in England and many of the states of this country, yet it has met with a dissatisfaction that has resulted in engrafting upon the main principle several important exceptions. Perhaps the most important of these qualifications are that the owner of land may not intercept and use all of the water of an underground stream, foully or maliciously divert percolating water, or appropriate such water so as to injure a flowing stream.<sup>4</sup> But these qualifications of the absolute ownership theory were not sufficient to allay the criticism of the rule. The Supreme Court of New Hampshire in a well reasoned case<sup>5</sup> attacked it as being unsound in theory and impractical in application and brought forth as a substitute the doctrine of correlative rights in percolating waters based on the maxim, "*sic utere tuo ut alienum non laedas*". This doctrine has been favorably received in many states and the trend of the later decisions is decidedly in that direction.<sup>6</sup>

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<sup>3</sup> *Action v. Blundell*, *supra*, 353.

<sup>4</sup> See cases cited in 30 *Am. & Eng. Cyc.* (2d ed. 1905) 310ff.

<sup>5</sup> *Bassett v. Salisbury Co.* (1862) 43 N. H. 569.

<sup>6</sup> *Sweet v. Cutts* (1870) 50 N. H. 439; *Katz v. Walkinshaw* (1903) 141 Calif. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, note; *Forbell v. City of New York* (1900) 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, note; *Barclay v. Abraham* (1903) 121 Iowa, 619, 96 N. W. 1030; *Stillwater Water Co. v. Farmer* (1903) 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, note; *Erickson v. Crookston Water-Works Co.* (1908) 105 Minn. 182, 117 N. W. 435, 17 L. R. A. (N. S.) 650, note; *Meeker v. East Orange* (1909, Ct. Err. & App.) 77 N. J. L. 623, 74 Atl. 379, 25 L. R. A. (N. S.) 465, note; *Pence v. Carney* (1906) 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. (N. S.) 266, note.

The question of property in oil seems to have first arisen in a Kentucky case decided in 1854.<sup>7</sup> Although *Acton v. Blundell* had been decided some eleven years previous no mention was made of that case. The defendant had taken three barrels of petroleum oil from the well of the plaintiff and action was brought for its recovery. One of the questions necessary for the decision was whether the oil, when taken, was a part of the freehold. Counsel argued that the law applicable to surface streams of water should govern and cited Blackstone, Kent and Bouvier's *Institutes* as authority. But the court refused so to hold, saying that as the owner of land had an exclusive property in water in a spring or well on his land, as distinguished from flowing water, so should he be considered

“the exclusive owner of oil, a peculiar liquid not necessary nor indeed suitable for the common use of man, and for reaching and obtaining which for its proper uses and for profit, he has constructed a well with suitable fixtures.”<sup>8</sup>

The Supreme Court of Pennsylvania, realizing the inapplicability of the absolute ownership doctrine, as applied to solid minerals, to oil and gas constructed a rule of property in these new minerals which has become the law in most of the states in this country.<sup>9</sup>

“Water and oil, and still more strongly gas, may be classed by themselves, if the analogy is not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the vo-

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<sup>7</sup> *Hail v. Reed* (1854) 54 Ky. 383.

<sup>8</sup> *Ibid.*, 392.

<sup>9</sup> *Westmoreland Gas Co. v. De Witt* (1889) 130 Pa. St. 235, 18 Atl. 724; *Hague v. Wheeler* (1893) 157 Pa. St. 341, 27 Atl. 714; *Jones v. Forest Oil Co.* (1900) 194 Pa. St. 379, 44 Atl. 1074; *Barnard v. Monongahela Gas Co.* (1907) 216 Pa. St. 362, 65 Atl. 801; *Poe v. Ulrey* (1908) 233 Ill. 56, 84 N. E. 46; *People's Gas Co. v. Tyner* (1892) 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, note; *Murray v. Allred* (1897) 100 Tenn. 100, 43 S. W. 355; *Isom v. Rex Crude Oil Co.* (1905) 147 Calif. 659, 82 Pac. 317; *Hughes v. United Pipe Lines* (1890) 119 N. Y. 423, 23 N. E. 1042; *Williamson v. Jones* (1894) 39 W. Va. 256, 19 S. E. 436, 25 L. R. A. 222, note; *Kelley v. Ohio Oil Co.* (1897) 57 Oh. St. 317, 49 N. E. 399; *Kansas Natural Gas Co. v. Haskell* (1909, C. C. E. D. Okla.) 172 Fed. 545; *Brown v. Spilman* (1895) 155 U. S. 665, 15 Sup. Ct. 245; *De Moss v. Sample* (1918) 143 La. 243, 78 So. 482.

