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Oil and Gas--Comparison of Results under Ownership and Non-Ownership Views

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mobile, which has in great measure supplanted the old horse-drawn carriage. . . . It is therefore patent that the contracting parties in the instant case, at the time of the execution of the contract, intended to deprive the defendant of the right of performing any service for the public which was an essential part of that performed by one engaged in the livery business, and the fact that such service was performed in a different manner from the way it was formerly done will not excuse the defendant in violating the very purpose and object intended by the contract."

No particular form is required for these covenants. Thus, the mere memorandum, given in connection with the sale of a marble shop, in these words, "This is to certify that I will not open up a marble shop in the city of Murray in three years," and signed by the seller, was held sufficient.²⁴ Neither is it essential that the covenant be in writing, if it is possible that it may be completed within one year, as when the contract is not to engage in business so long as one of the parties remains in business.²⁵

No case involving covenants not to compete has arisen in Kentucky in which the rights of either party to invoke the particular remedy asked for has been questioned. In some cases the plaintiff has sought damages for breach of the contract, in others he has asked for an injunction restraining defendant from breaching the contract, but in the majority of the cases, plaintiff has sought both damages and an injunction, which, of course, is permissible under our code procedure, and too well established to permit of questioning.

MAURINE SHARP

OIL AND GAS—COMPARISON OF RESULTS UNDER OWNERSHIP AND NON-OWNERSHIP VIEWS

The law of oil and gas is an exclusive subdivision of property law. Because of its fugacious nature it has been likened to animals *ferae naturae*; but this is not absolutely correct if for no other reason than that animals *ferae naturae* are owned by the State, until a person brings them into possession, while oil and gas are not owned by the State.¹ Another analogy has been advanced stating that oil and gas should be governed by the law of percolating waters. This is erroneous, because the owner of the land cannot use the water for commercial

²⁴ Skaggs v. Simpson, 33 Ky. Law Rep. 410, 110 S.W. 251 (1908).

²⁵ Dickey v. Dickinson, 105 Ky. 751, 49 S.W. 761 (1899) (A contract not to again engage in the newspaper business in the town of Glasgow is possible of performance within a year by the death of the obligor within that time, and not within the statute of frauds); Nickell v. Johnson, 162 Ky. 520, 172 S.W. 938 (1915).

¹ In *Ohio Oil Co. v. Ind.*, 177 U.S. 190 (1900), the Supreme Court recognizes the fallacy in the analogy of oil and gas and wild animals, and says that although they are similar they are not identical. See Roberts, *Right of a State to Restrict Exportation of Natural Resources* (1936) 24 Ky. L. J. 259, 266.

purposes if, in so doing, he defeats the use of other riparian owners, while in oil and gas he can.² Yet oil and gas are property and are definitely of pecuniary value to the persons who have the right to them. In order to determine to whom this right belongs, some states have said that the owner of the land is vested with an absolute fee in the oil and gas beneath the surface; others have adopted the non-ownership view which is, to put it vaguely, something short of ownership. The precise inquiries of this paper are those of determining the different results reached under the two doctrines. What is the proper view, and what is the position of Kentucky?

Kentucky has been classified as a non-ownership state.³ If this is correct, then a lessee of an oil and gas lease cannot obtain title to the oil and gas in place in this state, because the lessor did not have title to it. Under the ownership view, the lessee may obtain absolute ownership to oil and gas. Yet it is admitted, even in the states most strictly following the ownership view, that the lessee may have "title" to the oil and gas at the time of the execution of the lease, and then lose the oil and gas when a neighbor legitimately withdraws them by pump, or what have you, which is on his own land.⁴ It is submitted, therefore, that since a person may legally take oil and gas from another, who has "title" thereto, against his will, the ownership view tears out the very heart of one of the fundamental laws of property; namely, the right of one to retain his property without interference from the outside, except, of course, by the State under its powers of eminent domain and police power.⁵ Notwithstanding this, it might be argued that this is the simplest, and perhaps the only, way to reach practical results. The validity of this argument will be tested subsequently.

It seems to be well settled, under either view, that oil and gas are minerals and a part of the real estate in which they are found, and possess the incidents of real estate.⁶ It follows from this that the land-

² See Note (1924) 37 Harv. L. Rev. 602; Summers, *Property in Oil and Gas* (1920) 9 Ky. L. J. 2

³ See Hobson, *Ownership of Oil and Gas in Place* (1924) 13 Ky. L. J. 153.

⁴ In *Westmoreland & Cambria Nat. Gas Co. v. Dewitt*, 130 Pa. 241, 18 A. 724 (1889), the court says, "Possession of land, therefore, is not necessarily possession of the gas. If an adjoining, or distant, owner, drills on his land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his".

