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Kentucky Law Journal

Volume 44 | Issue 1

Article 10

1955

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Recommended Citation

Schrader, George D. (1955) "Oil and Gas--Waste of Oil and Gas as Between Adjacent Landowners," *Kentucky Law Journal*: Vol. 44 : Iss. 1 , Article 10.
Available at: https://uknowledge.uky.edu/klj/vol44/iss1/10

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Kentucky cases up to the present date.[29] The latest one, *Miles v. Prott,*[30] was decided at the 1954 term. Recission of the sale of a motor court was denied in part because the court found no evidence of *any* misrepresentation on the part of the vendor. However, the statement was made in the opinion that actionable fraud must be proved to secure recission of a contract.[31]

It is submitted that the Kentucky rule, denying recission of a contract when there has been an innocent misrepresentation, is contrary to the fundamental principles of equity, which grant relief where the law affords an inadequate remedy, and which prevent the injustice of allowing plaintiff to retain what he had received. Under the Kentucky rule, equitable relief is no significance, since the party seeking recission must prove all the elements of fraud necessary in a legal action for damages. Thus, equity affords a mere duplicate remedy, and unless recission is allowed under less rigorous conditions, justice may not always be attained. Kentucky law regarding misrepresentation follows the majority view and affords an adequate remedy against fraud, but the Kentucky doctrine of equitable relief should be overruled.

ROBERT A. PALMER

OIL AND GAS—WASTE OF OIL AND GAS AS BETWEEN ADJACENT LANDOWNERS

The preservation of our natural resources is one of the most important conservation problems of modern times. The waste of

[29] Miles v. Profitt, 266 S.W. 2d 333 (Ky. 1954) and Hargis v. Hargis, 252 Ky. 198, 66 S.W. 2d 59 (1933) (Attack on a judgment by consent of the parties, in a divorce proceeding; fraud was alleged.) Coons v. Bank of Commerce, 233 Ky. 457, 26 S.W. 2d 15 (1930) (Action by a holder and endorsers of a note on an absolute guaranty of payment; defense was that the holder fraudulently represented that the security was worth the debt); Electric Hammer Corporation v. Deddens, 206 Ky. 232, 267 S.W. 207 (1924) (Action on a note due for the purchase of stock; defense alleged false representations in the transaction); Towels et al. v. Campbell, 204 Ky. 591, 264 S.W. 1107 (1924) (Action on a covenant of general warranty of property bought by the pl. from the def.; alleged misrepresentation of title); Bewley v. Moreman, 162 Ky. 32, 171 S.W. 996 (1915) (Action for recission of the sale of land alleging misrepresentation on the part of the vendor); Taylor v. Mullins, 151 Ky. 597, 152 S.W. 774 (1913) (Counterclaim alleging fraud, which induced the making of a contract to haul logs); Chicago Bldg. & Mfg. Co. v. Beaven, 149 Ky. 267, 148 S.W. 37 (1912) (Action to set aside a contract for subscriptions to the stock of a corporation to be organized, on the ground that misrepresentations were involved in the making of the contract).

[30] 266 S.W. 2d 333 (Ky. 1954).

[31] *Id.* at 336.

oil and gas presents one of today's most perplexing problems, because never before has there been a greater need for these two natural resources. This discussion is concerned with only one phase of the problem, that is, waste as between adjacent landowners.[1]

First, it will be helpful to obtain a definition of "waste" as applied to the situation under discussion. Such a definition is found in Tiffany's REAL PROPERTY:

> Waste has been defined as 'an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in its substantial injury.'[2]

Consideration must be given to the nature of the landowner's right to oil and gas beneath the surface so as to better understand the specific problem of waste.[3] From the early beginning of commercial drilling for oil and gas, the courts have been perplexed by the problem of what rights a landowner has to these substances found beneath the surface of the ground. From their determination of this question come the decisions as to what should be done about waste of these products.

Although oil and gas are classified as minerals they are unlike solid minerals in that they are of a fugacious nature. Because of this difference, courts have turned to the analogies of percolating water[4] and wild animals[5] in an effort to establish oil and gas law along the lines of other already established principles of law. Thus, the AMERICAN LAW OF PROPERTY discusses the analogy to wild animals, where a "capture" is necessary, in these words:

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[1] This note is primarily concerned with the problem of waste as between adjoining landowners. For a discussion of waste as it applies to tenants, co-tenants and remainderman including their rights and duties, see SUMMERS, OIL AND GAS 52-56 (1st ed. 1927). The term landowner as herein used includes all those who in the production of oil and gas derive their rights from landowners (lessees, drillers, producers, etc.).

