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HAS A LANDOWNER ANY PROPERTY IN OIL AND GAS IN PLACE?

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Centuries ago Coke wrote the following: "And lastly, the earth hath a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum, ejus est usque ad coelum. . .*"[1] Probably Coke believed, and it was thereafter assumed, that the land owner, owned to the heavens and to the center of the earth, and it was probably assumed that he necessarily owned whatever happened to be included within this space. Courts have since been struggling to make cases fit this rigid understanding of the law and when they have departed from it, the departure has generally been with reluctance. By the time of Blackstone it certainly had become established that the landowner did not own all things included in the space above his land though it was taken for granted that he did own the space itself.[2] For example, he did not own the waters flowing over his land, nor the air above his land, nor the fish in such waters, nor the wild animals on his land.[3] He was considered as owning the space above his land, but not as owning absolutely the more or less fugitive things which might happen to be found within such space, for the reason that

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[1] COKE ON LITT., 4a.
[2] 2 BLACK. COMM., 18, 19.
[3] 2 BLACK. COMM., 394, 400-4.

it was probably found to be impossible to apply the ordinary rules of absolute ownership to things which had the power of departing from the land without the owner's volition.[4] It was difficult to conceive of a thing, uncontrolled by any owner, in which the property changed from one man to another every time an artificial boundary was crossed. However, it was probably assumed that the landowner did own absolutely everything beneath the surface, though no cases involving fugitive things beneath the surface of the earth had yet arisen, nor did any such cases arise for centuries thereafter. When cases involving rights in percolating waters did arise the courts applied at first the theory that the landowner owned everything to the center of the earth, as had been stated by Coke, and many of them have not yet departed from this ancient misconception in respect to fugitive things beneath the surface. The courts thus disregarded the fact that such water belonged with those things which Blackstone said must "unavoidably remain in common."[5] Perhaps one reason for this is that if things pass beneath the surface from the land of A to the land of B and are appropriated there by B, A can not prove that they were in fact his property, as he might be able to do in the case of flowing water, or wild animals, or air. Consequently cases have not arisen in which this rule clearly can not be followed without manifest injustice and absurdity. But such cases would certainly arise in regard to flowing water, or air, or wild animals above the surface if the absolute ownership of these things were held to be in the landowner.

As to these things of a fugitive nature found in the space above the surface of the land, Blackstone says:

> "A man may lastly have a qualified property in animals *ferae naturae propter privilegium,* that is, he may have the privilege of hunting, taking and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases. . . . . A man can have no absolute

[4] "But after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and, therefore, they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air and water;" 1 BLACK. COMM., 14.

[5] See note 4, *supra.*

> permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation and no longer. . . . . .
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> "Many other things may also be objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in the actual use and occupation, but no longer."[6]

As to game on the land, it is clear that what Blackstone calls a "qualified property" is merely the right which the owner of the land has to take such game found thereon, and to prevent others from doing so, for Blackstone says, "he may have the privilege of hunting, taking and killing them in exclusion of other persons," and then concludes from this that, "he has a transient property in these animals usually called game, so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases." The term "qualified property" is therefore misleading as used above, since all that Blackstone meant here was that the landowner has the exclusive right to take game on his land, but it does not follow from this, as Blackstone seemed to believe, that he has a "qualified property" or in fact any property whatever in any particular animal which might happen to be on his land. If a man has any property in a wild rabbit on his land then we may have the curious situation of this property shifting from one man to another many times in a single day without the knowledge of any of the persons concerned. It may also be assumed that the term "qualified property" which Blackstone uses in respect to water and air likewise means only the exclusive right the landowner has on his own land, to appropriate and use these things, a right which is a property right in itself, but does not give any property in either water or air.[7] The one common characteristic of all these things in which Blackstone says there is a "quali-

[6] 2 BLACK. COMM., 395.

[7] This is made clearer by the quotation in note 4, *supra*, and by his discussion of title by occupancy. See 2 BLACK. COMM., 400 *et. seq.* This statement of Blackstone, as hereafter stated, is probably responsible for the qualified property theory as to oil and gas. See the leading case of Westmoreland Gas Co. *v.* DeWitt, 130 Pa. St. 235, 18 Atl. 724 (1889).

fied property'' is that, ''these are of a vague and fugitive nature and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation and no longer.'' It is submitted that this is a fundamental difference, which, on principle, makes the rule of Coke inapplicable to things of a ''vague and fugitive nature'', that is, to all those things found either above or beneath the surface of the earth which possess this common characteristic—things which are capable of passing from one tract of land to another tract of land without the volition of the owner of the former tract. There are therefore three great classes of things: First, there are things which are fixed and immovable, such as the solid parts of the earth and the space above it and the space containing the solids; second, there are the chattels which may be moved by man or, like domestic animals, which have the power of motion, but are within the possession and control of some owner; third, there are things which in the state of nature are controlled by no one and in the possession of no one, and are not fixed and immovable, but which possess the power of moving from place to place on the surface of the earth or beneath the surface, without the volition of any surface owner. This third class on principle cannot be the property of any person or group of persons until appropriated. We have certain rules of law which apply to chattels and materially different rules which we apply to immovable things, but we do not yet have a distinct set of rules to govern the third class though the substances within it are fundamentally different from those within either of the other classes, in that they are not property of any one, though individuals may have the right to appropriate them and this right is property. Instead, most of the courts have tried to treat some substances belonging to this third class as the property of individuals and to apply to these substances the same principles which they apply to immovable portions of the earth.

