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THE OWNERSHIP OF PETROLEUM OIL AND
NATURAL GAS IN PLACE.*

BY D. EDWARD GREER.**

It has always been the boast of common-law lawyers that the system was so flexible and adaptable to new conditions that it afforded an adequate remedy in any case or state of facts, however novel and complicated. This claim has been put to a severe test in determining the rights of the owner of land to petroleum oil and natural gas underlying the same. At first the courts established the obvious proposition that these substances are minerals, since the term "minerals" embraces all inorganic substances in or under the surface of the earth; and hence it was argued that any such component parts of the surface, or underlying strata, were parts of the land; and that any disposition thereof would be a disposition of a part of the land. Therefore, it was held that an ordinary lease of the land did not authorize the extraction of oil therefrom; that an executor, having power to lease, could not grant power to extract oil; that a guardian could not make an oil lease or contract giving the right to extract these substances.¹ So a reservation of all "minerals" operated to reserve oil and gas, unless there was something in the deed showing an intention not to include these substances in the term "minerals," or the surrounding circumstances showed such intention.² Having so determined, it was an easy conclusion, if no consideration was given to the peculiar attributes of these substances, that they belonged absolutely to the owner of the land, since the land owner's title extended *ad caelum ad inferno*.³ Another corollary was drawn that since the right of

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¹ Lanyon Zinc Co. v. Freeman, 68 Kans. 691, 75 Pac. 995 (1904); Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 Pac. 317 (1905); Stoughton's Appeal 83 Pa. 198 (1878); Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436 (1894); Murray v. Allard, 100 Tenn. 100, 43 S. W. 355 (1897); Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307 (1908).

² Dunham v. Kirkpatrick, 101 Pa. St. 36, 47 Am. Rep. 696 (1882); Right of Way Co. v. Gladys City, etc., 106 Tex. 94, 51 L. R. A. (NS) 268 (1913); Deltor v. Holland, 57 Ohio St. 492, 49 N. E. 690 (1898); Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307 (1908).

³ Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411 (1897); Wilson v. Youst, 43 W. Va. 826, 28 S. E. 731 (1897); Isom v. Rex Crude Oil Co., *supra*; Lanyon Zinc Co. v. Freeman, 68 Kans. 691, 75 Pac. 995 (1904).

disposition was inherently incident to full ownership, the landowner had the power and right to convey the substances separate and apart from the surface.⁴ The doctrine of horizontal severance or partition was invoked (established as to solid minerals) and made to apply to these substances. This line of reasoning, however, was not allowed to go unchallenged and among the early decisions are some which question it and seek to point out its fallacy, and indeed, hold that, notwithstanding these substances are minerals, owing to their peculiar nature they are incapable of ownership *in situ*.⁵ It was shown in these early cases that there was a very substantial and radical difference between oil and gas and solid minerals, in that the former had, or were assumed to have, the power of moving from place to place—of migrating, so to speak, from one tract of land to another, and that by such movement the title of one land owner, if he had any, was lost without his consent and against his will.⁶ Now, since such condition was entirely inconsistent with the legal concept of true or absolute ownership, the question of such ownership was raised and has been debated by the courts ever since with somewhat varying and conflicting conclusions. The title of the land owner was compared, by those courts taking the view that oil and gas are migratory, with his title to wild animals (*ferae naturae*) that came on his land; and while the analogy was admitted to be incomplete it was insisted that the land owner's title was much more like his title to wild animals than like his title to solid minerals.⁷ Likewise, the earliest cases held that the title of the land owner to oil and gas was entirely similar to his title to running or percolating water under the surface of his land; that the extent of the right in either case, percolating water or oil and gas, was the exclusive right to capture, to take and to use such minerals while on or under his land. The right as to wild animals was known at common law as *ratione soli*; and the right to take water practically the same. This was declared

⁴ Preston v. White, 57 W. Va. 278, 50 S. E. 236 (1906).

⁵ Dark v. Johnston, 55 Pa. 164, (1867); Wood Co. Pet. Co. v. West Virginia, Etc., Co., 28 W. Va. 210 (1886).

⁶ Dark v. Johnston, *supra*; Westmoreland, Etc. Co. v. DeWitt, 130 Pa. 325, (1889); Wood Co. Pet. Co. v. West Va. Etc. Co., *supra*; Brown v. Spilman, 155 U. S. 665 (1895).

⁷ Schulte v. Warren, 218 Ill. 108, 75 N. E. 786 (1905); Westmoreland, Etc. Co. v. DeWitt, *supra*; Ohio Oil Co. v. Indiana, 177 U. S. 190 (1900); State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809 (1898).

In Wood Co. Pet. Co. v. West Virginia, Etc. Co., note 5, *supra*, a curious result was reached. Defendant had a lease allowing him to drill wells for oil only. In drilling for oil he found gas of commercial value which he sold—the gas coming out with oil. The court held that the lessor had no cause of action for the value of the gas as he did not own it in place, and as the lessee was lawfully in possession he had the title to the gas.

to be the extent of the right possessed as to oil and gas.⁸ Of course such right falls far short of the rights of an owner, or ownership, and under this view no conveyance transferring title or reserving title could be made. Likewise, it was pointed out, that from the conclusion that oil and gas are minerals, it does not follow that the land owner owns them, because percolating underground water is conceded on all hands to be a mineral, and yet it is universally held that the land owner does not own such water⁹ but only has the exclusive right on his land to capture and take possession of such water and thus acquire title thereto; he cannot convey it or reserve it distinct from the surface, because he does not own it.