[2] TIFFANY, REAL PROPERTY 629 (3rd ed. 1939).

[3] This topic has been discussed at great length. See Summers, *Legal Interest in Oil and Gas*, 4 ILL. L.Q. 12, 167 (1921); Hobson, *Ownership of Oil and Gas in Place*, 13 KY. L.J. 152 (1924); Veasey, *Law of Oil and Gas*, 18 MICH. L. REV. 445, 652, 749 (1920); 19 MICH. L. REV. 161 (1920); 63 U. OF PA. L. REV. 471 (1915); 29 YALE L.J. 174 (1919).

[4] Acton v. Blundell, 12 M. & W. 324, 152 Eng. Rep. 1223 (1843).

[5] Westmoreland and Cambria Natural Gas Co. v. DeWitt, 30 Pa. 235, 18 Atl. 724 (1889).

> . . . courts relying on the analogy afforded by the law of wild animals, which gives the landowner the exclusive right to reduce game to possession while on his land, came to the . . . conclusion: that each landowner, apart from statute, had the right to drill anywhere on his land and to appropriate all the oil and gas that flowed to his well even though he drained the oil and gas away from his neighbor. This resulted in the "Rule of Capture," which carried with it enormous consequences in the future development of the law of oil and gas.[6]

The analogies mentioned above gave rise to the three theories of ownership which are significant in the field of oil and gas today. First, the theory that the surface owner has title to the oil and gas in place, a fee simple determinable (ownership theory);[7] second, the theory that he has no ownership or title in the oil and gas beneath the surface, but only the *right* to search for it, and, if found, to reduce it to possession (non-ownership theory);[8] and third, that he has a common interest with others in the minerals and holds correlative rights therein (correlative rights theory).[9]

The ownership theory[10] has sometimes led to the view that inasmuch as the landowner has title to the oil and gas beneath the surface he can do anything with it he desires, therefore, waste of such minerals cannot be enjoined.[11] This view is expressed in the case of *Hague* v. *Wheeler*,[12] the leading case in favor of not enjoining waste in a state which follows that theory. The decision is critized in Summers' OIL AND GAS.[13] It is submitted that, re-

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[6] 2 AMERICAN LAW OF PROPERTY 511 (1952).

[7] Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290 (1923).

[8] Hammonds v. Central Kentucky Natural Gas Co., 255 Ky. 685, 75 S.W. 2d 204 (1934).

[9] Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

[10] THORNTON, OIL AND GAS 94 (5th ed. 1932). "So strongly is the notion of absolute ownership of the gas and oil in the land by the owner of it, beneath which it is found, embedded in our law, that without the aid of a statute the owner of such land cannot be prevented from wasting it by the owner of the adjoining premises."

[11] Gas Products Co. Rankin, 63 Montana Rep. 372, 207 P. 993 (1922). Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714 (1893).

[12] Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, 719 (1893). ". . . it is not the public interest that is involved in this litigation. It is the interest of an adjoining owner who seeks to appropriate to himself so much of his neighbor's gas as he cannot turn into money or use for some practical business purpose, and he asks a court of equity to hold his neighbor's hands by an injunction until this appropriation is accomplished. We cannot find any rule of law or any principle of equity on which such an injunction can rest."

[13] SUMMERS, OIL AND GAS 105-106 (1st ed. 1927).

gardless of whether or not the Pennsylvania court made a wise decision in 1893 when the *Hague* case was decided, the decision should certainly be questioned today, if for no other reason than the great need for this product in our national economy.

In the second theory (non-ownership theory), the courts have, on the other hand, found ample basis for enjoining the waste of oil and gas. *Louisville Gas Co.* v. *Kentucky Heating Co.*[14] is one of the foremost of such cases. There, the court stated that because of the fact that natural gas beneath the surface cannot be owned in fee, a surface owner should not be allowed to deliberately waste it so as to injure his neighbor. A Louisiana case[15] based the enjoining of waste on the principle that although a land owner is not bound to do anything to save his neighbor from loss, he must abstain from doing anything that might cause such a loss. A Kentucky case[16] reached the same conclusion on the basis that a joint owner in the common field should be able to enjoin any unlawful attempts on the part of other owners to destroy the gas fields by unnecessarily or fraudulently wasting the gas.

