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Supreme Court of Texas.
ELLIFF et al.
v.
TEXON DRILLING CO. et al.
No. A-1401.

March 3, 1948.
Rehearing Denied May 12, 1948.

Error to the Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by Mrs. Mabel Elliff, Frank Elliff, and Charles C. Elliff against the Texon Drilling Company, a Texas corporation, and others for damages resulting to plaintiffs' land from a 'blowout' of a gas well. To review a judgment of the Court of Civil Appeals, 210 S.W.2d 553, reversing the trial court's judgment for plaintiffs, plaintiffs bring error.

Reversed and remanded to Cout of Civil Appeals.

***576 **559** Boone, Boone & Davis, Kemp, Lewright, Dyer, Wilson & Sorrell, and J. M. Wilson, all of Corpus Christi, for petitioners.

Tarlton, Koch & Hale and McCampbell, Wood & Kirkham, all of Corpus Christi, for respondents.

FOLLEY, Justice.

This is a suit by the petitioners, Mrs. Mabel Elliff, Frank Elliff, and Charles C. Elliff, against the respondents, Texon Drilling Company, a Texas corporation, Texon Royalty Company, a Texas corporation, Texon Royalty Company, a Delaware corporation, and John L. Sullivan, for damages resulting from a 'blowout' gas well drilled by respondents in the Agua Dulce Field in Nueces County.

The petitioners owned the surface and certain royalty interests in 3054.9 acres of land in Nueces County, upon which there was a producing well known as Elliff No. 1. They owned all the mineral estate underlying the west 1500 acres of the tract, and an undivided one-half interest in the mineral estate underlying the east 1554.9 acres. Both tracts were subject to oil and gas leases, and therefore their royalty interest in the west 1500 acres was one-eighth of the oil or gas, and in the east 1554.9 acres was one-sixteenth of the oil and gas.

It was alleged that these lands overlaid approximately fifty per cent of a huge reservoir of gas and distillate and that the remainder of the reservoir was under the lands owned by Mrs. Clara Driscoll, adjoining the lands of petitioners on the east. Prior to November 1936, respondents were engaged in the drilling of Driscoll-Sevier No. 2 as an offset well at a location 466 feet east of petitioners' east line. On the date stated, when respondents had reached a depth of approximately 6838 feet, the well blew out, caught fire and cratered. Attempts to control it were unsuccessful, and huge quantities of gas, distillate and some oil were blown into the air, dissipating large quantities from the reservoir into which the offset well was drilled. When the Driscoll-Sevier No. 2 well blew out, the fissure or opening in the ground around the well gradually increased until it enveloped and destroyed Elliff No. 1. The latter well also blew out, cratered, caught fire and burned for several years. Two water wells on petitioners' land became involved in the cratering and each of them blew out. Certain damages also resulted to the surface of petitioners' lands and to their cattle thereon. The cratering process and the eruption continued until large quantities of gas and distillate were drained from under petitioners' land and escaped into the air, all of which was alleged to be the direct and proximate result of the negligence of respondents ***578** in permitting their well to blow out. The extent of the emissions from the Driscoll-Sevier No. 2 and Elliff No. 1, and the two water wells on petitioners' lands, was shown at various times during the several years between the blowout in November 1936, and the time of the trial in June 1946. There was also expert testimony from petroleum engineers showing the extent of the losses from the underground reservior, which computations extended from the date of the blowout only up to June 1938. It was indicated that it was not feasible to calculate the losses subsequent thereto, although lesser emissions of gas continued even up to the time of the trial. All the evidence with reference to the

damages included all losses from the reservoir beneath petitioners' land without regard to whether they were wasted and dissipated from above the Driscoll land or from petitioners' land.

The jury found that respondents were negligent in failing to use drilling mud of ****560** sufficient weight in drilling their well, and that such negligence was the proximate cause of the well blowing out.[…]

On the findings of the jury the trial court rendered judgment for petitioners for $154,518.19, which included $148,548.19 for the gas and distillate, and $5970 for damages to the land and cattle. The Court of Civil Appeals reversed the judgment and remanded the cause. 210 S.W.2d 553.