Again, the doctrine of *ad caelum ad inferno* does not give to a riparian owner, title to water passing over one's land in a stream, notwithstanding he owns the fee to the center of the stream; nor to shell fish, mollusks or oysters not planted by the land owner.¹⁰

These considerations were sufficient in the minds of many of the courts, and perhaps a majority of them, to upset the whole theory of absolute ownership of petroleum oil and natural gas in place. Just here it may be well to say that perhaps the courts went too far in assuming that these substances possessed the power of self-propulsion and movement in a state of nature. Such fact has not been and never could be proven; but the general belief among practical operators and geologists now is that these substances, generally speaking, have been confined for ages in pools, porous rocks, and sands where we now find them, and would so remain for ages to come if not allowed to escape or move by an earthquake breaking up the stratum, or some similar occurrence, or by the act of man in drilling into the pool, sand or rock. Evidently an earthquake of sufficient violence to shatter the containing rocks and leave crevices in adjacent rocks would cause the oil and gas to move to a lower, or even to a higher level, owing to the pressure of the gas; but probably courts would, and should, take no account of such an extraordinary, unusual and improbable occurrence in determining the ownership of these substances in place. However this may be, it is conceded on all hands by practical operators and geologists

⁸ Wood Co. Pet. Co. v. West Virginia T., Etc. Co., 28 W. Va., 210 (1886); Dark v. Johnston, 55 Pa. 164 (1867); Westmoreland, Etc. Co. v. DeWitt, 130 Pa. 325 (1889); Ohio Oil Co. v. Indiana, 177 U. S. 190 (1900).

⁹ Dark v. Johnson, 55 Pa. 164 (1867); TIFFANY ON REAL PROPERTY, § 342; BARNUM ON WATERS, § 944; Hudson Co. Water Co. v. McCarter, 70 N. J. Eq. 635, 65 Atl. 489, (1906).

¹⁰ Gratz v. McKee, 270 Fed. 713 (1920) (C. C. A. 8th Cir.) and the many cases cited.

Those authorities show it to be an established proposition that if a trespasser on land captures or kills wild game, fish, etc., the title of the land owner is thereby perfected to them.

that oil and gas will move to an opening into the pool or stratum and through such opening—the substances being always found under pressure; and hence by drilling a well on his own land, one can get possession of oil or gas which *was under his neighbor's land*, and thereby secure *the* title to the same. When the natural pressure is not sufficient, the oil and gas can be drawn by pumps from under another's land, and thus its *situs* changed from one tract to another; also by exploding dynamite in wells, the process being known as "shooting the well."

Aside from the belief of practical operators and geologists that oil and gas will move from their location in the earth to an opening made in the containing stratum by a well, it can be mathematically demonstrated that such is the fact. The ordinary oil or gas well is begun with a hole 10 inches in diameter. As the well gets deeper smaller pipe is inserted and the well is usually finished, when it is of any considerable depth, with a four-inch pipe. The oil sand or rock is rarely more than 100 feet thick. Hence all the oil or gas which lies immediately under the four-inch pipe forming the bottom of the well, is contained in a cylinder four inches in diameter by 100 feet long. Such a cylinder contains approximately 115 gallons capacity, or about 2.74 barrels. So, if more fluid comes out of the well than 115 gallons, *some* of it necessarily comes from strata lying *adjacent* to the prolonged cylinder. Suppose a well produces 10,000 barrels of oil per day; all of this except 2.74 barrels *necessarily comes from the strata adjacent to the prolonged cylinder of the well pipe*. Now suppose the well is drilled with its center on the dividing line of two land owners. It is perfectly apparent that one-half of the oil produced comes from each tract. If the center of the well is one foot from the line, not quite half comes from each tract. So, for any distance from the dividing line that the oil or gas will move to the opening, *some part of it comes from each tract*. Let us assume that oil will flow to an opening only 400 feet. Then a well drilled 400 feet from a division line will draw no oil from the adjacent tract. But suppose a well is drilled 200 feet from the line—it is apparent that such well will draw that proportion of its total production from the adjacent tract which the area of the segment of the circle drawn around the well with a 400-foot radius which falls in the adjacent tract, is of the total area of the circle.

In the above calculation we have assumed the thickness of the oil-bearing sand or rock at 100 feet, and treated it as if all was oil. Now, it is rare that the sand is more than fifty feet thick and the degree of saturation is rarely more than 20 per cent—that is, of a

a given bulk of the oil sand only 20 per cent of such is oil. Suppose a well, four-inch diameter at the bottom, has a producing sand fifty feet thick with a saturation of twenty per cent. Suppose such a well in its lifetime produces 100,000 barrels of oil. A calculation will show that this well drains all of the oil from a circle of 374 feet in diameter, or for a distance in every direction from its center of 187 feet, or will drain an area of 2.6 acres.

These established facts are entirely sufficient to throw grave doubt on the title of the land owner to these substances while under his land. Indeed, just as much doubt as if the assumption of self-propulsion was an established fact. Therefore, the fact that the assumption of self-migration may be erroneous does not aid us in a solution of the question of the ownership of these substances while in place.

Assuming, then, a condition which is admitted to exist on all hands, and which is demonstrably true, to wit, that the oil and gas underlying A's land may be withdrawn therefrom by the drilling of a well on B's land, and that B acquires full and complete title to such oil or gas when he brings it to the surface through a well drilled on his land, the question is, what is the character of title which A had to the oil before it was withdrawn? And, if it is contended that he had full and complete ownership, how can his title be lost in harmony with recognized legal principles, without his consent and against his will?¹¹

We cannot conclude that the land owner has not title to oil and gas *in situ* because he has not such title to wild animals, or to percolating underground water, because it must be conceded that there are substantial differences between the land owner's dominion over wild animals which come at will on his land and leave when they please, and oil and gas in place, and percolating water. The title to wild animals, before capture, is in the public or state at large, subject to be vested in the land owner on capture or reduction to possession; whereas the title to oil and gas is not in the public but is, in the view of some courts, in the land owners in common whose lands cover or overlie the pool or producing rock or sand containing the oil, subject to being individualized or perfected by reduction to actual possession by each. This is the view taken by the Federal or Supreme Court both as to oil and gas and as to the

¹¹ See article by Dr. J. W. Simonton in 27 W. VA. L. QUAR. 332, for philosophical discussion of this question. Also article by Dr. W. L. Summers in 4 ILL. L. QUAR. 12.