It would seem that these cases reach the right result regardless of whether they be based on a desire for conservation or squarely on a theory of non-ownership in the sub-surface minerals. The principle as to a common reservoir and a reasonable use of the supplies therefrom for the common benefit of all, which naturally follows from an acceptance of the non-ownership theory, is a basic argument in favor of the injunction against waste in the non-ownership states.

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[14] Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368, 369-370 (1903): "Independently of the statute, the common law affords an ample remedy for a wrong like this. While natural gas is not subject to absolute ownership, the owner of the soil must, in dealing with it, use his own property with due regard to the rights of his neighbor. He cannot be allowed deliberately to waste the supply for the purpose of injuring his neighbor. While a bad motive will not render that unlawful which is lawful . . ., a man is only allowed to make a reasonable use of those natural supplies which are for the common benefit of all. . . . 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 case on appeal is 132 Ky. 435, 111 S.W. 374 (1908). After the plaintiff was granted his injunction he again brought suit, this time seeking damages for the gas which defendant had wasted and the court allowed the claim holding that a suit for injunctive relief alone would not bar a later suit for damages.

[15] Higgins Oil and Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919).

[16] Calor Oil and Gas Co. v. Franzell, 128 Ky. 715, 109 S.W. 328 (1908).

Although this argument may not be considered feasible in an ownership state the same result can be reached in such a jurisdiction based on the following theory. Granted that the surface owner holds title to the subsurface minerals beneath his land and can use any lawful method of extracting them even to the extent of draining the minerals from beneath a neighbor's land, he should not be allowed to deliberately waste the minerals thus captured. This is because: (1) such waste will deprive adjacent landowners of present assets which can never be regained once they are wasted; (2) even though he is not bound to do anything to save his neighbor from loss, he should not do an affirmative act which would cause his neighbor loss;[17] and (3) such waste deprives the nation of much needed and valuable resources. Therefore, a surface owner should be enjoined from wasting such products regardless of any theory of ownership, to protect his neighbor, himself and his nation.

The third approach to the problem, known as the correlative rights theory,[18] has been stated by the Supreme Court of the United States in the case of *Ohio Oil Co.* v. *Indiana* as follows:

> But there is a coequal right in them all to take from a common source of supply, the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *ferae naturae,* which it is unquestioned the legislature has the authority to forbid all

[17] *Supra* note 15.

[18] Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900). Andrews, *The Correlative Rights Doctrine in the Law of Oil and Gas,* 13 So. CAL. L. REV. 185 (1940).

> from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed.[19]

This theory as thus stated does not guarantee each owner an equal share but does guarantee him a fair opportunity to extract a reasonable share provided he acts and does not sit idly by.

In addition, the Supreme Court in the *Ohio Oil Co.* case upheld an Indiana statute which provided for the conservation of oil and gas, thereby establishing the power of the states to regulate the production of oil and gas.[20] Thus, either by way of the correlative rights theory, or through a conservation statute, states have taken it upon themselves to regulate the production of oil and gas in a manner so as to benefit all those concerned.[21]

Conclusion: After having viewed the various possibilities, the conclusion must be reached that under either the ownership, non-ownership or correlative rights theory, and in the absence of statute, waste of oil and gas may be restrained in the great majority of American jurisdictions. There are few decisions supporting the minority rule and their illogical view cannot be sustained in our present day law. As was said in *Commonwealth* v. *Trent:*

> The right of the owner of property to do with it [the oil and gas] as he pleases is subject to the limitations that he must have due regard for the rights of others. To allow the storehouse of nature to be exhausted by the waste of the gas would be to deprive the state and its citizens of many advantages incident to its use.[22]

Thus, for the future of our nation and its great oil and gas resources, the problem of waste, as it applies to adjacent landowners, can be solved through *judicial enjoinment.* And, of course, the same result can be reached by statute.

GEORGE D. SCHRADER

[19] Ohio Oil Co. v. Indiana, 177 U.S. 190, 209-210 (1900).
[20] See also Commonwealth v. Trent, 117 Ky. 34, 77 S.W. 390 (1903).
[21] Moosa and Saloom, *The Oil and Gas Conservation Movement in Louisiana,* 16 TULANE L. REV. 199 (1942).
[22] *Supra* note 20 at 393.