DePaul Law Review

Volume 12
Issue 1 *Fall-Winter 1962*

Article 20

Oil and Gas - Mines and Minerals - Title to Gas Stored in Natural Underground Reservoirs - Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (1962)

DePaul College of Law

which he felt the legislature never intended them to apply. Second, he held that to allow an insured to make false statements at the trial level and still collect on the policy would promote an undesirable state of affairs whereby an insured could resort to all types of false swearing to collect on his policy. However, although his first argument is correct as applied to the court's method of interpreting public policy, as it has been pointed out, the court need not have relied on the statutes nor public policy to reach its decision. His second argument may be morally sound, in view of the actions of the plaintiff, but the courts have consistently held that since the insurance company suffers no loss, either by an increase of its risk or by the loss of a defense as a result of the insured's false statements at the trial level, it should not be allowed to use such false statements as a defense.

In conclusion, fraudulant or false swearing will cancel an insurance policy, within the meaning of its forfeiture clause, (a) where it occurs in the application for the policy and thereby increases the insurer's risk or (b) where it occurs in the proof of loss thereby inducing the insurer to make payment on a fraudulant claim; but it will not cancel the policy where its only occurrence is after the suit has been instituted. The insurance company must have a valid defense for refusing to make payment on its policy at the time it makes such a refusal, and it cannot wait until the trial to acquire such a defense.

OIL AND GAS–MINES AND MINERALS–TITLE TO GAS STORED IN NATURAL UNDERGROUND RESERVOIRS

Plaintiff, a public utility engaged in the business of transporting and distributing natural gas to the public, maintained an underground storage reservoir to meet the seasonal demands for gas. The reservoir consisted of an exhausted gas field to which plaintiff held mineral rights except for a small tract owned by defendants located in the southwest part of the reservoir. After plaintiff commenced storing gas in the reservoir, defendants drilled a well on their tract and removed some of the stored gas. Plaintiff brought an action for conversion and unjust enrichment. The trial court held that plaintiff's petition did not state a cause of action because, by analogy to the doctrine of animals *ferae naturae*, plaintiff lost title to the gas by returning it to its natural state.[1] On appeal, the Texas Court of Civil Appeals reversed and remanded, holding that title

[1] Defendants also attacked the jurisdiction of the trial court in their pleadings and briefs claiming the present action was a collateral attack on a certain order of the Railroad Commission of Texas authorizing the construction of defendants' well. The claim was disposed of by stating this was a common law action to determine title, and thus the Railroad Commission had no jurisdiction to decide such a question.

to natural gas injected into a natural reservoir is not lost in the absence of an intent to abandon. *Lone Star Gas Co. v. Murchison*, 353 S.W. 2d 870 (1962).[2]

In holding that title to natural gas injected into an underground reservoir is retained by the injector, the court rejected prior decisions[3] and resolved this question in accordance with current statutory law in at least three states[4] and the views of most legal writers.[5] Because of a lack of scientific knowledge, early cases looked to other areas of law and found an analogy in the law relating to animals *ferae naturae*.[6] The first case to apply the doctrine of animals *ferae naturae* to natural gas was *Westmoreland & Cambria Nat. Gas Co. v. DeWitt*,[7] decided in 1889, wherein the court stated "[w]ater and oil, and still more strongly gas, may be classified . . . as minerals *ferae naturae* . . . they have the power and tendency to escape without the volition of the owner."[8] It is now recognized that this analogy is contrary to scientific fact for gas and oil are securely entrapped in a static condition in the original pool,[9] and the injector of gas into such a pool retains the ability to reduce it to his possession by extraction through a well.

Under the animals *ferae naturae* doctrine, a wild animal becomes the property of an individual only when removed from its natural liberty and made subject to man's dominion.[10] If it escapes from custody anyone has an equal right to capture it, unless the animal has *animus revertendi*, *i.e.*, the intention of returning, in which case a temporary departure from control does not terminate property rights.[11] It is thus the ability to retain control over a wild animal that determines ownership.

Nearly all courts hold that the land owner has the right to extract gas in its natural state through wells located on his land even though the gas

[2] *Writ of error refused no reversible error.* Under Texas practice this notation indicates the Supreme Court of Texas was of the opinion the Court of Civil Appeals entered the proper judgment but did not agree in all respects with the reasons given therefor. VERNON'S TEXAS STAT. 1948, RULES OF CIVIL PROCEDURE, Rule 483.

[3] Central Kentucky Natural Gas Co. v. Smallwood, 252 S.W. 2d 866 (Ky. App. 1952); Hammonds v. Central Kentucky Natural Gas Co., 255 Ky. 685, 75 S.W. 2d 204 (1934).

[4] COLO. REV. STAT. ANN. ch. 100, § 100-9-7 (1953); MO. ANN. STAT. tit. 25, § 393-500 (Vernon Supp. 1960); OKLA. STAT. ANN. tit. 52, § 36.6 (Supp. 1960).

[5] See *e.g.*, 1 SUMMERS, OIL AND GAS 167 (perm. ed. 1954); Comments 16 TEXAS L. REV. 370 (1938); 21 U. KAN. CITY L. REV. 217 (1954); 36 VA. L. REV. 947 (1950).

[6] See 1 SUMMERS, OIL AND GAS 167 (perm. ed. 1954).

[7] 130 Pa. 235, 18 Atl. 724 (1889).

[8] *Id.* at 249, 18 Atl. 725.

[9] Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W. 2d 558, 4 A.L.R. 2d 191 (1948). See also Comment in 16 TEXAS L. REV. 370 (1938).

[10] 4 AM. JUR. 2d, *Animals* § 14 (1962).