mineral water at Saratoga Springs, New York.¹² The theory was also adopted by the New York Court of Appeals as to underlying percolating water, and one land owner was successfully enjoined from taking water from his own land by means of powerful pumps for the purpose of selling the same to a city, on the ground that the result of such operation was to prevent the rise of underground water to the surface of adjacent lands and thus render them barren.¹³ There is another difference between oil and gas in place and percolating water, and that is in the case of water the supply is replenished by surface rains, the water finding its way to the subterranean sands and thus there is more or less a continuation of the supply and not a permanent complete exhaustion by the extraction of the water. This is also true of wild animals, of course, since after some are captured others come. So far as known, this is not true of oil or gas. There is no steady, constant supply, and when the oil in the sand, rock or pool, as the case may be, is once exhausted, it will probably never be replaced. This replenishing or renewal condition, however, is not supposed to be true as to the carbonated waters at Saratoga Springs, New York, and the rule was applied there that the ownership of these waters was in all the land owners owning the surface overlying the same.¹⁴ Moreover, the fact that ordinary percolating underground waters are replenished from rains on the surface, is not of much practical importance, since the land owner can, by excavating large reservoirs on his land, stop the flow of these waters and thereby deprive the owner of adjacent land of such flow and take for himself all such waters. This it is generally held he may do, and his act as to the adjacent proprietor is *damnum absque injuria*. The differences, therefore, between the dominion of the surface owner over wild animals, percolating underground water and oil and gas, though important and considerable, do not seem to be sufficient to put oil and gas in a class entirely by themselves, and to make different rules of law applicable to the ownership of such substances from those applicable to wild animals and percolating water. Indeed, the differences between the dominion of the surface owner over wild animals which come on his land, and under-

¹² Ohio Oil Co. v. Indiana, 177 U. S. 190 (1900); Walls v. Midland Carbon Co. 254 U. S. 300, 41 Sup. Ct. 118 (1920); Lindsey v. Natural Carbonic Gas Co., 220 U. S. 61 (1911); Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504 (1909).

¹³ Forbell v. City of New York, 164 N. Y. 522, 58 N. E. 644 (1900). See also Gagnon v. French, Etc. Springs Co., 163 Ind. 687, 72 N. E. 849 (1904); Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663 (1902).

¹⁴ Lindsey v. Natural Carbonic Gas Co., note 12, *supra*.

ground percolating water, are greater than the differences between such dominion over water on the one hand and oil and gas on the other. As before stated, the title to wild animals is in the state or the public at large before capture; whereas the title to percolating underground water is never in the state or public at large. The one common attribute of all three of these classes is that *title may be acquired lawfully by a person other than the owner of the land where such substances for the time are situated or abide, by inducing or causing a movement thereof by an adjacent owner to his land.* Also the rule that the land owner has the exclusive right to take such substances, reduce them to possession and thereby acquire title while they are on his land, is applicable to all three; and any one going on the land of another and reducing any of these things to possession there, is a trespasser and he acquires no title to them; but the reduction to possession by such trespasser perfects the title in the land owner.

If A goes on to B's land and captures or kills wild animals or birds, such birds or animals belong to B. If he goes on B's land and drills a well and brings water to the surface, such water belongs to B. If he goes on B's land, drills a well and brings oil or gas to the surface, such oil or gas belongs to B; but if A entices wild animals away from B's land, in any way not constituting a trespass, on to his own land and there captures them, they belong to A. So if he excavates a reservoir on his land and thereby entraps and causes a flow of underground water from B's land to his own, it belongs to him; also if he drills an oil or gas well on his land and oil or gas which was under B's land comes up through his well, he has full title thereto. Substantially, therefore, it would appear that the rules of law governing the title as to wild animals, percolating underground water and oil and gas, should be the same, notwithstanding the different attributes of these things above pointed out.

The true and absolute test of the ownership of a thing on all sound legal principles, must be *whether the party claiming such ownership has such right or title to the thing that no one can lawfully take it from him without his consent.* If this rule is made the test, then unquestionably a land owner has no ownership of the oil and gas underlying his land. It is demonstrable, as above shown, that the land owner loses all semblance of the title to oil and gas which were under his land if they come to the surface through a well drilled by his neighbor on his land. He can not enjoin or stop the drilling of such well, no matter how evident it is that some

part of the production of that well is from oil and gas underlying his land, nor can he sustain any claim for damages for such act.¹⁵

As previously indicated, the courts seem to be in disagreement on the question of ownership of oil and gas in place, though in the opinion of the writer the weight of authority is in favor of the doctrine of non-ownership. The Federal Supreme Court is entirely committed to the doctrine, and, of course, that great tribunal has much weight in all jurisdictions.¹⁶ As might be expected, since the Supreme Court holds to this doctrine, the lower Federal Courts likewise maintain the doctrine of non-ownership.¹⁷ The doctrine of non-ownership is settled in Indiana,¹⁸ Kentucky,¹⁹ Oklahoma,²⁰ Louisiana,²¹ Illinois,²² New York²³ and Ohio.²⁴

The contrary doctrine seems to have been adopted in Tennessee at an early date, but in a case which was not given very much consideration.²⁵ In that case it appeared that A, the owner of the land, conveyed the same to B, reserving to the grantor all mines, minerals and metals in and under the land. The title came to D through deeds containing no reservation of minerals. C, at judicial sale, purchased whatever interest A had by virtue of the reservation in the original deed, and contest was between C and D as to who had the legal right in the oil and gas under the land. The court held that C had such rights, and in a brief opinion said:

“In addition it is well settled that one person may own the surface or soil and another the minerals and mines and metals, and even the water and there may be different owners for the several different strata under the earth.”

¹⁵ Even in West Virginia, where the court seems to hold to the doctrine of absolute ownership, this fact is recognized. *Coffindaffer v. Hope Natural Gas Co.*, 74 W. Va. 107, 81 S. E. 986 (1914); *South Penn Oil Co. v. Haught*, 71 W. Va. 720, 78 S. E. 759 (1913).

¹⁶ *Ohio Oil Co. v. Indiana*, 177 U. S. 190 (1900); *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 Sup. Ct. 118 (1920); *Lindsey v. Natural Carbonic Gas Co.*, 220 U. S. 61 (1911); *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 725 (1911).

¹⁷ *Priddy v. Thompson*, 123 C. C. A. 282, 204 Fed. 955 (1913); *Lindley v. Raydure*, 239 Fed. 928 (1917), affirmed in 249 Fed. 675 (1918), and cases there collected.

¹⁸ *Townsend v. State*, 147 Ind. 624, 47 N. E. 19 (1897); *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809 (1898).

¹⁹ *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71, 77 S. W. 368 (1903); *Louisville Gas Co. v. Kentucky Heating Co.*, 132 Ky. 435, 111 S. W. 374 (1908).

²⁰ *Rich v. Doneghey*, 177 Pac. 86 (1918), wherein a long list of Oklahoma cases is cited.