lition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. 147, 148. They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."<sup>10</sup>

A few years later the question was presented to the same court as to whether an owner of land having a gas well thereon could be restrained from allowing the gas to escape, thereby draining the reservoir below so as to deplete the flow of the well of an adjoining owner. The court, following the logical application of the absolute ownership doctrine, denied that the maxim "*sic utere tuo ut alienum non laedas*" in any way affected the landowner's right to take or use the gas. It is said that the owner's dominion is, upon general principles, as absolute over the fluid as the solid minerals.<sup>11</sup>

In another case where the question was of the right of the owner of an oil well to pump oil from his well regardless of injury to his neighbor, the Supreme Court of Pennsylvania apparently realized that the absolute ownership doctrine in the sense of giving an absolute right to take could not be applied, so they reverted to the theory that "possession of the land is not necessarily possession of the oil and gas," and concluded "that the property of the owner of the lands in oil and gas is not absolute until it is actually within his grasp and brought to the surface."<sup>12</sup>

Thus far in the cases it is to be noted that the courts have concerned themselves primarily with the owner's right to take the oil and gas under his land and have held the right absolute upon the principle of absolute ownership or some qualification of that doctrine, but they have not given serious consideration to the

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<sup>10</sup> *Westmoreland Natural Gas Co. v. De Witt*, *supra*, 249.

<sup>11</sup> *Hague v. Wheeler*, *supra*.

<sup>12</sup> *Jones v. Forest Oil Co.*, *supra*, 383.

rights of the adjoining landowner whose oil or gas is taken by the operations of his neighbor. But in *Barnard v. Monongahela Natural Gas Company*, which was an action to prevent the owner of land from drilling a well so close to the land of his neighbor as to draw the oil therefrom, the court said:<sup>23</sup>

“Every landowner or his lessee may locate his wells wherever he pleases regardless of the interest of others. He may distribute them over the whole farm or locate them only on one part of it. He may crowd the adjoining farms so as to enable him to draw the oil and gas from them. What then can the neighbor do? Nothing, only go and do likewise.” The same rule has been adhered to in Ohio.<sup>24</sup>

These cases, it is to be observed, adhere strictly to the doctrine of absolute ownership in defining the rights of the owner of the soil to take the oil and gas thereunder, and go farther than do those courts which apply the absolute ownership doctrine to subterranean water.<sup>25</sup> This rule is the law in a great majority of American states,<sup>26</sup> although waste of oil and gas underlying the land has been prevented in some states by statute and in some by judicial decision.<sup>27</sup>

The opinions of the courts, particularly those of Pennsylvania, have been thus referred to, for the purpose of showing some of the developments of the law of oil and gas, and making clear if possible the influences which affected the adoption of the theory of absolute ownership as a basis of the rights of the landowner in these substances. To construct and apply a correct rule of property governing these new and peculiar substances was no doubt a puzzling one to the courts. One proposition seemed clear enough, that is, that oil and gas were minerals,<sup>28</sup> and as such a part of the

<sup>23</sup> *Supra*, 365.

<sup>24</sup> *Kelley v. Ohio Oil Co.*, *supra*.

<sup>25</sup> See 64 L. R. A. 236, note; 30 *Am. & Eng. Cyc.* (2d ed. 1905) 310ff.

<sup>26</sup> *Thornton, Oil and Gas* (2d ed. 1918) secs. 18ff; also cases cited in note 9, *supra*.

<sup>27</sup> *Thornton, op. cit.*, secs. 30-35; *Gillespie v. Fulton Oil Co.* (1908) 236 Ill. 188, 86 N. E. 219; *Louisville Gas Co. v. Kentucky Heating Co.* (1903) 117 Ky. 71, 77 S. W. 368; *Manufacturers' Gas Co. v. Indiana Gas Co.* (1900) 155 Ind. 461, 57 N. E. 912; *Ohio Oil Co. v. Indiana* (1899) 177 U. S. 190, 20 Sup. Ct. 585.