⁵ Summers, *supra* note 2, at 8.

⁶ See *Ewart v. Robinson*, 289 Fed. 740 (1923), where the court says, "While the lease did not amount to a conveyance of the oil and gas, or mineral in the ground, it did amount to a conveyance of an interest in the land, and was not a mere license". See also *Lovelace v. Southwestern Pet. Co.*, 267 Fed. 504 (1919); *Kash v. United Star Oil Co.*, 192 Ky. 422 (1921); *Gray-Mellon Oil Co. v. Fairchild*, 219 Ky. 143, 292 S.W. 743 (1927); *Swiss Oil Co. v. Hupp*, 253 Ky. 552, 69 S.W. (2d) 1037 (1934); *Union Gas & Oil Co. v. Wiedeman Oil Co.*, 211 Ky. 332, 277 S.W. 323 (1925); *Beckett-Iseman Oil Co. v. Backer*, 165 Ky. 318, 178 S.W. 1084 (1915), "It is well settled that oil and gas are minerals and a part of the realty, and a lease giving to the lessee the gas is a

owner has a real interest in the oil and gas beneath the surface. Under the doctrine of ownership, the interest amounts to absolute title, or title with a condition subsequent. Under the non-ownership doctrine, the interest has been classified as that of an irrevocable license, a profit a prendre a present vested interest in land, or one of many other phrases. It is submitted that the third mentioned, that is, a present vested interest in land, handles the situations that arise more reasonably than any of the other non-ownership classifications, and is more consistent with settled rules of property law than is the ownership doctrine. This is the rule expressed in *Gray-Mellon Oil Co. v. Fairchild*,⁷ where the Court of Appeals of Kentucky says that although the landowner does not own a "specific cubic foot of water, oil or gas under the earth", yet he has the right to reduce them to possession, which is "an interest in the land springing out of his ownership of everything above and below the surface." It is anticipated at this point that, if this is the correct interpretation of the non-ownership view, substantially the same results may be reached whether it is followed, or whether the ownership view is followed.

It will be helpful to look at the Kentucky cases to find out how a court has handled the problem over a number of years. When writers say Kentucky is a non-ownership state,⁸ they invariably cite *Louisville Gas Co. v. Kentucky Heating Co.*⁹ and *Louisville Gas Co. v. Kentucky Heating Co.*¹⁰ Undoubtedly the court did, by these decisions, lay down the non-ownership view. In the latter case, the court says, "The right of the surface owners to take gas from subjacent fields or reservoirs is a right in common. There is no property in gas until it is taken."

In 1919, the Kentucky Court made an about face in its decision of *Scott v. Laws*.¹¹ There the instrument conveyed "all of the mineral rights and coal privileges . . . , also the right to search for all undiscovered minerals and coals upon the lands . . ." The court ends its opinion by saying, "we conclude that the title to oil and gas necessarily passed by the conveyance." It cannot be denied that the language of

contract for the transfer and sale of interests in lands and is required to be in writing." See Willis, *Kentucky Law of Oil and Gas* (1924) 13 Ky. L. J. 3, "The legal status of oil and gas, debated for many years, is now established. They are minerals, and a part of the real estate in which they are found, and possess all the incidents of real estate". See also Lewis, *Is a Lease for Oil and Gas Mining Purposes for a Term of Years Realty or Personalty?* (1932) 21 Ky. L. J. 188.

⁷ 219 Ky. 143, 292 S.W. (2d) 1037 (1934). This is substantially the same position taken by Judge Cochran in *Lindlay v. Raydure*, 239 Fed. 928 (1917), a case arising in Kentucky, when he says, "That an estate in the surface of the land of some character vests in the lessee immediately upon the execution of the instrument I do not understand to be questioned anywhere".

⁸ Summers, *Oil and Gas* (1927) 185.

⁹ 117 Ky. 71, 77 S.W. 368 (1903), "While natural gas is not subject to absolute ownership, the owner of the soil must, in dealing with it, use his property with due regard to the rights of his neighbor".

¹⁰ 132 Ky. 35, 111 S.W. 374 (1908).

¹¹ 185 Ky. 440, 215 S.W. 81 (1919).

the case is inconsistent with the non-ownership view.¹² It should be noted, however, that there is not a single case cited for the proposition that oil and gas in place are subject to ownership. In an attempt to show that it was the clear intentions of the parties that a perpetual and exclusive right to all the minerals should pass to the purchaser, "thereby investing him with title," the court cites four cases. Two of the cases¹³ were decided in Pennsylvania, where the ownership doctrine, or at least a variation of it, governs. The only Kentucky case cited¹⁴ is one where the exact problem involved was a stone quarry. True, the instrument attempted to pass "all minerals," yet when the court said that title passed, it amounted to mere dictum so far as oil and gas are concerned. The last case cited is a South Carolina case,¹⁵ and has little weight in supporting the court's decision because the subject matter involved in the case was phosphate, a non-fugacious substance.