On principle this class of fugitive things ought to be treated differently from the other classes. No one has any actual possession or control over them and consequently no landowner is liable if they pass to other land and do damage there. No one has title to any land of which they are a fixed and immovable part until detached by the owner, as in the case of solid minerals. Our property law has been built up on these other classes of things as to which title of an owner remains in him until dislodged in cer-

tain well settled modes. That this third class of things does not constitute personal property until reduced to the possession or control of someone is everywhere well settled, but the rules which apply to title to real property are also inapplicable because these things do not remain fixed but move from place to place. So far we have no established conception of a sort of title to property which shifts from one man to another merely because the property changes its location. Consequently, as heretofore stated, on principle no one should have any property in these substances until appropriated.

Among the things above the surface which possess this characteristic of moving from place to place are air, flowing water, fish and game. Among the things beneath the surface which possess this common characteristic are percolating waters and oil and gas. Other valuable things possessing this common characteristic may possibly be discovered in the future. Any of these things may be reduced to possession by man, and when so reduced to possession may become valuable personal property. As has been stated heretofore, it was very early recognized that Coke's rule could not be successfully applied to air, flowing water, game and fish, without making serious modifications in the established theories of title to real property. These things were not controlled by any one and they would not stay in one place. Hence if they passed from A's land to that of B and B appropriated them, A could not well be permitted to bring trover, nor could B be permitted to sue A for failure to keep his property off of B's land. They clearly were not chattels until actually reduced to possession and if they were realty, then there was the difficulty that if the property in them were held to be in the owner of the land where they were temporarily found, it necessarily would be lost when these substances passed to other land. There would thus result the strange spectacle of A's real estate moving around over other real property. Think of applying the principles of lateral and subjacent support to such substances!

Do oil and gas properly belong within this class of fugitive things? It is submitted that they do.[8] They are found under great

[8] In the first of a valuable series of articles on "The Law of Oil and Gas" in 18 MICH. L. REV. 445, Mr. James A. Veasey has pointed out that oil and gas have a fixed *locus* in the land before there is production and that the apparent notion of various courts that these are minerals which migrate from one piece to another is erroneous. This is undoubtedly true and it would be well if every court which has to deal with the law of oil and gas could read this article. But Mr. Veasey admits

pressure in porous strata of sand or rock and while they undoubtedly stay in place for very long periods, yet if the reservoir containing them is tapped by a well, and the pressure reduced at that point, they do flow towards that point of reduced pressure. Gas flows more readily than oil which is a heavy liquid, but certainly oil does flow from considerable distances though the flow may be slow. Oil wells often prove to be gushers and on account of the tremendous pressure below continue to flow for a considerable period and then may be pumped for a longer period, so the supply must come from surrounding areas. It is universally admitted that a landowner is able to drain oil and, to a greater extent, gas from his neighbor's land. The value of these minerals is so great that even a relatively small drainage means a great loss in value to the land drained. Therefore these minerals do possess the common characteristic in so great a degree as to make it logically impossible to bring them under Coke's rule of absolute ownership.

The law as to these various things of a fugitive nature varies. As to air and flowing water it is well settled that the landowner has no actual title but that he has a right to reduce them to possession and of course this includes a right to use them without actual reduction to possession.[9] This right to reduce to possession is not an absolute right. Thus the landowner may take water from a stream to any extent for domestic use, and he may make a more limited use of the water for various other purposes, but he is not permitted to pollute the stream to an unreasonable degree nor reduce the volume of water unreasonably.[10] Likewise as to air he may take an unlimited quantity because the supply so far has proved unlimited, but he may not pollute the air unreasonably to the detriment of his neighbors.[11] Why? Because both the water and the air are constantly passing over land belonging to different owners, each of whom has like rights and privileges of enjoyment and therefore the rights of each owner are limited by consideration for the rights of the others. Each may make a reasonable use of

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that drainage may occur to a greater or lesser extent. There can be no doubt that large quantities of both oil and gas can be drained. In many sections one gas well on forty acres seems to be considered sufficient to exhaust the gas beneath the land and one oil well on each ten acres is considered sufficient to exhaust the oil. If this is the case, the character of these minerals would seem to be established.

[9] See 2 BLACK. COMM., 18, 19, 394. As to water, see TIFFANY, REAL PROPERTY, 2 ed., 1131; FARNHAM, WATERS AND WATER RIGHTS, § 462. That the landowner has no property in air or in flowing waters seems to be established.

[10] See TIFFANY, REAL PROPERTY, 2 ed., 1130-1148; FARNHAM, WATERS AND WATER RIGHTS, §§ 462-67; GOULD, WATERS, § 204.