<sup>28</sup> *Thornton, op. cit.*, sec. 18.

land.<sup>19</sup> If minerals and a part of the land, they must, according to all known principles of law, belong to the owner of the land by some degree of ownership. The principle of absolute ownership has been applied to minerals of solid nature such as coal and iron and also to subterranean waters, another mineral of fugitive nature, therefore, it was only natural for the courts to follow as far as possible these analogies and precedents and make the principle of absolute ownership the basis of property rights in oil and gas. To do so, certain qualifications and exceptions were made so as to fit the principle to the peculiar nature of the subject matter. This struggle of the courts to make the *cuius est solum* doctrine applicable to oil and gas has resulted in producing rules of property which it is believed are unsound in theory and unjust in application.

The rule of absolute ownership when applied to solid materials of the earth is qualified by the maxim "*sic utere tuo ut alienum non laedas*," so that one may not use his own land so as to injure his neighbor. On this theory it is settled law that the owner of land has an easement of lateral support in the land of his neighbor.<sup>20</sup> For example, if a bank of gravel or sand is located on the land of A and B, and A in removing gravel from his land digs so close to the land of B as to cause B's gravel to fall into A's land, B may recover in damages for the removal of the gravel and still assert his title to the mineral removed. But suppose, instead of taking gravel, A drills an oil or gas well on his land with the result that he takes not only the gas from under his land but also draws the oil and gas from under B's land. A seems here to have done nothing more than remove the natural support of B's oil and gas so as to cause it to flow in A's land. But the courts in this latter instance not only refuse to give B a remedy for the removal of natural support but go further and declare that as soon as A gets the oil into his own land it is his and that the entire act is *damnum absque injuria*. However inconsistent it may seem, the courts have given two main reasons for refusing to

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<sup>19</sup> *Ibid.*, sec. 19.

<sup>20</sup> 1 Tiffany, *Modern Law of Real Property* (1903) sec. 301.

apply this principle of absolute ownership as applied to solid materials to oil and gas. These reasons are: first, because the owner of land is an absolute owner and may take all the oil and gas he finds therein so long as he confines his operations to his own land; and second, because oil and gas are fugitive and wandering in their nature the same principles cannot be applied to them as are applied to solid minerals without qualification. The first reason is in application a peculiar one. B is refused a remedy against A for the taking of the oil from under B's land because A is an absolute owner of all the oil and gas under his land and has an absolute right to take it. But is not B also an absolute owner? If A's ownership must be protected by law so as to allow him to enjoy it, must not B's ownership likewise be protected? A vital incident of ownership is the protection given by law against interference by others. The inconsistency seems to be in declaring that the owner of land is an absolute owner of the oil and gas therein and using that principle as a basis to declare that he may take all the oil and gas possible from his land regardless of the effect upon the property of his neighbor and, on the other hand, refusing to recognize that same principle in enforcing or protecting the ownership of one whose oil or gas is taken. To put it shortly, the absolute ownership doctrine is used to make legal the act of taking and is refused when a remedy for the taking is asked. Such an application of the doctrine forms an anomalous exception that destroys the principle itself, forms a rule violative of the plainest principles of justice and equity, acknowledges the weakness of the law to enforce defined rights of property, and makes that relic of barbarism,

“The simple plan,  
That they should take who have the power,  
And they should keep who can,”

the basis of the law of property in oil and gas.

In support of this first reason for refusing the owner of land a remedy against a neighbor who takes or injures his oil or gas the courts have two supporting propositions based on the peculiar