²¹ *Frost-Johnson Lumber Co. v. Sallings*, 150 La. 756, 91 So. 207 (1920), in which all the cases in Louisiana are reviewed, and the court states emphatically that the non-ownership doctrine is established in that State; see also *Frost-Johnson Lumber Co. v. Nabors, Etc.* 149 La. 100, 88 So. 723 (1920).

²² *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53 (1908); *Poe v. Ulery*, 233 Ill. 56, 84 N. E. 46 (1908).

²³ *Shepherd v. McCalmont Oil Co.*, 38 Hun. 37 (1885); *Hathorn v. Natural Carbonic Gas Co.*, 23 L. R. A. (NS) 437 (1909); *Wagner v. Mallory*, 169 N. Y. 509, 62 N. E. 584 (1902).

²⁴ *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N. E. 399 (1897).

²⁵ *Murray v. Allard*, 100 Tenn. 100, 43 S. W. 355 (1897).

It is apparent that it was not necessary for the court to hold that C acquired legal title to the oil and gas in place, because if C acquired whatever rights A had reserved in the original conveyance, he acquired the exclusive right to go on the land and take all of the oil and gas, whether such substances are susceptible of ownership or not. Thus, it is held distinctly in the *Louisiana Case, Frost-Johnson Lumber Co. v. Salling, supra*, that a reservation of all the oil and gas in a tract of land has the effect of reserving a *right to take such oil and gas* though it does not have the effect of reserving *any title* to any part of the land. The Tennessee court was evidently misled by the analogy of solid minerals. I have not been able to find that the question has again risen in Tennessee, but it is reasonable to suppose that in the light of later decisions this court would not hold to the bald doctrine announced in the case of *Murray v. Allard*.

Perhaps the State of Kansas can properly be ranged on the side of those states holding to the doctrine of ownership of oil and gas in place. In the case of *Moore v. Griffin*,²⁶ *Murray v. Allard* was relied upon by the court in holding that the reservation of the oil and gas reserved the title to such substances, the court using this language:

“Different estates may be created in the surface and soil of lands and the underlying strata in which minerals, oils and gas may be found; and this separation of estates may be accomplished by an exception in the deed conveying the lands by which the grantor carves out and retains the right to the minerals in the land. The right retained by the exception is the ownership of the minerals.”

Here, again, it was entirely unnecessary for the court to hold that the exception amounted to a reservation of the title to the minerals in place. Indeed, the reservation, as quoted by the court in the opinion, reserves, first, “*all of the rights, privileges and benefits secured to the grantor under an oil and gas lease*” which he had executed, in other words, reserving royalty in such a lease, and in the second place it recited, that “it is intended hereby to reserve all oil and gas *privileges* in and to said premises.” So that as a matter of fact, the reservation was not an attempt to reserve title to minerals in place, and the decision of the court that such minerals can be owned, or are owned, by the land owner, is a pure dictum. It is more than probable that upon

²⁶ *Moore v. Griffin*, 72 Kans. 164, 83 Pac. 395 (1905).

subsequent review of the precise question in both Tennessee and in Kansas the court will do as the Louisiana court has done, where the two cases, *De Moss v. Sample*,²⁷ and *Calhoun v. Ardis*,²⁸ were distinguished from prior cases holding to the doctrine of non-ownership and were held to be not in conflict with such doctrine, in the later cases of *Frost-Johnson Lumber Co. v. Nabors Oil Co.*, and *Frost-Johnson Lumber Co. v. Salling*.²⁹ The *De Moss-Sample* and *Calhoun-Ardis* Cases are almost as strong in expressions in favor of ownership by the land owner as are the expressions in the Tennessee and Kansas cases. For instance, in the former case it was said by the court:

“Oil and gas in place are minerals, and they fall under these principles. Therefore when the Samples, in the deed to De Moss, reserved the oil and gas and mineral rights, the ownership of these things remained as they had been before, vested in them. DeMoss is the owner of the surface and the Samples are the owners of the oil and gas, as separate property from the surface. It makes no difference that the oil and gas are fluent and wandering for the present question.”

Notwithstanding this declaration, the Supreme Court of Louisiana, in the subsequent case of *Frost-Johnson Lumber Co. v. Salling*, emphatically declared that the decision in the *De Moss Case* was not intended to, and did not, overrule prior cases holding that oil and gas in place were not susceptible of ownership, and did not belong to the owner of the land.

Therefore, I say that the Supreme Courts of Tennessee and Kansas can, with just as good grace, explain that they did not mean to hold to the doctrine of absolute ownership of these substances in the mentioned cases, and, therefore, join the majority in the non-ownership doctrine.

Arkansas is claimed by the advocates of the absolute ownership theory to be on their side of the controversy, and the case of *Osborne v. Arkansas Territorial Oil Co.*,³⁰ is cited in support of such claims. It must be admitted that expressions of the court in argument indicate, within the opinion of the judge who wrote the decision, such substances can be, and are, owned by the land owner. What was really decided, however, and all that was decided, was that purchases of the fee from the lessor of spe-

²⁷ 143 La. 243, 78 So. 482 (1918).

²⁸ 144 La. 311, 80 So. 548 (1918).

²⁹ Note 20, *supra*.

³⁰ 103 Ark. 175, 146 S. W. 122 (1912).

cific parts of the leased land are entitled to the royalties from wells drilled on their specific tracts. The facts were that A, the owner of a tract of land, leased it for the production of oil and gas; subsequently he sold the leased land in three separate parcels to three separate purchasers. Gas was produced from one of these parcels. The purchaser of such parcel claimed all the rental and the other purchasers claimed that the rental should be apportioned. The court held that it should not be apportioned but should all be paid to the purchaser of the specific tract. The court relies largely in its decision upon the case of *Northwestern Ohio Natural Gas Co. v. Ullery*,³¹ and yet as has been shown in the preceding part of this paper, Ohio is one of the states which holds to the doctrine of non-ownership. The doctrine of non-ownership is also thoroughly established in Oklahoma,³² and yet that court holds to the doctrine of non-apportionment of rents and royalties, just as does the Arkansas court.³³ This doctrine of non-apportionment of royalties is also upheld in Indiana,³⁴ notwithstanding, as has been shown, the non-ownership doctrine is firmly established in that State. It would, therefore, seem that the absolute-ownership doctrine is not established in Arkansas, but that the question is open in that State.