[11] For a collection of cases on pollution of the air, see TIFFANY, REAL PROPERTY, 2 ed., 338.

the air or the flowing water. What is a reasonable use depends on many circumstances including the character of the thing taken and its relation to the land and the enjoyment thereof. As said above, a man may take all the air he pleases because the supply is adequate and the rights of others are thereby not damaged, but as soon as he unreasonably pollutes the air he may interfere with the rights of others; but he may not take an unlimited amount of flowing water because the supply is not adequate for all purposes. It has always been understood that underground streams are to be treated like surface streams in this respect. Whether such so-called streams are distinguishable from percolating waters may well be questioned. Undoubtedly real streams of this sort are very rare. At any rate it is settled that the water in underground streams is one kind of substance beneath the surface which it is settled the landowner does not own.[12]

As to percolating waters it would seem that on principle the same general rule ought to apply that is applied to air, to water in surface streams and to water in subterranean streams, that is, that each landowner has a right to take such waters and make a reasonable use of the same but that prior to reduction to possession the landowner has no property in any of the water. Certainly there can be no valid distinction between water in an underground stream and percolating waters. Until the middle of the past century it was apparently considered that the landowner owned everything beneath the surface of his land, consequently when the first cases arose involving percolating waters, the courts were predisposed in favor of the absolute ownership rule, and this rule has been regarded as established in England.[13] Being unsound on principle, there arose difficulty in applying this absolute ownership rule logically. If one owns certain percolating water absolutely, he should have a right to pollute it if he so desires yet if this were permitted it might seriously damage the enjoyment of land by neighboring landowners. The landowner does not have control of the water and could not possibly keep this water which he theoretically owned within his own land, yet he is not liable

[12] See FARNHAM, WATERS AND WATER RIGHTS, § 944; GOULD, WATERS, § 281; TIFFANY, REAL PROPERTY, 2 ed., § 342; 19 L. R. A. 97n. It is usually said that the law as to underground streams is the same as that governing surface streams. While this statement is too broad, yet the law is the same in so far as the landowner's property rights in the water in such streams are concerned.

[13] Chasemere *v.* Richards, 7 H. L. C. 349 (1859); Acton *v.* Blundell, 12 M. & W. 324 (1843).

for any damages which this water does to adjoining land after it escapes if he does not pollute it. If he should color it in order to see whether his neighbor was converting the water and found the colored water in the tank by his neighbor's well, damages ought to be allowed. Yet, even the English courts seem disposed to allow the neighbor to recover damages although the one these courts say owned the water, colored it for the purpose of proving that the neighbor was converting it.[14] This merely indicates some of the difficulties in applying an absolute ownership rule of law to a thing of fugitive nature which will not stay in place, but which moves about without any landowner being able to control it. The difficulty in applying the absolute ownership theory has led to a departure from this theory in this country in some jurisdictions.[15] though others still purport to apply the absolute ownership theory. But few of the courts so far have ventured to assert that the landowner has no property in the water at all. Usually they have resorted to Blackstone's "qualified property" theory just as in the case of wild animals. One of the earliest and best reasoned cases denying the absolute property theory as to percolating waters is *Bassett* v. *Salisbury Manufacturing Company*,[16] in which the court said:

> "If this doctrine of absolute ownership is not well founded in legal principles, certainly there is nothing in its practical operation that so commends it to our approval as to lead to its adoption. It must, if held as in several cases, leave everywhere a conflict of right and enjoyment, irreconcilable in law and in fact; and, however held, it will, in a variety of cases, lead to incalculable mischiefs. Logically followed out this doctrine, if confined to water naturally in or upon the land, would forbid almost all interference by each landowner with his own

[14] Ballard *v.* Tomlinson, L. R. 29 Ch. Div. 115 (1885); Hodgkinson *v.* Enner, 4 Best & S. 229 (1863). See Collins *v.* Chartiers Valley Gas Co., 131 Pa. St. 143, 18 Atl. 1012 (1890); Ball *v.* Nye, 99 Mass. 582 (1868). See also FARNHAM, WATERS AND WATER RIGHTS, § 945, for additional cases. In this section the learned author says: "Some courts are very willing to assert that a landowner may maliciously deprive his neighbor of a water supply by pumping or draining it away, but at the same time they assert that he cannot effect such deprivation by polluting the source of the supply. It could not for a moment be conceded that there was a right to pollute the water, and that the fact that there is no such right shows that the rights with respect to percolating waters are not absolute, but correlative, and that each landowner must, in using his property, see that he does not injure his neighbor."

[15] Katz *v.* Walkinshaw, 141 Cal. 116, 70 Pac. 663 (1902); Erickson *v.* Crookston Water Works Co., 100 Minn. 481, 111 N. W. 391 (1907), s. c. 105 Minn. 182, 117 N. W. 435 (1908); Meeker *v.* East Orange, 77 N. J. L. 623, 74 Atl. 379 (1909); Forbell *v.* New York, 164 N. Y. 522, 58 N. E. 644 (1900); Hathorn *v.* Natural Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504 (1909); Pence *v.* Carney, 58 W. Va. 296, 52 S. E. 702 (1905).

[16] 43 N. H. 569, 575 (1862).

land; or if applied to all the waters found in or upon the land not gathered into natural watercourses, would take away all remedy for malicious acts in relation to them."