nature of oil and gas. The first is that it is difficult to tell with exactness how close one landowner may drill a well to the land of his neighbor and take oil or gas therefrom without also taking the oil or gas from that neighbor's land, and if this could be determined, the quantity taken could not be proven with sufficient certainty to form the foundation of an action. In other words the remedy is denied because the extent of the wrong is difficult of proof. It is not necessary that any law, the product of either popular or judicial legislation, should prescribe the exact distance within which an oil or gas well may be drilled to the land of an adjoining owner. The law lays down no rule saying how close one may excavate to the land of another, yet if such excavation is made and the land of an adjoining owner is injured a remedy is afforded for the wrong done. The taking of oil or gas from under the land of another, like the removal of lateral support, is a question of fact. If the courts insist on adhering to the principle of absolute ownership, to be consistent they must compensate an injury to that ownership and not deny it merely because it is difficult of proof. In many actions of damages the extent of the actual damage is difficult of proof but the right of action is not denied on this account. In oil and gas cases it is interesting to note if A and B, adjoining owners of land, both lease to C for the purposes of operating for oil and gas reserving a royalty in themselves, and C drills for oil on the land of A so as to exhaust the land of B, the courts recognize that B has been injured and allow him a remedy in damages. It is true the right of B in this instance is said to be based upon an implied contract in the lease that C will honestly develop the lands so as to produce the most for B, but it is to be observed that the measure of damages must be determined by the amount of oil taken from B's land. As to proof of damages in this sort of action the Supreme Court of Illinois said:

“The right of recovery being assumed, plaintiffs in error cannot escape liability because the damages are difficult of exact ascertainment. The nature of the inquiry here is such that it is practically impossible to ascertain with mathematical certainty the exact amount of defendant in error's damages. This, however,

affords no answer to a cause of action resulting from the breach of contract or a duty imposed by law."<sup>22</sup>

The second subsidiary reason urged by the courts as an excuse for refusing a remedy to one whose oil and gas are taken by the operations of his neighbor, on first impression, appears controlling. Assuming that the owner of land is absolute owner of the oil and gas therein with the consequent right to take, such right could not be exercised at all, if such owner is to be hampered by injuries to his neighbor's oil and gas, for these substances are of such nature that any taking from the land of one is likely to injure his neighbor. If, therefore, one land owner had the right to restrain his neighbor from drilling, it would be impossible to develop oil and gas lands. But this argument does not reconcile the fact that the owner of land is said to be the absolute owner of oil and gas and yet is given no remedy if it is taken. Such argument would seem on the other hand to show conclusively that the principle of absolute ownership is not the correct basis of property rights in oil and gas for if strictly applied practically every taking of these substances from the earth would give rise to an action for damages.

The foregoing discussion leads up to the second main reason why the courts have refused to apply the doctrine of absolute ownership as applied to solid minerals to oil and gas. If they attempted such application they apparently realized the difficulty pointed out above. Recognizing the peculiar nature of these substances and their power to move about beneath the surface of the earth, they no doubt realized that if they applied the doctrine of absolute ownership to allow one owner to take all beneath the surface, to be consistent they must also apply such doctrine to give a remedy to one whose oil and gas was taken, and that the result of this would be that oil and gas lands could not be developed. Still clinging to absolute ownership as a fundamental and controlling doctrine the Pennsylvania court adopted a qualification to that principle which was supposed to avoid the difficulties of the old rule. Relying upon the analogy between oil and gas and animals

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<sup>22</sup> *Daughettee v. Ohio Oil Co.* (1914) 263 Ill. 518, 525, 105 N. E. 308.

*ferae naturae* that court laid down the rule to be that oil and gas belong to the owner of the land so long as they are in it but when they escape and go into the land of another the former owner loses all of his rights thereto.

This theory of absolute ownership as qualified by the Pennsylvania court establishes a rule which allows the oil and gas operator great latitude in the development of oil lands. Under such a rule he may take all of the oil and gas from under his own land even though in so doing he may drain the oil and gas from the land of his neighbors, and he may take by any means his ingenuity may provide, and use, sell, or waste the same, and as long as he confines his surface operations to the boundaries of his own land, whatever injury results to his neighbor is *damnum absque injuria*.<sup>22</sup> This result is arrived at by the court saying that the taker has absolute ownership which must be protected by giving this absolute right to take, and by further declaring that one whose land is drained loses his ownership and right of property in oil and gas *in situ* under the land as soon as it is taken. Such rule or principle is produced by judicial legislation violative of the simplest principles of the law of property.

There came a time, however, when it began to be realized that the public had some interest in these great natural resources and that some measure leading to conservation and prevention of waste should be enacted. Such statutes were passed in some of the states but were immediately met with the argument that since the owner of oil and gas lands was the absolute owner of these substances, at least for the purpose of development, and that any interference with his right to the use or production of these minerals was an unconstitutional deprivation of property rights. This argument was probably first met and answered in an Indiana case.<sup>23</sup> Although the court of that state had in a previous case<sup>24</sup> depending upon the analogy of subterranean water, adopted the Pennsylvania rule of absolute ownership, and held that an owner of a gas well might "shoot" it with nitroglycerin and thereby in-

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<sup>22</sup> See cases cited in note 9, *supra*.