The reversal by the Court of Civil Appeals rests [on the ground] that since substantially all of the gas and distillate which was drained from under petitioners' lands was lost through respondents' blowout well, petitioners could not recover because under the law of capture they had lost all property rights in the gas or distillate which had migrated from their lands.[…]

[T]he sole question [is] whether the law of capture absolves respondents of any liability for the negligent waste or destruction of petitioners' gas and distillate, though substantially all of such waste or destruction occurred after the minerals had been drained from beneath petitioners' lands.

We do not regard as authoritative the three decisions by the Supreme Court of Louisiana to the effect that an adjoining owner is without right of action for gas wasted from the common pool by his neighbor, because in that state only qualified***580** ownership of oil and gas is recognized, no absolute ownership of minerals in place ****561** exists, and the unqualified rule is that under the law of capture the minerals belong exclusively to the one that produces them. Louisiana Gas & Fuel Co. v. White Bros., 157 La. 728, 103 So. 23; McCoy v. Arkansas Naturals Gas Co., 175 La. 487, 143 So. 383, 85 A.L.R. 1147, certiorari denied 287 U.S. 661, 53 S.Ct. 220, 77 L.Ed. 570; McCoy v. Arkansas Natural Gas Co., 184 La. 101, 165 So. 632. Moreover, from an examination of those cases it will be seen that the decisions rested in part on the theory that 'the loss complained of was, manifestly, more a matter of uncertainty and speculation than of fact or estimate.' In the more recent trend of the decisions of our state, with the growth and development of scientific knowledge of oil and gas, it is now recognized 'that when all oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions.' Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, 940, 87 S.W.2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393.

[2][3] In Texas, and in other jurisdictions, a different rules exists as to ownership. In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. Lemar v. Garner, 121 Tex. 502, 50 S.W.2d 769; Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296, 29 A.L.R. 607; Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27; Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, L.R.A. 1917F, 989. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. Brown v. Humble Oil & Refining Co., supra. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value. Peterson v. Grayce Oil Co., Tex.Civ.App., 37 S.W.2d 367, affirmed 128 Tex. 550, 98 S.W.2d 781; Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., Tex.Com.App., 298 S.W. 554; Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 109 S.W. 328; Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368, 70 L.R.A. 558, 111 Am.St.Rep. 225; Id., 132 Ky. 435, 111 S.W. 374; Ross v. Damm, 278 Mich. 388, 270 N.W. 722; 31A Tex.Jur. 911, Sec. 530; Id. 924, Sec. 537; 24 Am.Jur. 641, Sec. 159.

[4] ***581** The conflict in the decisions of the various states with reference to the character of ownership is traceable to some extent to the divergent views entertained by the courts, particularly in the earlier cases, as to the nature and migratory character of oil and gas in the soil. 31A Tex.Jur. 24, Sec. 5. In the absence of common law precedent, and owing to the lack of scientific information as to the movement of these minerals, some of the courts have sought by analogy to

compare oil and gas to other types of property such as wild animals, birds, subterranean waters and other migratory things, with reference to which the common law had established rules denying any character of ownership prior to capture. However, as was said by Professor A. W. Walker, Jr., of the School of Law of the University of Texas: 'There is no oil or gas producing state today which follows the wild-animal analogy to its logical conclusion that the landowner has no property interest in the oil and gas in place.' 16 T.L.R. 370, 371. In the light of modern scientific knowledge these early analogies have been disproven, and courts generally have come to recognize that oil and gas, as commonly found in underground reservoirs, are securely entrapped in a static condition in the original pool, and, ordinarily, so remain until disturbed by penetrations from the surface. It is further established, nevertheless, that these minerals will migrate across property lines towards any low pressure area created by production from the common pool. This migratory character of oil and gas has given rise to the so-called rule or law of capture. That rule simply is that the owner of a tract of land acquires title to the oil ****562** or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage. The non-liability is based upon the theory that after the drainage the title or property interest of the former owner is gone. This rule, at first blush, would seem to conflict with the view of absolute ownership of the minerals in place, but it was otherwise decided in the early case of Stephens County v. Mid-Kansas Oil & Gas Co., 1923, 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566. Mr. Justice Greenwood there stated, 113 Tex. 167, 254 S.W. 292, 29 A.L.R. 566:

'The objection lacks substantial foundation that gas or oil in a certain tract of land cannot be owned in place, because subject to appropriation, without the consent of the owner of the tract, through drainage from wells on adjacent lands. If the owners of adjacent lands have the right to appropriate, ***582** without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own.'