[11] *Id.* § 19.

may be drawn from adjoining property.[12] Once gas is thus reduced to possession by capture, it becomes the personal property of the person so capturing it.[13] If gas is then injected into a natural underground reservoir, it is still under the control of the person injecting it,[14] and thus should retain its character as the personal property of the injector, even though the reservoir may be partially located under another's land.

The only prior cases in which a court of review has decided the issue of title to gas injected into an exhausted gas field for storage purposes are *Hammonds v. Central Kentucky Natural Gas Co.*[15] and *Central Kentucky Natural Gas Co. v. Smallwood.*[16] Both of these were decided by the Court of Appeals of Kentucky. In the *Hammonds* case, defendant stored gas in an underground reservoir which was partially located under a small tract owned by plaintiff who claimed the storage of gas in the reservoir amounted to a trespass on her property.[17] The court denied plaintiff's right to recover stating "[i]f one captures a fox in the forest and turn it loose in another . . . had he not done with that migratory, common property just what the appellee has done with the gas in this case?"[18] The *Central Kentucky Natural Gas Co. v. Smallwood* case involved a determination of who was entitled to rents and royalties as between the surface owner and owner of the mineral rights, under leases providing for underground storage of gas. The right to rents and royalties depended upon ownership of the gas. The court, stating there was no distinction in the title to gas once recovered and released for subterranean storage, and native gas before its initial recovery, held that the owner of the mineral rights was entitled to the rents and royalties.

The only other reported decision on the issue is *White v. New York State Natural Gas Corp.*,[19] decided by a United States District Court in 1960, which is the first known decision to reject the *Hammonds* doctrine. In the *White* case plaintiff held mineral rights with defendant in a nearly

[12] 24 AM. JUR. *Gas and Oil* § 6 (1939). [13] *Id.* § 3.

[14] Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W. 2d 558, 4 A.L.R. 2d 191 (1948).

[15] 255 Ky. 685, 75 S.W. 2d 204 (1934). The *Hammonds* case was cited with approval in West Edmond Salt Water Dist. Ass'n v. Rosecrans, 204 Okla. 9, 226 P. 2d 965 (1951) where in disposing of salt water defendants forced some under plaintiff's land. No actual damages were shown and the court held defendants were not liable.

[16] 252 S.W. 2d 866 (Ky. App. 1952).

[17] In the *Lone Star* case the question of trespass was not raised in the trial court, and thus the Court of Civil Appeals refused to consider the issue. For a general discussion see Stamm, *Legal Problems in the Underground Storage of Natural Gas*, 36 TEXAS L. REV. 161 (1957).

[18] Hammonds v. Central Kentucky Natural Gas Co., 255 Ky. 685, 689, 75 S.W. 2d 204, 206 (1934).

[19] 190 F. Supp. 342 (W.D. Pa. 1960).

exhausted gas field. Defendant also held rights in an adjoining field, and when it commenced storing gas therein, the pressure in the first field greatly increased making it evident for the first time that the two fields were in fact connected. Defendant then restricted production of gas from the field in which plaintiff held rights, and plaintiff brought this suit for an accounting and injunction restraining artificial restriction of the production of gas from the first field. The court rejected the analogy to animals *ferae naturae* and held title to natural gas is not lost by the injection of such gas into a natural underground reservoir for storage purposes.

The interest of the public in the maintenance of such reservoirs is evidenced by statutes in eleven states providing for condemnation of exhausted gas fields by natural gas utilities,[20] in addition to the statutes in three states rejecting the *Hammonds* doctrine.[21] These laws enable a natural gas public utility to better provide for the seasonal demands for its product by storing reserve gas during the warm months.

The decision in the principal case indicates a definite trend from the *Hammonds* doctrine when considered with the statutes rejecting the doctrine and the decision in the *White* case. The trend appears sound from the viewpoint of public policy and scientific knowledge. The analogy to the "fanciful fox" has been discarded, and a rule based on sound principles of property law has been supplied in its place. The result indicates a sound re-evaluation of this field of law.

[20] COLO. REV. STAT. ANN. ch. 100, §§ 100-9-1–100-9-7 (1953); ILL. REV. STAT. ch. 104, §§ 104-112 (1961); KAN. GEN. STAT. ANN. ch. 55, §§ 55-120100055-1206 (Supp. 1959); KY. REV. STAT. ch. 278, § 278.501 (1955); MICH. STAT. ANN. ch. 230, § 22.1672 (Supp. 1959); MO. REV. STAT. ch. 393, §§ 393.410–393.510 (1959); MONT. REV. CODES ANN. tit. 60, §§ 60-801–60-805 (Supp. 1957); NEB. REV. STAT. ch. 57, §§ 57.601–57.607 (Cum. Supp. 1959); OKLA. STAT. ANN. tit. 52, §§ 36.1–36.7 (Supp. 1960); PA. STAT. tit. 52 § 2401 (Supp. 1960); W. VA. CODE ANN. ch. 54, § 5362 (2) (c) (1961).

[21] *Supra* note 4.

SALES–BREACH OF IMPLIED WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE § 2-318

Plaintiff was employed as a truck driver by the Keal Driveaway Company. While he was delivering a new truck which had been manufactured by the defendant, the brakes on the truck suddenly locked causing it to overturn, resulting in injuries to the plaintiff. An action was brought for personal injuries based on negligence and implied warranty. The trial court dismissed the action upon plaintiff's failure to plead further after the court had sustained a motion requiring the plaintiff to allege facts in his second cause of action (breach of implied warranty) showing privity of contract between plaintiff and defendant. On appeal the Court of Ap-