<sup>23</sup> *Townsend v. State* (1896) 147 Ind. 624, N. E. 19.

<sup>24</sup> *People's Gas Co. v. Tyner*, *supra*.

crease its flow regardless of the alleged injury to his neighbor's well, yet in this case, which was to try the constitutionality of a statute to prevent the waste of gas by burning it in flambeau lights, that court held the statute constitutional and not an interference with property rights. In arriving at such a conclusion the analogy between oil and gas and animals *ferae naturae* was made use of. The court reasoned that the state could regulate the use and consumption of these minerals of fugitive and wandering nature as they did that of animals, but the court did not in any clear sense define its theory of the landowner's right of property in oil and gas.

In a later Indiana case, *State v. Ohio Oil Company*,<sup>22</sup> that court, apparently realizing that the conclusion reached in the previous case could not stand together with the theory of absolute ownership as adopted in earlier decisions, repudiated the theory of absolute ownership and presented a new one. The court discussed the absolute ownership doctrine and then its own adoption of the theory that oil and gas were like animals, *ferae naturae* and concluded:

"We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore that the act from which we have quoted is not violative of the constitution, as an unwarranted interference with private property."<sup>23</sup>

This theory of property in oil and gas may be scrutinized from many viewpoints all of which are interesting. There is no doubt that it produces a theory upon which the state can regulate the waste of these natural resources without violation of property rights of the landowner. From that standpoint it is no doubt an improvement over the Pennsylvania rule. From the standpoint of the adjoining owner no different result is reached. Since the owner of the land has no property in the oil or gas in or under his land, none of his property rights can be violated by the operations of his neighbor.

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<sup>22</sup> (1897) 150 Ind. 21, 49 N. E. 809.

<sup>23</sup> *State v. Ohio Oil Co.*, *supra*, 32, citing *Townsend v. State*, *supra*, and *People's Gas Co. v. Tyner*, *supra*. The same rule has apparently been adopted as to oil.

The only difference as to this point then between the Indiana rule and Pennsylvania rule is one of theory; the former denies any right of property in one whose oil or gas is taken, while the latter, as pointed out, defines a property right, but fails to protect it. There is no question but that in its zeal to protect the interest the Indiana court greatly overworked the analogy between gas and wild animals. As the Supreme Court of the United States pointed out in the appeal of this same case, there is an analogy between gas and wild animals but not an identity.<sup>21</sup> Property in wild animals is in the public, with a right in the owner of the land to reduce to possession in accordance with the regulations and expressions of the public will, and therefore any regulation of their use would not be in violation of rights of property. But oil and gas are not property of the public it must at once be conceded. The Indiana court says ownership is not in the landowner. This statement was too strong and had to be qualified later when a life tenant made the defence to an action for waste by saying that since the remainder-man had no property in the oil and gas and that his own act of mining these substances was not waste.<sup>22</sup> The court then said that the landowner did have a property right in oil and gas in the sense that he had an exclusive right to take these substances.

The Supreme Court of the United States in upholding the constitutionality of the Indiana statute, without adopting either the Indiana or the Pennsylvania theory of property in oil and gas, pointed out the dilemma which was involved in any argument against the statute:

“If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them, in and to the substances contained in the common res-

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<sup>21</sup> *Ohio Oil Co. v. Indiana*, *supra*.

<sup>22</sup> *Richmond National Gas Co. v. Davenport* (1905) 37 Ind. App. 25, 76 N. E. 525; *Rupel v. Ohio Oil Co.* (1911) 176 Ind. 4, 95 N. E. 225. See also *Manufacturers' Gas Co. v. Indiana Gas Co.*, *supra*, where it was admitted that a landowner does have a property right in oil and gas *in situ* under his land.

ervoir of supply, then as a necessary result of the right of property, its indivisible quality and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction."<sup>22</sup>

Shortly after this decision the Indiana court was presented with the question as to whether an owner of oil and gas lands could prevent his neighbor from using artificial means to increase the flow of gas wells to the alleged injury of the plaintiff's wells.<sup>23</sup> In this case the court goes to great length of argument and explanation to evade its former decisions. The absolute ownership doctrine as applied to percolating water in earlier cases is repudiated, and the *ferae naturae* analogy from which the theory was produced that there was no property in oil and gas in the landowner is likewise receded from.