As to California, I have been unable to find any decision on the subject, one way or the other. That court has held, construing their code, that a leasehold interest in oil or gas lands is taxable; but this, it is believed, is due to the fact that their Civil Code makes and such interest in land taxable, whether it is a title or not.³⁵ It was held in this case that the lease before the court did not pass any title to the minerals in place, hence the decision that the leasehold is taxable was not a decision on the question of ownership of oil and gas in place. Likewise, in Kentucky, a leasehold is held taxable under the statutes of that State,³⁶ though the doctrine of non-ownership is established in that State. So, in Illinois, a leasehold is taxable under the statute of that State, though the doctrine of non-ownership is fully established there.³⁷

As to Pennsylvania, the question is perhaps still in doubt,

³¹ 68 Ohio St. 259, 67 N. E. 494 (1903).

³² See cases cited in note 17, *supra*.

³³ *Kimberly v. Luckey*, 179 Pac. 928 (Okla. 1919).

³⁴ *Fairbanks v. Warren*, 56 Ind. App. 337, 104 N. E. 983 (1914).

³⁵ *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 99 Pac. 483 (1909).

³⁶ *Wolfe County v. Beckett*, 127 Ky. 252, 105 S. W. 447 (1907).

³⁷ *People v. Bell*, 237 Ill. 167, 86 N. E. 593 (1908), and cases cited in note 21, *supra*.

strange to say, though the doctrine of non-ownership was approved in the earlier cases, and the now-celebrated comparison of the ownership of these substances in place with the qualified ownership of wild animals was first made by the Supreme Court of that State. Later decisions seem to indicate a reversal of the doctrine and a tendency to hold that such substances are owned by the owner of the land. In the earliest case in that State, *Dark v. Johnston*,³⁸ decided in 1867, it is said:

“But if it be conceded that by the contract there was a grant of the oil, it by no means follows from that alone that ejectment is maintainable. Oil is a fluid, like water, it is not the subject of property except while in actual occupancy. A grant of water has long been considered not to be a grant of anything for which an ejectment will lie. It is not a grant of the soil upon which the water rests, *Coke-Littleton*, 4, V. It would confound all legal notions were it held that an action can be maintained for the recovery specifically of the possession of a subterranean spring or stream of water, no matter whether the waters are mineral or not. There is a manifest difference between a grant of all the coal or ore within a tract of land, or even the grant of an exclusive right to dig, take and carry away all the coal in the tract, and a grant of the waters in or on the tract. The nature of the subject has much to do with the rights that are given over it, and to us it appears that a right to take all the oil that may be found in a tract of land, cannot be a corporeal right.”³⁹

It was in the case of *Westmoreland Gas Co. v. De Witt*,⁴⁰ that the analogy between the title to wild animals and natural gas and oil was first referred to. In this case it is said:

“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.”⁴¹

In the comparatively late case of *Kelly v. Keys*,⁴² the doctrine was reaffirmed that a grant of oil and gas in place did not convey anything for which ejectment would lie—in other words, conveyed nothing but an incorporeal hereditament and, therefore, no part of the land. It is true that the instrument before the court was a lease and not a property deed, but the court would evidently have

³⁸ 55 Pa. 164 (1867).

³⁹ See also *Thompson's Appeal*, 101 Pa. 225 (1882).

⁴⁰ Note 6, *supra*.

⁴¹ See also *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732 (1893).

⁴² 213 Pa. 296, 62 Atl. 911 (1906).

held that a deed would have had no greater effect than the instrument being construed by the court. Again, in the case of *Jones v. Forest Oil Co.*,⁴³ the court says:

“We conclude that the property of the owner of the lands in oil and gas is not absolute until it is actually within his grasp and brought to the surface.”

On the other hand, in the quite recent case of *Mandle v. Ghar-ing*,⁴⁴ where the instrument before the court contained this clause: “Excepting and reserving from the above all the oil and gas produced from said undivided one-fourth of the above tract of land,” the court held that this was an exception in the grant, and that after making the grant the grantor had the same title to the oil and gas as he would have had in the coal and other minerals had they been reserved. The court evidently did not have in mind the distinction between the fluid minerals, oil and gas, and the solid minerals, notwithstanding the same court has often referred to such distinction.⁴⁵ Again, in the case of *Barnsdall v. Bradford Gas Co.*,⁴⁶ the court apparently holds that the land owner owns all the oil and gas under his land, even though no wells have been drilled. However, all that the court really decided was that where a tract of land was leased for the purpose of allowing the tenant to produce oil and gas therefrom, such tenant had such a right or estate in *the land* as would support an action of ejectment, and this on the ground that he had a lease on the land itself for a specific purpose, and, of course, at common law ejectment will lie by a lessee to recover the possession of the leased premises. From the foregoing I think that it may be said that the question is unsettled in Pennsylvania, and that probably if the Supreme Court of that State is required to decide the precise question, it will fall in line with the Supreme Court of the United States, and the majority of the oil states, in holding to the doctrine of non-ownership.

As to West Virginia, there is the same state of confusion as in Pennsylvania. Space forbids any considerable review of the cases, but a few to show the uncertainty of decision there will be cited. In the case of *Hall v. Vernon*,⁴⁷ it is said in the opinion:

“Oil and natural gas are minerals, in the view of the law; but because of their peculiar attributes, they, as the subject of

⁴³ 44 Atl. 1074 (1900).

⁴⁴ 256 Pa. 121, 100 Atl. 535 (1917).

⁴⁵ *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732 (1893).

⁴⁶ 225 Pa. St. 338, 74 Atl. 207 (1909).