From this time on, the Kentucky Court has unpredictably swung from one view to another. In *Hammonds v. Central Kentucky Natural Gas Co.*,¹⁶ the court says that Kentucky follows Pennsylvania, and that the owner of land owns oil and gas in the same manner and to the same extent as an owner of solid minerals, subject, of course, to loss through escape. In accord with this, and cited in the *Hammonds Case*, is *Trimble v. Kentucky River Coal Corp.*¹⁷ in which the court says that Kentucky adopts the "corporeal rule," meaning that the purchaser of oil and gas and other minerals, obtains ownership of the substances. Only two months preceding the decision of the *Hammonds Case*, the court, in *Swiss Oil Co. v. Hupp*,¹⁸ said that the leasing of coal is a conveyance of absolute title thereto, and is different from that of oil and gas in that in the latter, the right of the lessee is "limited to exploring and producing, and he does not acquire any title to the oil and gas until it has been taken from the ground." The court cites *Gray-Mellon Oil Co. v. Fairchild*, supra, in which is found the statement that landowner "does not own a specific cubic foot of water, oil, or gas under the earth until he reduces it to possession."

In brief reiteration, up to the decision of *Scott v. Laws*, 1919, Kentucky consistently adhered to the non-ownership view. It should be recalled that the court, in its opinion in *Scott v. Laws*, failed to cite a

¹² Kulp, *Cases on Oil and Gas* (1924) 33, "The 'absolute ownership' theory recognized by Kentucky in *Scott v. Laws*, supra, has also been accepted by Texas as one of its chief exponents". But see *Summers, Oil and Gas* (1927) 134, "But the court did not decide in this case (*Scott v. Laws*), as one writer seems to think (referring to Kulp), that the grantee became owner of the oil and gas in place".

¹³ *Caldwell v. Copeland*, 37 Pa. St. 427, 78 Am. Dec. 436 (1860); *Sanderson v. The City*, 105 Pa. St. 469 (1884).

¹⁴ *Kennedy v. Hicks*, 180 Ky. 562, 203 S.W. 318 (1918).

¹⁵ *Massot v. Moses*, 3 S.C. 168 (1871).

¹⁶ 255 Ky. 685, 75 S.W. (2d) 204 (1934).

¹⁷ 235 Ky. 301, 31 S.W. (2d) 367 (1930).

¹⁸ 253 Ky. 552, 69 S.W. (2d) 1037 (1934).

single Kentucky case supporting the ownership view, concerning oil and gas. Cases which follow are inharmonious, to say the least, and it cannot be said, with certainty, that the trend is toward either the ownership or the non-ownership view.

What brought on the abrogation of the non-ownership view by the Kentucky Court in *Scott v. Laws*? It might be suggested that justice demanded that the court subscribe to the doctrine that the title to the oil and gas passed to the lessee, the argument being that by the terms of the instrument itself, such was intended. It is one thing for a court to attempt to deliver justice in a virgin subject-matter, and quite another to deliver it by turning its back on former decisions; especially when to do such admits that oil and gas in place are subject to ownership, which as insisted above, may result in violation of a fundamental property law, in view of their fugacious nature. Aside from this, the same result could have been obtained by following the non-ownership view, as shown in *Gray-Mellon Oil Co. v. Fairchild*, supra. In both cases the instrument conveyed all of the mineral rights and privileges. It was contended in *Scott v. Laws*, as in the Gray-Mellon Case, that the rights had been lost by nonuser and abandonment, and the court, in the latter case, states that *Scott v. Laws* "is the well-settled rule in this state," but later says that the "owner in fee does not own a specific cubic foot of water, oil or gas under the earth until he reduces it to possession." Later, "But the right to reduce them to possession, if found, is a valuable part of his property. It is an interest in the land springing out of his ownership of everything above and below surface."

It is submitted that the situation involved in the Hammonds Case, cited supra as an ownership case, could have been handled, reaching the same result, under the non-ownership view. In that case the gas company brought vast quantities of gas from distant fields and put it through its previously drilled wells into the vacated underground reservoir. Some of the gas went under appellant's land, and she sued to recover for use and occupation on the ground of trespass. Judgment went for the gas company, the court saying that the gas company lost title to the gas when it went under appellant's land. This is far from being inconsistent with the non-ownership doctrine, under which it could be said that when the gas company forced the gas into the ground, it thereafter had an exclusive right to retake all the gas that it could extract, and that appellant had the same right on her land. Appellant could not sue in trespass for use and occupation, because the gas no longer belonged to the gas company. In other words, under both views, the gas company lost its ownership of the gas when it was again put in the ground.