The court apparently adopted the theory suggested by the United States Supreme Court that the owners of oil and gas lands are common owners of the oil and gas beneath, that every owner should exercise his right to take in such manner as not to destroy the common source and that to prevent such destruction, independently of statute, the common owners of the gas in the common reservoir, have the right to enjoin any and all acts of another owner which will materially injure, or which will involve the destruction of, the property in the common fund, or supply of gas.

This theory is adopted by a line of Kentucky cases.<sup>24</sup> In *Louisville Gas Company v. Kentucky Heating Company*, which was an action by one owner of gas wells to prevent waste by another, the Kentucky Court of Appeals made this statement:

"Every owner may bore for gas on his own ground, and may make a reasonable use of it; but he may not wantonly injure or destroy the reservoir common to him and his neighbor. This principle has been often applied. Thus each riparian owner may make a reasonable use of a lake or stream of water flowing through his land, but he can not make an unreasonable use of it. Every traveler may make a

<sup>22</sup> *Ohio Oil Co. v. Indiana*, *supra*, 210.

<sup>23</sup> *Manufacturers' Gas Co. v. Indiana Gas Co.*, *supra*.

<sup>24</sup> *Louisville Gas Co. v. Kentucky Heating Co.* (1903) *supra*; *Commonwealth v. Trent* (1903) 117 Ky. 34, 77 S. W. 390; *Hamby v. City of Dawson Springs* (1907) 126 Ky. 451, 104 S. W. 259, 12 L. R. A. (N. S.) 1164, note; *Louisville Gas Co. v. Kentucky Heating Co.* (1909) 132 Ky. 435, 111 S. W. 374.

reasonable use of a highway, but not an unreasonable use to the detriment of another. No one may make an unreasonable use of the atmosphere. In all these instances the party aggrieved by the unreasonable use may maintain an action for redress. In the case before us the plaintiff and the defendant have each the right to take gas from the common source of supply, but neither may by waste, destroy the rights of the other; and, as in the case of other like wrongs, the action for redress may be brought in the name of the real party in interest."<sup>32</sup>

In a later case the same court said:<sup>33</sup>

"The right of the surface owners to take gas from the subjacent fields or reservoirs is a right in common. There is no property in the gas until it is taken. Before it is taken it is fugitive in its nature, and belong in common to the owners of the surface. The right of the owners to take it is without stint; the only limitation being that it must be taken for a lawful purpose and in a reasonable manner. Each tenant in common is restricted to a reasonable use of this right, and each is entitled to the natural flow of the gas from the subjacent fields, and any unlawful exercise of this right, by any tenant in common, which results in injury to the natural right of any other tenant or surface owner, is an actionable wrong."

From these last mentioned cases it is clear that the courts of Indiana and Kentucky have advanced a theory, not new in its application to other substances but new in its application to oil and gas. The Indiana court has receded from that extreme viewpoint assumed in *Ohio Oil Company v. State*, that the landowner has no property whatever in oil and gas under his land, and the Kentucky court has repudiated their former view that the owner of the land is the absolute owner of these substances which underlie his land, and they have met on the common theory, each relying upon the analogy of oil and gas to air and water above the surface and the modern doctrine of percolating waters, that the owner of the land does have a property in the oil and gas underlying in that he has an exclusive right to take, but that such property right is qualified by the principle that the right must be so exercised as not to injure other land-

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<sup>32</sup> *Louisville Gas Co. v. Kentucky Heating Co.* (1903) *supra*, 78.

<sup>33</sup> *Louisville Gas Co. v. Kentucky Heating Co.* (1909) *supra*.

owners who also have a right to take from the common reservoir. Whether or not a given act of one landowner or his lessee is violative of the rights of his neighbor is wholly dependent upon whether such act or omission is a reasonable use of that right.

The objection to the doctrine of absolute ownership, and the qualifications of that theory have already been pointed out. The unsoundness of the Indiana theory that the landowner has no property whatever in the oil and gas under his land has likewise been made clear. It now remains to determine if possible, if this middle view of qualified owner is sound in theory and just and possible of application.