⁴⁷ 34 S. E. 764 (1899).

property, differ from other minerals . . . Out of possession, there is not property in them . . . They are not capable of distinct ownership in place, owing to their liability to escape from the place where they may be temporarily confined without necessarily any interference on the part of the owner of the soil, or others claiming through him, under whose land they may be found. Like water, they are not the subject of property, except in actual occupancy, and a grant of them passes nothing for which ejectment will lie . . . Oil and gas cannot, while in the ground, like the solid minerals, be the subject of an estate distinct from that in the soil. 'Barringer and Adams on Mines, p. 30. A grant to the oil and gas passes nothing for which ejectment will lie. It is a right, not to the oil in the ground, but to the oil the grantee may find.' *Dark v. Johnston*, 55 Pa. St. 164. So the reservation of the oil and gas is not of the oil and gas in the ground, but of the oil and gas the grantor or his assigns may find and reduce to possession, with the exclusive right to search therefor. Natural gas is incapable of being absolute property, and is the subject of qualified property only."⁴⁸

In the case of *Preston v. White*,⁴⁹ it is held that the owner of the land is the owner of the oil and gas in place, and no reference is made to the above cases. The question before the court was whether a reservation of all the oil and gas in the tract of land created a severance and reserved title in the grantor so that the oil and gas would be susceptible of conveyance separate and apart from the surface. The court held that it did. In support of the decision the court cites a number of cases relating only to solid minerals, and at the end of the opinion makes this remarkable statement: "The case of *Ohio Oil Co. v. State of Indiana* contains nothing to the reverse." If it is meant that this case contains nothing to the reverse of the doctrine of ownership of oil and gas in place, it is manifestly a mistake. If the court meant to hold that by the reservation the grantor retained practically all of the beneficial or valuable right in the oil and gas, that is, the exclusive right to reduce to possession on the land these substances, then the statement might be true. Again, in the case of *Ankrom v. Pittsburgh, etc. Gas Co.*,⁵⁰ the West Virginia court holds in line with Ohio and Arkansas and Indiana, that a purchaser of a part of the leased premises is entitled to all of the oil produced from such tract, and in the argument, in support of this conclusion, states that the

⁴⁸ In support of this the court cites the case of *Wood Co. Petroleum Co. v. West Virginia Transportation Co.*, 28 W. Va. 210, (1886); *BARRINGER & ADAMS ON MINES*, p. 78, and *Shepherd v. Oil Co.*, 38 Hun. 37 (1885).

⁴⁹ 57 W. Va. 278, 50 S. E. 236 (1906).

⁵⁰ 83 W. Va. 81, 97 S. E. 593 (1918).

owner of the land is the owner of the oil and gas under the land; but for reasons already stated, such decision might be correctly made without reference to the question of the ownership of these substances in place. As has been said in regard to the decisions in Kansas and in Arkansas, the conclusion of the court in *Preston v. White* could be upheld and be correct without the necessity of holding to the absolute ownership doctrine. The reservation in the instrument before the court was certainly of all of the right of the land owner to operate for and produce the oil and gas on the premises. This right could undoubtedly be reserved or excepted from the conveyance, and, just as was held in Louisiana in the *Ardis Case, supra*, could be exercised by the grantor or his assigns.

In Texas, prior to the decision in *Texas Company v. Dougherty*,⁵¹ it seems to have been held that oil and gas in place were not susceptible of ownership, but since the decision in that case it must be conceded that, unless and until such decision is overruled, the doctrine of absolute ownership is established in Texas.

In the case of *Bender v. Brooks*,⁵² the Supreme Court by Mr. Justice Brown, said:

“It is true that appellants, as owners of the land, had no specific title to the oil therein until it has been removed from the earth. Costigan on Mining Law, p. 474, note 18; *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317.”

He quotes from the last mentioned case as follows:

“Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes part and parcel of that tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pool or deposits. In either event, it is property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty and converts it into personalty.”

I think I might say that under the decision in this case the profession generally considered that the non-ownership doctrine was

⁵¹ 107 Tex. 226, 176 S. W. 717 (1915).

⁵² 103 Tex. 329, 127 S. W. 168 (1910).

established in Texas. It had been previously held, in *Oil Company v. Teel*,⁵³ that an instrument which purported to transfer oil and gas in place did not have that effect, but no reason was given for it except that the instrument before the court was only an option.

The Courts of Civil Appeals in Texas had held almost uniformly that title did not pass to the minerals in place although apt words of conveyance were used in such instruments.⁵⁴

Of course, since the decision in the *Texas Company v. Daugherty Case* the courts of Civil Appeals in this State have felt themselves bound to follow such decision.⁵⁵

It is true that the Courts of Civil Appeals have shown some reluctance in following the doctrine of absolute ownership, and have seized on what appear to be very slight differences in the instrument under construction, to decide that the title in the given case did not pass. For instance, in *Pierce-Fordyce Co. v. Woodrum*,⁵⁶ the words, "grant, bargain and sell" were followed by the two words, "and lease," and it was held that the addition of these two words prevented the title in the minerals from passing. In *McLaughlin v. Brock*,⁵⁷ it was held that an instrument using the words, "granted, conveyed, demised, leased and let," was simply a lease and not a deed. In *Marnett Oil Co. v. Munsey*,⁵⁸ it was held that, notwithstanding the instrument purported to convey the oil and gas in place for a valuable consideration and contained the recital that it was not a franchise but a grant, just as in the *Daugherty Case*, but also contained a provision that if the grantee did not drill wells, the grantor should have the right to do so, the court held that this was a lease and not a sale of the minerals. So, in *Leonard v. Caruthers*,⁵⁹ it was held no title passed to the minerals though apt words of conveyance were used and a large cash consideration paid. In the case of *Corsicana Petroleum Co. v. Owens*,⁶⁰ the Supreme Court had under consideration a contract almost exactly like that considered in the *Daugherty Case*, nevertheless the court considered the instrument as a lease, not a deed, and held that

⁵³ 95 Tex. 586, 67 S. W. 545 (1902).

⁵⁴ *Forney v. Ward*, 25 Tex. Civ. App. 443, 62 S. W. 108 (1901); *Hodges v. Brice*, 32 Tex. Civ. App. 353, 74 S. W. 590 (1903); *O'Neil v. Sun Co.* 58 Tex. Civ. App. 167, 123 S. W. 172 (1909); *Witherspoon v. Staley*, 138 S. W. 1191 (Tex. 1911); *Witherspoon v. Staley*, 156 S. W. 557 (Tex. 1913).

⁵⁵ *McIntire v. Thompson*, 210 S. W. 563 (Tex. 1919); *Thomason v. Upshur Co.*, 211 S. W. 325 (Tex. 1919); *Jackson v. Pure Oil Co.*, 217 S. W. 959 (Tex. 1919); *Davis v. Texas Co.*, 232 S. W. 549 (Tex. 1921).