In *Trimble v. Kentucky River Coal Corp.*, cited above as supporting the ownership view, A bought coal, minerals, oils and gases underlying certain property. He sold part of what he had purchased. After his death the question arose as to whether the widow was entitled to dower. The court seems to assume that in order to allow

dower, A must have been vested with the fee in a corporeal thing real. This is erroneous, as expressed by Tiffany when he makes the following statement:¹⁹ "Since there is a right of dower in lands and tenements, and this latter term is regarded as inclusive of incorporeal things real, it may exist in what we designate as 'rights to the use and profits of another's land.'" So, under the non-ownership view, even if it is interpreted as meaning nothing more than a right to go on and search for and extract oil and gas, the widow would be entitled to dower. Then certainly, under the proper interpretation, that there is present vested interest in land, she would be entitled to dower.

In the cases thus far discussed, it is urged that the same result could be had regardless of which view is taken. Two other situations will be briefly discussed. They are (1) waste and (2) ejectment.

(1) Waste. It is also submitted that under either view, waste might be prevented by a statute passed under the police power.²⁰ Kentucky has such a statute, and in this state it has consistently been held that one may make reasonable use of oil and gas under his land,²¹ but that he may be enjoined from wasting them.²² In *Louisville Gas Co. v. Kentucky Heating Co.*, supra, it is said that each operator will not be allowed to waste the common supply, and that independent of statutory regulation the court will enjoin such waste. At this time Kentucky was committed to the Indian view that neighboring landowners had a communal interest in the oil and gas under their lands, but this conception is not a necessary attribute of the non-ownership doctrine.²³ The problem, then, is whether or not there is sufficient public interest involved to support a statute preventing waste, so as not to contravene the due process clause of the Fourteenth Amendment. If there is such public interest under the non-ownership view, then there is bound to be under the ownership, and vice versa.

(2) Ejectment. No Kentucky cases are available on this subject, so it will be necessary to look to other jurisdictions for light. Under an ordinary lease to blackacre, the lessee under the common law,

¹⁹ Tiffany, *Outlines of Real Property* (1929) 186.

²⁰ Digest of statutes of Ark., Crawford and Moses (1921) ch. 121, part F, section 7309; Burns' Annotated In. Stat. (1926), sections 3016 and 3017; Revised Statutes of Kansas (1923) sections 55-103; Page's Annotated General Code of Ohio (1926) section 6317; Compiled Statutes of Oklahoma, Annotated (1921) ch. 68, section 7966; Vernon's Ann. Civ. St. Tex. (1925) tit. 102, art. 6006.

²¹ *Calor Oil and Gas Co. v. Franzell*, 128 Ky. 715, 109 S.W. 328 (1908).

²² In *Commonwealth v. Trent*, 117 Ky. 34, 77 S.W. 390 (1903), the court upheld Acts 1891-93, pp. 60, 61 (Kentucky Statutes, sections 3910-3914) when it prevented the wasting of gas as prohibited by the acts. The court said it was within the police power to pass the act, as a protection of the natural resources of the state. See also *Calor Oil and Gas Co. v. McGehee*, 117 Ky. 71, 77 S.W. 368 (1903).

²³ According to Veasey, *The Law of Oil and Gas* (1920) 18 Mich. L. Rev. 445, 467, Kentucky and Indiana are the only states which have adopted the common ownership view.

had an *interesse termini* before entry and could not maintain ejectment. The lease was considered more in the nature of personalty. On the other hand, as has already been urged, an oil and gas lease passes, not a personal, but a real, interest. Judge Cochran, in a much discussed opinion,²⁴ says that the instrument is more in the nature of a deed than a lease, and thus the lessee should bring an action for waste or ejectment, rather than for specific performance. Where the lessee has taken possession, there is little authority opposing the view that the lessee may maintain ejectment.²⁵ Where the plaintiff has not entered the cases are not in harmony.²⁶ Pennsylvania has handled the situation by looking at the granting clause in the lease.²⁷ In the case of *Barnsdall v. Bradford Gas Co.*,²⁸ where the instrument demised, leased, and let land for purpose of mining and operating for minerals, the court said that an interest in land, a corporeal hereditament, passed, and thus the lessee may maintain ejectment though not in possession. In *Funk v. Haldeman*,²⁹ the lease granted the right to merely explore for oil. The court reluctantly called the interest which passed, an incorporeal hereditament, and thus concluded that ejectment would not lie. Where there is a lease containing this type of granting clause the Pennsylvania Court has steadfastly adhered to the doctrine of that case.³⁰ Some of the states, including Kentucky, have failed to distinguish the kinds of interests that pass under the two types of leases.³¹ In *Scott v. Laws*, the instrument conveyed "all of the mineral right and coal privileges, also the right to search for all undiscovered minerals and coals upon the lands . . ." The court adopted the ownership view and construed this clause to mean that a fee was passed to the lessee. In *Wolfe Co. v. Beckett*,³² where the instrument gave appellees the right to drill and operate for oil and gas, the court says, "We conclude, therefore, that the form of the con-