The argument of this court is difficult to answer. Courts which adopt the absolute property theory in fact do make exceptions in many cases. If the absolute property theory must lead to injustice or to a lot of inconsistent exceptions, it ought to be discarded.

The cases in which it has been said the landowner owns the percolating waters have usually been cases where he asserted the right to drain his neighbor's supply by intercepting the waters on his own land. But no court has followed out this theory to its logical conclusion. An examination of the authorities will convince one that not only is the law unsettled on this point, but a grave doubt will arise as to whether in any jurisdiction the absolute ownership theory prevails.[17] Certain it is that the thory that each landowner may make only a reasonable use of percolating waters has been gaining in favor.

Coming now to the right of the landowner to oil and gas in place, we find the law in great confusion. There are three theories as to the right of the landowner in the oil and gas in place, all of which have been suggested by various courts in the cases involving percolating waters.

1. That the landowner owns the oil and gas beneath the surface of his land absolutely just as he owns solid minerals. This for convenience will hereafter be called the absolute property theory.

2. That the landowner has title to the oil and gas while they are beneath his land, but loses such title if they pass beneath the surface to the land of another. It follows that the latter gains title just as soon as they come within his boundaries. This will hereafter be called the qualified property theory.

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[17] In FARNHAM, WATERS AND WATER RIGHTS, § 938, the learned author after fully discussing the problem concludes: "In view of the fact there are no binding precedents in the English law, what is the rule which should govern the subject of percolating waters? The law governing water requires it to seek its lowest level, so that in case the surface of a basin filled with saturated earth is opened by several different persons, the one who sinks a pump to the lowest point may exhaust all the water, drawing it from beneath the land of the others, although they have an equal right to the enjoyment of the common mass. In all cases where there is a community ownership of, or common right to, the enjoyment of a natural product, the rule is that one of the joint owners can make only a reasonable use of his interest so as not unnecessarily or unreasonably to injure or destroy the equal rights of the co-owners. This rule should apply to the subject of water from a saturated stratum extending under the property of several owners. And this is the rule which has been applied by the great weight of authority."

3. That the landowner does not have title to the oil and gas in place beneath his land, but within his own boundaries he has the exclusive right to reduce these minerals to his possession. This will hereafter be called the no-property theory.

Each of these theories is supported by a considerable body of authority.[18] It will be noted that the first theory is similar to the absolute property theory which is applied to percolating waters in England and in some jurisdictions in this country. The qualified property theory is much like the doctrine stated in many of the cases involving the rights of a landowner in wild animals on his land, and in many of the cases in this country which hold landowners have correlative rights in percolating waters. The no-property theory closely resembles the theory applied to air, and to surface and underground streams. Each of these theories will be discussed briefly.

The absolute property theory assumes that the landowner owns the oil and gas in place just as he owns the coal or other solid minerals while in place. The objections to this theory have already been suggested in the discussion of percolating waters. If A has absolute title to the oil and gas beneath his land and B sinks wells near the boundary and begins to draw part of these minerals from A's land, since he is taking A's oil and gas he ought to be liable to A for damages for conversion. In a paper read before the Texas Bar Association last summer[19] in which the absolute property theory was supported as being sound on principle, this difficulty was met by stating that A does not lose title to the oil and gas

[18] Time and space will not permit an extended discussion of the numerous cases. Discussions of the leading cases supporting these theories will be found in the following articles: "The Right of a Landowner to the Oil and Gas in His Land," 63 PA. L. REV. 471; "Property in Oil and Gas," 29 YALE L. J. 174; "The Law of Oil and Gas," 18 MICH. L. REV. 445, 652; "The Struggle of the Oil Industry for the Sanctity of its Basic Contract: The Oil and Gas Lease," to be published in the REPORT OF THE TEXAS BAR ASSOCIATION, 1920.

[19] This paper was by Mr. James A. Veasey of Tulsa, Oklahoma, and will be published in the REPORT OF THE TEXAS BAR ASSOCIATION for 1920. This report is apparently not yet published. This paper and the articles by the same author now running in the MICHIGAN LAW REVIEW are the most interesting and valuable which have so far been published on this subject. Since they are written by a lawyer with long experience in oil and gas litigation they are entitled to great weight. The learned author strongly favors the absolute property theory whereas the authors of previous articles have all favored the no-property theory as being correct on principle. It is interesting to note that while the learned author insists the weight of authority favors the absolute ownership theory he says that these courts which have decided that the landowner owns the minerals absolutely confined their decisions to the oil and gas actually in place at the time of the inquiry into its ownership and that "This concept does not include the oil or gas which has departed from the land, and it ignores the possible escape of a portion of the oil or gas in the future. The subject matter dealt with is the oil and gas in place at the moment of inquiry into its ownership." If this is true then West Virginia must be ruled out of the absolute ownership jurisdictions. See cases cited in note 24. See also TIFFANY, REAL PROPERTY, 2 ed., § 256; GOULD, WATERS, § 291.