⁵⁶ 188 S. W. 245 (Tex. 1916).

⁵⁷ 225 S. W. 575 (Tex. 1920).

⁵⁸ 232 S. W. 867 (Tex. 1921).

⁵⁹ 236 S. W. 194 (Tex. 1921).

⁶⁰ 110 Tex. 568, 222 S. W. 154 (1920).

the right of the lessee could be lost by abandonment, which, of course, could not be if the legal title to the minerals had passed. Notwithstanding the opinion in this case was rendered by Chief Justice Phillips, who wrote the opinion in the *Daugherty Case*, no reference is made to the *Daugherty Case*.

With all due respect, it is submitted that the decision in the *Daugherty Case* is contrary to the overwhelming weight of authority, and is unsound in principle and will be finally overruled, that is, will be overruled in so far as such decision holds that oil and gas in place are susceptible of grant or conveyance separate and apart from the land.

I believe that the preceding discussion of the authorities demonstrates that the weight of authority, not only numerically but considering the dignity of the courts, is against the doctrine of ownership. Practically all the text writers are in accord on this proposition.⁶¹

In the *Daugherty Case*, Mr. Justice Phillips, after stating that, if the effect of the instrument was but the creation of a franchise or privilege to devote the land to a certain use and to appropriate a portion of the oil and gas which might be discovered, it would not pass title to the minerals in place, and the owner of such privilege would have no such interest in the land as would be subject to taxation under the laws of Texas, makes this observation:

“We accordingly turn to an examination of the instruments for the purpose of determining their legal effect. It will be observed that they constitute no mere demise of the premises for a given period, as in the case of an ordinary leasehold. Nor do they amount simply to a grant of the right to prospect upon the land for oil or gas and reduce those substances to possession and ownership. They deal with the oil, gas and other minerals, ‘in and under’ the land as property, in the ground, capable of ownership and subject to be conveyed, for, as such, in unmistakable terms they are ‘granted, sold and conveyed’ to the grantee for a stated consideration acknowledged to have been paid, valuable in itself and independent of the royalties stipulated as payable to the grantor in the event of the discovery of such minerals, or any obligation imposed upon the grantee to explore for them. [It may be here remarked that the statement that the instrument was granted on consideration independent of the royalties, is a mistake of fact; the instrument really distinctly provided that the royalties to be paid were a part of the consideration for the whole instrument.] . . . The rights of the grantee

⁶¹ COSTIGAN ON MINING LAW, p. 474; TIFFANY ON REAL PROPERTY, (2nd ed.) Vol. 1, p. 872; THORNTON ON OIL AND GAS, p. 1102; also §§ 20 and 22 p. 34.

are made subject to forfeiture if operations for the drilling of a well for oil or gas are not begun within one year from the delivery of the instrument, or if the payment of the amount provided in lieu of such commencement is not made; but the sinking of a well or shaft and the discovery of any of the minerals named, within the period of one year or the extension thereof provided for, in each instance renders the instrument effective for twenty years and as much longer as such minerals shall be produced in paying quantities. This constituted the entire grant as one capable of indefinite duration. . . . The grant amounted to a defeasible title in fee to the oil and gas in the ground, if oil and gas in place are capable of ownership and conveyance."

The court then, by way of argument and reasons for holding that such substances are capable of conveyance, states, first, that "they are minerals;" that "they lie within the strata of the earth and necessarily are a part of the realty;" that "being a part of the realty while in place it would seem to logically follow that whenever they are conveyed while in that condition or possessing that status, a conveyance of an interest in the realty results." The court then states:

"It is generally conceded that for the purpose of ownership and conveyance of solid minerals the earth may be divided horizontally as well as vertically, and that title to the surface may rest in one person and title to the strata beneath the surface containing such minerals in another."

Then says:

"Because of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession and analogizing their ownership to that of things *ferae naturae*, have made a distinction between their conveyance while in place and that of other minerals, holding that it created no interest in the realty. But it is difficult to perceive a substantial ground for the distinction. A purchaser of them within the ground assumes the hazard of their absence through the possibility of their escape from beneath that particular tract of land, and, of course, if they are not discovered the conveyance is of no effect; just as the purchaser of solid minerals within the ground incurs the risk of its absence and therefore a futile venture. But let it be supposed that they have not escaped, and are in repose within the strata beneath the particular tract and capable of possession by appropriation from it. There they clearly constitute a part of the realty. Is the possibility of their escape to render them while in place incapable of conveyance, or is their ownership while in that condition, with the exclusive right to take them

from the land, anything less than ownership of an interest in the land? Conceding that they are fluent in their nature and may depart from the land before brought into absolute possession, will it be denied that so long as they have not departed they are a part of the land? Or when conveyed in their natural state and they are in fact beneath the particular tract, that their grant amounts to an interest in the land.”

The above quotation fairly represents the entire argument of the court in this case. It will be noted that in comparing these substances to solid minerals the court says “the purchaser of them within the ground assumes the hazard of their absence through the possibility of their escape, just as the purchaser of solid mineral within the ground incurs the risk of its absence and, therefore, a futile venture.” Herein lies the vice of the whole argument. While it is true that the purchaser of solid minerals assumes the risk of whether there are any such under the land, he does not assume the risk of their departing from the land after he has purchased, and this without his will or consent. The purchaser of solid minerals under a tract of land gets absolute title, which cannot be lawfully taken away from him by any means whatsoever, to such minerals as are under the land at the time of conveyance. On the other hand, the purchaser of oil and gas *in situ* may take nothing, notwithstanding at the time of the conveyance there were rich deposits of these substances under the land. If he should buy the minerals under a narrow strip of land in a proven oil field, with numerous wells drilled thereafter adjacent to the strip, and should drill no wells on the strip, he would find that all claim of title which he had secured to the minerals under the strip was lost to him by the oil being brought to the surface through wells on adjacent lands. Therefore, what he gets in the conveyance of solid minerals is vastly different from what he gets in a purported conveyance of these fluid minerals. Again, the fact that these substances are minerals and that while in a tract of land they form a part of the bulk of the land, proves nothing in regard to this question of ownership or their capability of conveyance. Under the authorities percolating water is a mineral; it is in the land and forms a part of its bulk while there, and yet there is no respectable authority which holds that running water is susceptible of conveyance. All legal ideas or concepts of the transfer of a piece of property by sale are based in the idea that the property exists at the time and can be identified and delivered. Moving oil and gas cannot be identified, nor can the specific oil and gas which are

under a tract of land at a given moment be delivered. If one secures the right to produce oil and gas from a tract of land, he secures the right to produce and own, after reduction to possession, not only the oil and gas in the land at the time of the conveyance, but such as may come therein after the conveyance, which comes in from other tracts of land in which the grantor had no interest.