Thus it is seen that, notwithstanding the fact that oil and gas beneath the surface are subject both to capture and administrative regulation, the fundamental rule of absolute ownership of the minerals in place is not affected in our state. In recognition of such ownership, our courts, in decisions involving well-spacing regulations of our Railroad Commission, have frequently announced the sound view that each landowner should be afforded the opportunity to produce his fair share of the recoverable oil and gas beneath his land, which is but another way of recognizing the existence of correlative rights between the various landowners over a common reservoir of oil or gas.

[5][6] It must be conceded that under the law of capture there is no liability for reasonable and legitimate drainage from the common pool. The landowner is privileged to sink as many wells as he desires upon his tract of land and extract therefrom and appropriate all the oil and gas that he may produce, so long as he operates within the spirit and purpose of conservation statutes and orders of the Railroad Commission. These laws and regulations are designed to afford each owner a reasonable opportunity to produce his proportionate part of the oil and gas from the entire pool and to prevent operating practices injurious to the common reservoir. In this manner, if all operators exercise the same degree of skill and diligence, each owner will recover in most instances his fair share of the oil and gas. This reasonable opportunity to produce his fair share of the oil and gas is the landowner's common law right under our theory of absolute ownership of the minerals in place. But from the very nature of this theory the right of each land holder is qalified, and is limited to legitimate operations. Each owner whose land overlies the basin has a like interest, and each must of necessity exercise his right with some regard to the rights of others. No owner should be permitted to carry on his operations in reckless or lawless irresponsibility, but must submit to such limitations as are necessary to enable each to get his own. Hague v. Wheeler, 157 Pa. 324, 27 A. 714, 717, 22 L.R.A. 141, 37 Am.St.Rep. 736.

[7] While we are cognizant of the fact that there is a certain amount of reasonable and necessary waste incident to the production of oil and gas to which the non-liability rule must also ***583** apply, we do not think this immunity should be extended so as to in-

clude the negligent waste or destruction of the oil and gas.[…]

In 85 A.L.R. 1156, in discussing the case of Hague v. Wheeler, supra, the annotator states:

'The fact that the owner of the land has a right to take and to use gas and oil, even to the diminution or exhaustion of the supply under his neighbor's land, does not give him the right to waste the gas. His property in the gas underlying his land consists of the right to appropriate the same, and permitting the gas to escape into the air is not an appropriation thereof in the proper sense of the term.'

[8] In like manner, the negligent waste and destruction of petitioners' gas and distillate was neither a legitimate drainage of the minerals from beneath their lands nor a lawful or reasonable appropriation of them. Consequently, the petitioners did not lose their right, title and interest in them under the law of capture. At the time of their removal they belonged to petitioners, and their wrongful dissipation deprived these owners of the right and opportunity to produce them. That right is forever lost, the same cannot be restored, and petitioners are without an adequate legal remedy unless we allow a recovery under the same common law which governs other actions for damages and under which the property rights in oil and gas are vested. This remedy should not be denied.

***584** In common with others who are familiar with the nature of oil and gas and the risks involved in their production, the respondents had knowledge that a failure to use due care in drilling their well might result in a blowout with the consequent waste and dissipation of the oil, gas and distillate from the common reservoir. In the conduct of one's business or in the use and exploitation of one's property, the law imposes upon all persons the duty to exercise ordinary care to avoid injury or damage to the property of others. Thus under the common law, and independent of the conservation statutes, the respondents were legally bound to use due care to avoid the negligent waste or destruction of the minerals imbedded in petitioners' oil and gas-bearing strata. This common-law duty the respondents failed to discharge. For that omission they should be required to respond in such damages as will reasonably compensate the injured parties for the loss sustained as the proximate result of the negligent conduct. The fact that the major portion of the gas and distillate escaped from the well on respondents' premises is immaterial. Irrespective of the opening from which the minerals escaped, they belonged to the petitioners and the loss was the same. They would not have been dissipated at any opening except for the wrongful conduct of the respondents. Being responsible for the loss they are in no position to deny liability because the gas and distillate did not escape through the surface of petitioners' lands.

[9] We are therefore of the opinion the Court of Civil Appeals erred in holding that under the law of caputre the petitioners cannot recover for the damages resulting from the wrongful drainage of the gas and distillate from beneath their lands. […]

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