thus drained from his land by B, but that A's predicament is due to his inability to prove title to the oil or gas taken from his land by B.[20] To this suggestion we may answer, first, that it seems to have no support in the decisions, second, that the court ought not deny A a remedy merely because his damages are difficult to prove with any great degree of precision, and, third, that since the remedy at law is manifestly inadequate and the damages to his land will be irreparable a court of equity at the suit of A ought to restrain B from further drainage of these minerals from A's land. In regard to the second objection in one case where the suit was brought by an oil and gas lessor against his lessee, for breach of the lessee's implied covenant to protect the leasehold from drainage, the damages were based on the value of the oil so lost by the lessor.[21] In this case the court did instruct the jury to find from the evidence the amount of oil lost by drainage and allowed damages based on the same. In other cases where the suit was for breach of express or implied covenant of the lessee to develop the leasehold diligently the damages allowed were based on the amount of oil the lessee would have produced had he performed his covenant, a matter which is as difficult to prove as the amount of oil lost by drainage.[22] No court has denied an action for breach of covenant on this ground though the difficulty in proving damages is just as great. It is submitted that the very fact that it is necessary to resort to the suggestion that the difficulty is merely one of proof, is a strong argument against the soundness of the absolute property theory. But this suggestion does not explain why A should not be able to secure an injunction against B though certainly no court would seriously consider granting such a remedy. The absolute property theory is supported by the courts of West Virginia, Kansas and Texas,[23] but in the two former states the decisions were in cases which involved grants or reservations of oil and gas in

[20] The page cannot be given because the REPORT OF THE TEXAS BAR ASSOCIATION for 1920 is not yet available.

[21] Kleppner *v.* Lemon, 197 Pa. St. 430, 47 Atl. 353 (1900); on rehearing, 198 Pa. St. 581, 48 Atl. 483 (1901). See also cases collected in L. R. A. 1917E 981.

[22] Daughetee *v.* Ohio Oil Co., 151 Ill. App. 102 (1909) and 181 Ill. App. 135 (1913); affirmed, 263 Ill. 518, 105 N. E. 308 (1914); Bradford Oil Co. *v.* Blair, 113 Pa. St. 83, 4 Atl. 218 (1886); Guffey Petroleum Co. *v.* Jeff Chaison Townsite Co., 48 Tex. Civ. App. 555, 107 S. W. 609 (1908), reversed on appeal without consideration of this point. See also note in 25 W. VA. L. QUAR. 73.

[23] Moore *v.* Griffin, 72 Kan. 164, 83 Pac. 395 (1905); Mound City Brick & Gas Co. *v.* Goodspeed Gas & Oil Co., 83 Kan. 136, 109 Pac. 1002 (1910); Texas Co. *v.* Daugherty, 176 S W. 717 (1915); Williamson *v.* Jones, 39 W. Va. 231, 10 S. E. 436 (1894); Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781 (1897); Preston *v.* White, 57 W. Va. 278, 50 S. E. 236 (1905).

place and in these cases simply followed the rule of law applicable to grants or reservations of solid minerals. But it seems that none of these courts recognize the right of one landowner to any remedy against another for drainage, thus refusing to carry out the theory to a logical conclusion in the very case where it would be of value to the landowner.[24] If A cannot sue B for draining the oil from A's land, then it must follow that A loses his title in the oil or gas and that B gains title when the mineral crosses the boundary line unless we adopt the above suggestion that A's difficulty is merely one of proof, but this difficulty of proof ought to aid A in securing a remedy in equity. If title is thus lost when the mineral crosses the boundary, then the absolute property theory becomes nothing more than the qualified property theory.[25] It is submitted there is no jurisdiction which follows the absolute property theory.

The qualified property rule was stated in a leading case on the point as follows:

> "They (oil and gas) belong to the owner of the land, and are a part of it, so long as they are on it 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."[26]

This language, or variations of it, often with considerable changes in the wording, has been quoted in subsequent cases over and over again, together with a bewildering lot of other statements more or less inconsistent with it. However, the above statement has become so near a classic that it sometimes seems that a court feels an opinion on the question cannot be complete without repeating it. Furthermore, the statement is found quoted with apparent approval not only by courts which have adopted the absolute property

[24] Ohio Fuel Oil Co. *v.* Burdett, 72 W. Va. 803, 79 S. E. 667 (1913); Gain *v.* South Penn Oil Co., 76 W. Va. 768, 86 S. E. 880 (1915). In the two cases cited in note 25 the Kansas court approved the qualified property theory.

[25] It is interesting to note that in West Virginia, one of the states which asserts the absolute property theory in cases arising between grantor and grantee of the oil and gas in fee or between tenants in common and life tenants and remaindermen, the court has emphatically declared in the cases in note 24, *supra*, that an adjoining landowner has no remedy for drainage. Also in Howerton *v.* Kansas Natural Gas Co., 82 Kan. 367, 108 Pac. 813 (1910), a suit in which damages were allowed a lessor for failure of his lessee to drill offset wells to prevent drainage, the court approved the qualified property theory. These cases indicate that even West Virginia and Kansas have repudiated the absolute property theory. See also Lanyon Zinc Co. *v.* Freeman, 68 Kan. 691, 75 Pac. 995 (1904).