It may be true that the instrument under consideration in the *Texas Company-Daugherty Case* passed an interest in land, and it may have passed a higher or a different interest from that which passes by the ordinary agricultural or urban lease. The fact is, if we must give the character of estate which passed by the instrument a name, taken from the common law nomenclature, we must class it as the estate well known at common law as *profit a prendre*. This was the right to take and abstract the minerals from land without impeachment for waste; it was a species of lease, but a lease without impeachment for waste. This was an estate well known and recognized at common law, but nobody ever supposed that the title to even solid minerals in place passed to the owner of the profit by the execution of this character of instrument.⁶²

The authorities which the court cites in support of its conclusion are meagre and inconclusive, and in part do not sustain the statements in the opinion. In referring to the case of *Ohio Oil Co. v. Indiana*,⁶³ the court states, "It was pointed out in that case that the analogy between deposits of oil and gas and things *ferae naturae* is, at best, a limited one." This is true, but the court goes on to state that "the difference between them is that things *ferae naturae* are public property and all have an equal right to reduce them to possession and ownership, while the right to the oil and gas beneath his land is an exclusive and private property right in the land owner, inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property." Now, in the first place, no one has the right to go on my land and take wild animals, and if he does so as a trespasser such animals belong to me, the owner of the land. In the second place, as has been shown, the owner of the land may be deprived of the oil and gas underlying the same by wells drilled on adjoining tracts, and thus he may be deprived of what the court assumes to have been his private property. The court then quotes from Thornton on Oil and Gas, Section 19. As has been shown herein this author, in an addendum to his first work, has

⁶² TIFFANY, REAL PROPERTY, (2nd ed.) Vol 2, p. 1388, and authorities collected.
⁶³ Note 15, *supra*.

stated the doctrine of non-ownership as being established. The court also quotes from Gould on Water, wherein it is distinctly stated: "Like water, it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejection will lie; the same is true of natural gas."

The case of *Stoughton's Appeal*,⁶⁴ referred to in preceding portions of this paper shows the confusion on this question which existed in the Pennsylvania Supreme Court, and much later cases than *Stoughton's Appeal*, referred to herein, seem to overrule that decision. The same may be said of *Blakely v. Marshall*,⁶⁵ and the quotation is evidently not the meat of the decision in that case, because the question there was whether a life tenant had the right to lease the land. There is also a quotation from *Heller v. Dailey*.⁶⁶ The quotation itself shows that the Indiana court holds to the doctrine of non-ownership. The early cases from West Virginia are quoted, but these cases really hold that a guardian has not the authority to make an oil lease on land without an order of the court, and these cases have been really overruled, in so far as any expressions tending to show that such a lease was a sale of the minerals in place, by *Harvey Coal and Coke Co. v. Dillon*.⁶⁷ Then cases in Illinois are referred to; and if the doctrine of non-ownership is anywhere settled, it is in that State.

On the whole, as before stated, it is respectfully submitted that the decision in this case of *Texas Co. v. Daugherty* is unsound.

Doubtless the loose decisions in many jurisdictions on this question proceed from the fact that the court considered that by an attempted transfer or conveyance of the minerals the grantee got all that he would get whether the instrument is deemed a conveyance or as a transfer of the right to enter on the land and produce the minerals, and that, therefore, the question was not very material. The establishing of the doctrine of absolute ownership is fraught with many consequences and will lead to many complications. For instance, it is universally held that if the owner of land grants the solid minerals therein, that his constructive possession as to such minerals ceases and, therefore, limitation ceases to run in his favor, and if his title had not matured at the time of the severance or conveyance, then the owner of the paramount title

⁶⁴ 88 Pa. St. 198 (1878).

⁶⁵ 174 Pa. 425, 34 Atl. 564 (1896).

⁶⁶ 28 Ind. App. 555, 63 N. E. 490 (1902).

⁶⁷ 59 W. Va. 605, 53 S. E. 928 (1905).

could recover the minerals from him, although the right to recover the land itself is barred.

Again, in a case, such as was presented to the court in *Texas Company v. Daugherty*, called there a defeasible fee estate, or an estate upon condition, if, after making such a conveyance, the land is levied upon on execution and sold, the purchaser would get no title to the minerals, and then if the supposed estate of the grantee was lost by failure to perform a condition subsequent, this title would revert to and be in the original grantor and not in the purchaser at execution sale. The same would be true in case of a sale by a guardian or by an administrator, or under a deed without warranty made by the land owner after the execution of the purported deed to the minerals.

Other complications in land titles will occur to others. It is, therefore, of great importance that this question should be settled, and settled rightly.

The court in the *Daugherty-Texas Company Case* recognizes the fugacious character of oil and gas, and recognizes the fact that although oil and gas may be in or under a tract of land at the time of the purported conveyance, they may leave such land and go into other tracts of land before they are reduced to possession by the purported grantee, and that by this migration, as it were, the title of the land owner or grantee of the minerals is lost against his will and consent. This being so, the asserted claim of ownership will not bear examination, because there cannot be such a thing as unqualified ownership in property if the title thereto can be lost against the purported owner's consent, especially by the act of another. The supreme test of ownership or full title is whether a claimant has such right to the thing as that it cannot be taken from him lawfully without his consent. If A had the undisputed right to capture and kill cattle while on his land, but had no right or power to prevent such cattle from going away from his land, and that on going from his land all his title to the cattle was lost, no one could say that he was the absolute owner of such cattle. And yet, this is exactly the relation that the land owner has to oil and gas underlying his land.

I think I cannot better conclude this paper than by quoting from an article written by Professor James W. Simonton, in the *West Virginia Law Quarterly*, for June, 1921.

"In conclusion, it is submitted that on principle the land-owner ought to be held to have no property in substance 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 to see how there could 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."