It seems needless to contend longer that oil and gas are not minerals and when *in situ* in or under the land a part thereof and that the owner of the surface has a right to use for himself or transfer property in these substances to others as separate from the land. Nor is it possible to evade the possibility that from the peculiar nature of these fugitive and wandering substances, that every taking of oil and gas by one landowner from his own land in the exercise of this right may affect the oil under the land of his neighbors. But should the owner of oil and gas lands be wholly deprived of this right to take because another may be injured, or should the right of the taker as the Pennsylvania rule provides be absolute and the rights of others be subservient to him? But this doctrine of qualified ownership avoids all of these inconsistencies and provides that each owner has a right to take and that any taking is permissible which does not unreasonably injure his neighbor. The sole ground of the qualification of the landowner's right to oil and gas is the similar rights of others and the extent of the qualification is determined by the reasonable use of the right. Since the right of each landowner is similar, and his enjoyment thereof dependent upon the action of the neighboring landowners, these rights must be valueless unless exercised with reference to each other. The maxim "*sic utere tuo ut alienum non laedas*," therefore applies, and as in the case of water, restricts each to a reasonable exercise of his own right, a reasonable use of his own property, in view of the similar rights of others.

When the doctrine of reasonable use based on the correlative rights of the adjoining owners of the surface has been suggested as being the correct theory of the law of property in oil and gas, the objection has been raised that there is such difference in the nature of underground water on the one hand and oil and gas on the other that the same theory cannot be applied to both. This objection, it is believed, has been made without a clear understanding of the problem involved and is without foundation in reason. It is true the courts have generally declared that water is necessary for the use, enjoyment and improvement of lands, particularly where they are used for agricultural purposes, and that without it, life could not be sustained. That if the landowner is deprived of its use his land is destroyed, and this has been urged as a strong reason for the doctrine of reasonable user of percolating water. It has been repeatedly declared that any use of water for the purpose of the enjoyment or improvement of the land is reasonable, but that wasting or carrying away the water for commercial purposes is unreasonable if it injures the adjoining owner. And it must also be immediately recognized and admitted that oil and gas are not necessary for agricultural purposes or necessary for the common use of man, and that the sole purpose of its production is for sale and manufacture which necessitates its removal from the vicinity of the land. But these things are not controlling. Both of these substances are things of value. To deprive a man of water under his land deprives him of an indirect profit to be realized out of the soil, but to remove the oil and gas from another's land, may in many instances deprive him of the entire value of the land. Because the tests of reasonableness of use of these different classes of property are not the same, is not a sound reason that the same theory of property should not govern both. The fundamental reason after all why the doctrine of correlative rights is the proper rule of property governing them is because of their fugitive and wandering nature beneath the surface of the earth in liquid or gaseous form so that any taking by one may have some effects on the presence of these things under the land of another.

The Indiana and Kentucky courts have not gone very far in the

application of this doctrine of correlative rights in oil and gas. In fact none of the decided cases have been concerned with oil, but the foundation is laid and there only remains the application. But will this theory prove more just and more sound in determining the rights of adjoining owners than the Pennsylvania doctrine? In the first place it does not deceive the landowner by telling him that he has an absolute right of ownership in the oil and gas under his land and then refuse him any remedy when another takes it. It informs him that he has a property in the oil and gas under his land and that he has a right to take it and use it, but that in exercising this right he must so act as not to unreasonably injure his neighbor. Such a rule has already provided a remedy against waste or a malicious sapping of the earth of the gas therein contained.<sup>34</sup> It has likewise declared that the use of powerful pumps drawing the gas from under the land of the adjoining owner is an injury which may be enjoined.<sup>35</sup> What then is to prevent this rule from being applied to prevent one owner from placing wells near his boundary so as to sap the land of his neighbor of the oil and gas therein contained? It merely remains for the court to determine in each individual case whether this exercise of the right to take is reasonable. The question of reasonableness is a mixed question of law and fact. There seems to be no reason why the remedy should not be either in equity by injunction or in damages at law.

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<sup>34</sup> *Louisville Gas Co. v. Kentucky Heating Co.* (1903) *supra*.

<sup>35</sup> *Manufacturers' Gas Co. v. Indiana Gas Co.*, *supra*.