[26] Westmoreland Gas Co. *v.* DeWitt, 130 Pa. St. 235, 249, 18 Atl. 724, 725 (1889).

theory, but also by those which have adopted the no-property theory.

It is probable that this term "qualified property" was suggested by Blackstone and subsequent text writers, and by the language used in the cases relating to wild animals. In the case last mentioned the court applied the analogy of water and wild animals, saying:

> "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals ferae naturae. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner."[27]

The court evidently considered the landowner the qualified owner of wild animals on his land, and applied to oil and gas its notion of the law as to wild animals. As has been above pointed out the idea that a landowner has a qualified property in the animals on his land is unsound, though this term "qualified property" has been apparently approved by the courts from time to time, probably by reason of the misleading statement in Blackstone above quoted. It has always been the opinion of the writer that this accounts for the qualified property theory—that it was established on analogy to the law as to wild animals and percolating waters by courts which understood the law to be that the landowner had a qualified title to wild animals on his land and to percolating waters beneath his land.

The objection to the qualified property theory is that if taken literally, it establishes unnecessarily a species of property to which a man loses title whenever the thing in question passes to other land, though it is without his volition and against his desire and consent. The learned writer of the paper read before the Texas Bar Association said: "There is no place in our jurisprudence for this species of legerdemain."[28] This is certainly true if the rule is taken literally, for there is no necessity for establishing such new species of property. Be that as it may, the theory has undoubtedly been announced in many more cases than either of the other theories and is generally regarded as representing the

[27] See note 26, *supra,* at the same pages.
[28] See note 20, *supra.*

weight of authority.[29] It is submitted, however, that the law cannot be regarded as thus settled even in the jurisdictions which have approved the qualified property theory. Furthermore, there is great doubt whether these courts which seem to have adopted this theory mean more than that the landowner has the right to take these minerals and for this reason is regarded as having some kind of qualified property in the minerals in question—whether they mean any more by the term "qualified property" than did Blackstone.

The no-property theory is supported in Indiana, Kentucky and Oklahoma[30] and is followed consistently by the Supreme Court of the United States.[31] The leading case adopting the theory is *Ohio Oil Co.* v. *Indiana,*[32] which was a case involving the constitutionality of an Indiana statute prohibiting the waste of natural gas under certain circumstances. This case is one of the class of cases sometimes known as "Conservation Cases". It is the writer's opinion that the court would have reached the same conclusion and would have upheld the validity of the statute in question regardless as to whether the absolute property theory or the no-property theory was held to be the law in Indiana. If the landowner had absolute title to the gas, then for the state to prohibit him from wasting it would be an interference with his use of his own property. If we say he had no title to the gas in question but only an incorporeal right to take it from him own land, then since this right is property the effect of the statute would likewise be to interfere with his use of his own property. The property in question would merely differ in character under the two theories. Under the one theory there would be interference with the owner's use of his gas and under the other theory an interference with his exercise of his right to take gas from his land.[33] The constitutional objection would be the same in either case. The question involved in the case was the power of the state to conserve this natural resource and it would be immaterial whether the resource in question was solid, liquid or gaseous. The waste

[29] Many cases are collected in THORNTON, THE LAW OF OIL AND GAS, §§ 20-24.
[30] Lindley *v.* Raydure, 239 Fed. 928 (Ky. 1917), affirmed, 249 Fed. 675 (1918); Townsend *v.* State, 147 Ind. 624, 47 N. E. 19 (1897); State *v.* Ohio Oil Co., 150 Ind. 21, 49 N. E. 809 (1898); Louisville Gas Co. *v.* Kentucky Heating Co., 117 Ky. 71, 77 W. 368 (1903); Louisville Gas Co. *v.* Kentucky Heating Co., 132 Ky. 435, 111 S. W. 374 (1908); Rich *v.* Doneghey, 177 Pac. 86 (Okla. 1918).
[31] Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900); Walls *v.* Midland Carbon Co., 41 Sup. Ct. Rep. 118 (1920).
[32] See note 31, *supra.*
[33] See note by Professor Hardman in 27 W. VA. L. QUAR. 255.

of forests might be prohibited by the state with just as much reason as waste of gas or oil. The day may even come when it will be necessary for the state to say to a man "You may dig the coal from your land and use it or sell it, or you may leave it in place, but, if you dig it, you must not waste it." The court in *Ohio Oil Co.* v. *Indiana* did discuss at length what interest a landowner has in the gas in place under the law of Indiana. In the course of the decision the court pointed out a marked difference between wild animals on one hand, and oil and gas on the other, namely, that the state has power to prohibit the taking of wild animals while it has no such power over oil and gas. The state's power over wild animals is of historical origin. This historical distinction does not, as has been supposed, greatly weaken the analogy between wild animals and oil and gas in place.[34] The fundamental likeness that both are fugitive in nature is still present. As to the absolute property theory, the court said: "But it cannot be that property as to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right or property."[35] It then proceeded to approve the no-property theory. It has subsequently applied the same theory to mineral waters[36] and has recently again applied it to gas.[37]

In *Ohio Oil Co.* v. *Indiana* the court stated that oil and gas are contained in a reservoir of limited extent and that all the land above the reservoir is privately owned, and it seems to conclude therefrom that these common owners have some sort of collective right or property in the oil and gas in place, for it said:

> "On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a co-equal 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

[34] On principle the state has no property in the wild animals within it, though it does have the power to prohibit the killing or taking of such animals within its border. The state has no title to oil or gas in place under private land but it does not have any similar historical power to prohibit the landowners from taking oil and gas from their land.