²⁴ *Linlay v. Raydure*, supra n. 7.

²⁵ In *Karns v. Tanner*, 66 Pa. 297, 5 M. Min. Rep. 239 (1870), it was held that a lessee of oil and mineral rights and privileges, who had been ousted, might recover in ejectment whether the right conferred by the lease was corporeal or incorporeal. Accord: *Bartley v. Phillips*, 179 Pa. 175, 36 A. 217 (1897); and *Chandler v. Hart*, 161 Cal. 405, 119 Pac. 516 (1911).

²⁶ See 35 A.L.R. 237-241 (1925).

²⁷ See Veasey, *The Law of Oil and Gas* (1920) 18 Mich. L. Rev. 749.

²⁸ 225 Pa. 338, 74 A. 207 (1909).

²⁹ 53 Pa. St. 229 (1866).

³⁰ See *Dark v. Johnston*, 55 Pa. St. 164 (1867); and *Kelly v. Keys*, 213 Pa. 295, 62 A. 911 (1906).

³¹ See *Lindlay v. Raydure*, 239 Fed. 928 (1917); *Kansas Court held in Dickey v. Coffeerville Brick Co.*, 69 Kan. 106, 76 Pac. 398 (1904), that an oil and gas lease creates an incorporeal hereditament or license, regardless of the character of the lease presented. *New York Court of Appeals, in Wagner v. Mallory*, 169 N.Y. 501, 62 N.E. 584 (1902), holds that a "grant, demise and let" lease creates an incorporeal hereditament, citing *Funk v. Haldeman*, failing to observe a distinction between the two forms of lease.

³² 127 Ky. 252, 105 S.W. 447 (1907).

tract is immaterial, and that it makes no difference whether the oil or gas privileges be conveyed by deed or lease, just so the effect of the instrument is to vest in the lessee all property rights to the oil or gas that may be found in paying quantities." Under this view of the court, the lessee takes the same interest whether the instrument purports to pass a mere right to drill and explore for oil and gas, or to lease land for purpose of obtaining oil and gas, or even to pass title to oil and gas themselves.

It is submitted, after a comparison of these cases, that whether the different types of clauses cause a different result or not depends upon the interpretation given them by a court, rather than an adherence to either the ownership or non-ownership view. If the lease merely provides for the privilege or right to explore for oil and gas, the interest could be said to be an incorporeal hereditament under the non-ownership view as well as under the ownership view, and ejectment probably would not lie where the lessee has not taken possession. If it is one which demises the land for the purpose of obtaining oil and gas, the interest conveyed is a corporeal interest under the non-ownership view where there is a present vested interest, as well as under the other view where there is a fee simple interest; and ejectment should lie in the one case as well as in the other.³³

CONCLUSION

There can be no doubt that the Kentucky cases are inconsistent. The writer has received the impression, from a review of Kentucky decisions, that the Court of Appeals, in adopting the non-ownership doctrine in the early cases, realized that to say oil and gas in place are subject to ownership would necessarily force it to say that an adjoining landowner could take private property from under the nose of another, who owns it, without this other person being able to take legal steps to prevent it. But later, situations arose in which the court felt that in order to reach the most practical results, it must adopt the ownership view, which it did on various occasions.

There has been an attempt, in this paper, to show that the ownership doctrine is fundamentally wrong, and further, that the various situations could be adequately handled with the non-ownership doctrine.

W. MAJOR GARDNER

³³ In *Ewart v. Robinson*, 239 Fed. 740 (1923), it was held that though a lease for a term of years, granting to the lessee the right to prospect for the oil, gas, and mineral ores contained in the premises, with a right to remove the same, did not convey the oil or gas minerals in the ground, yet it was more than a mere license or incorporeal hereditament, and vested in the lessee a present interest in the premises, and the lessee could maintain ejectment, though he had never had prior possession.