[35] See p. 201.

[36] See Lindsley *v.* Natural Carbonic Gas Co., 220 U .S. 61 (1911).

[37] Walls *v.* Midland Carbon Co., *supra.*

> 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.''[38]

It is submitted that this is unsound and that there can be no such collective ownership in the oil and gas in place. The difficulty in applying such a theory is as great as the difficulty in applying the qualified property theory. In fact this seems to be the qualified property theory in a modified form. The theory of the court apparently is that, since a limited number of persons have the right to tap this particular reservoir, these owners must in some way collectively own the contents. There is certainly no necessity for reaching such a conclusion. If the landowners are collective owners of the oil and gas in the reservoir then they ought to have the right to make joint claims of some sort to the product of the reservoir. But it is settled both by custom and by law that one landowner has the right to take all the oil and gas he can secure.[39]

The state may prohibit waste of the minerals[40] and perhaps an adjoining landowner could enjoin malicious waste.[41] Whether the adjoining owner can enjoin non-malicious waste is still an open question,[42] but if the landowner cannot exercise his right to take oil and gas with reasonable regard for the rights of his neighbors then an injunction ought to be allowed for non-malicious waste. In one state the validity of a statute prohibiting the pumping of

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[38] See pp. 209-10.

[39] Brown *v.* Spillman, 155 U. S. 665 (1895); Higgins Oil & Fuel Co. *v.* Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919); Kelly *v.* Ohio Oil Co., 57 Oh. St. 317, 49 N. E. 399 (1898); Jones v. Forest Oil Co., 194 Pa. St. 379, 44 Atl. 1074 (1900); Barnard *v.* Monongahela Gas Co., 216 Pa. St. 362, 65 Atl. 801 (1906); Ohio Fuel Oil Co. *v.* Burdett, 72 W. Va. 803, 79 S. E. 667 (1913); Gain *v.* South Penn Oil Co., 76 W. Va. 768, 86 S. E. 880 (1915).

It is submitted that the numerous cases holding that the lessor can sue the lessee for damages for failure to protect the leasehold from drainage, or may in such case forfeit the lease for breach of implied condition also support this statement. For a collection of such cases see L. R. A. 1917E, 981 and L. R. A. 1915B, 561.

[40] Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900); Walls *v.* Midland Carbon Co., 41 Sup. Ct. Rep. 118 (1920).

[41] See Louisville Gas Co. *v.* Kentucky Heating Co., *supra.*

[42] See Manufacturers' Oil & Gas Co. *v.* Indiana Gas & Oil Co., 155 Ind. 461, 57 N. E. 912 (1900).

gas wells was sustained and the court stated that an injunction might have been granted on common law principles in the absence of statute.[43] But these cases were apparently based on the assumption that the pumping of gas wells would have the effect of destroying the wells on neighboring lands before the gas was exhausted from such lands. Aside from these cases there seems at present no authority to the effect that the pumping of gas wells can be enjoined by an adjoining landowner where the only effect thereof is to exhaust the gas in the reservoir sooner than would otherwise have been the case, though the idea that such an injunction might be had seems prevalent among writers on the subject.[44] If the landowner does not have any title to the oil and gas in place beneath his land, then all the right he has is the incorporeal right to take oil and gas within his boundaries. This right is limited in that he can be prohibited by statute from needlessly wasting the minerals, and where his acts are malicious he may be enjoined by a court of equity at the suit of a neighbor. Perhaps he is further limited in that he may be restrained from pumping gas if the effect is to damage his neighbors' right in any way except by the exhaustion of the gas. The only uses of oil and gas are the ordinary commercial uses therefore it is reasonable to allow each landowner to take all he can secure so long as the only effect is to exhaust the available supply. Any other rule would seriously interfere with the production of oil and gas. Thus oil and gas differ from percolating waters and flowing waters, both of which have other important values to the land aside from, and usually more important than, their purely commercial value. These waters are essential to the fertility of the land, and to its use for either residential purposes or business purposes. Land is not damaged by the exhaustion of the oil and gas otherwise than by its reduction in value by reason of the fact that these minerals can no longer be obtained from it. Consequently what is reasonable in the case of oil and gas might well be unreasonable as to water. It is submitted that so far, the courts as to oil and gas have in effect applied the doctrine that the landowner must exercise his right to take oil and gas reasonably with due respect to the rights of his neighbors. He does not own the

[43] Manufacturers' Oil & Gas Co. *v.* Indiana Gas & Oil Co., *supra;* also case of the same name, 156 Ind. 579, 59 N. E. 169 (1901).
[44] See note in 27 W. VA. L. QUAR. 74.

oil and gas. Neither do the adjoining landowners. He does own the land and may take these more or less fugitive minerals and his neighbors have no right to complain but if he needlessly wastes them, then they do have a right to complain.

It is evident this incorporeal right to take oil and gas from the land is a valuable thing under this no-property theory. Is there any difficulty in conveying this right separately and apart from the land? None whatever. Practically all courts are agreed that the so-called oil and gas lease gives only an incorporeal right in the land to the lessee.[45] No difficulty has been encountered in enforcing such leases and in protecting the rights of the parties thereto in every particular. If we can have an incorporeal right to take oil and gas so long as they can be produced in paying quantities, there would seem to be no good reason why we can not have such a right conveyed in fee simple. It would only amount to a profit in fee simple instead of a profit for less than a fee simple. Fee simple profits in coal are common and other forms of incorporeal fee simple rights may be created, so evidently this one could. The courts in Indiana and Kentucky where the no-property theory is established have apparently had no more difficulty respecting conveyances of oil and gas or in regard to leases of oil and gas than the other states. It is possible in these states to convey this right in fee.[46] Does any one suppose that a grant of oil and gas in place in these states is less valuable because the grantee gets merely the incorporeal *right* to take the oil and gas instead of the absolute title to the oil and gas in place? One thing is exactly as valuable as the other because no court has ever allowed a landowner a remedy at law or in equity for drainage. He gets in either case in effect no more than the right to take all the oil and gas he can procure from the land and it becomes his oil and gas when reduced to possession. The grantee cannot procure more oil and gas or more valuable oil or gas merely because the courts of the state in which the land is located hold he owns the oil and gas in place. The privilege of taking the oil and gas is all any one desires. If the grantee gets only an incorporeal right to take oil and gas and makes a lease he gives his lessee just as complete and valuable a

[45] See cases cited in 18 MICH. L. REV. 736 *et seq.*; also cases cited in 25 W. VA. L. QUAR. 295.

[46] See Heller *v.* Dailey, 28 Ind. App. 555, 63 N. E. 490 (1902); Richmond Natural Gas Co. *v.* Davenport, 38 Ind. App. 27, 76 N. E. 524 (1905); McKinney *v.* Central Kentucky Natural Gas Co., 134 Ky. 230, 120 S. W. 314 (1909); Barker *v.* Campbell-Ratcliff Land Co., 176 Pac. 468 (Okla. 1918).

right as the oil and gas lessee acquires in West Virginia or Kansas or Texas where the courts say the landowner owns the oil and gas absolutely.

It has been suggested in the article heretofore mentioned that the courts will regard such an incorporeal right as being something of little dignity and will therefore not protect it properly.[47] But is this true? Has it proved true in states where the no-property theory has been adopted? It is submitted it has not. Furthermore, it is submitted that most of the difficulties have arisen in regard to oil and gas leases and such leases are usually held to confer only an incorporeal right on the lessee. If there is any merit in the practical objection to the no-property theory it would have to be carried to the extent of radically changing the law as to oil and gas leases in order to reach the real field of difficulty.

In conclusion, it is submitted that on principle the landowner ought to be held to have no property in substances of a fugitive nature merely because they happen to be on, over or within his land for the time being; that while he has no property in these substances themselves while in the state of nature, he does have an exclusive right on his own land to reduce them to his control and thus acquire a personal property interest in the portion he has thus brought within his control; that this right to reduce to control is an incorporeal property right incident to the ownership of the land but the ownership of such right may by proper conveyance be separated from the property in the rest of the land. Among the substances which possess this fugitive nature are waters in streams both above and below the surface, percolating waters, air, oil and gas. The law as to air and as to water in both surface streams and underground streams is settled substantially in accord with the principle above stated. There is confusion in the law as to the landowner's rights in wild animals, percolating waters and oil and gas but in no jurisdiction has the landowner been allowed the absolute title in these substances for no court has held that a landowner has title to such substances after they have passed from his land. There is no possible reason for distinguishing percolating waters from the water in underground streams and it is difficult

[47] See notes 18 and 20, *supra*. The logical result of the no-property theory is that no corporeal estate in the oil and gas in place can be created either by grant or reservation but why should this be alarming? An incorporeal estate can be conveyed separate and apart from the land and certainly is not a new or strange thing. Nearly every oil and gas lease and nearly every coal lease creates an incorporeal estate in land.

to see how there can be any distinction as to oil and gas. While there are courts which hold that the landowner has title to oil and gas in place, the law seems to be settled that he cannot protect his title, if they pass from his land to other land and therefore the landowner has been thus deprived of the most important attribute of ownership and of the only advantage he can derive from such theory. The result is that even in these jurisdictions the landowner does not own these minerals in place, because he loses title if they leave his land without his consent. While in some jurisdictions it has been held that the landowner has a qualified property in oil and gas in place, this theory cannot be supported on principle and it is doubtful whether the courts in such jurisdictions mean more than that the landowner has a right on his own land to take the minerals. A substantial body of authority has adopted the theory that the landowner has no property in these minerals in place but has the exclusive right to reduce them to possession on his own land. This, it is submitted, is sound on principle and is supported by the analogies as to water in surface and underground streams, as to air, and by a very respectable body of authority as to percolating waters and wild animals.