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Mines and Minerals--Ownership of Containing Space

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adjustment, it seems that perhaps society would profit by a less stringent interpretation. It is further suggested that the stand taken by the courts in *Peterson v. Peterson,* 240 P.2d 1075 (Okla. 1952) and *Wilson v. Wilson,* 229 Minn. 126, 38 N.W.2d 154 (1949), and the dissenting opinion in *Cottle v. Cottle,* 129 W. Va. 344, 40 S.E.2d 863 (1946), would be well worth a thought. In these opinions it is stated that where the conduct of either spouse is such as utterly to destroy the legitimate ends of matrimony it is sufficient to constitute cruelty.

A very apt summation of what appears to be the present tendency toward a more liberal policy is found in *Pavletich v. Pavletich,* 50 N.M. 224, 174 P.2d 826 (1946). There the court said that denial of divorce seldom restores life to families sociologically dead when they come into court, and that if anything is preserved it is but the dead and empty shell of what has been and is no longer.

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MINES AND MINERALS—OWNERSHIP OF CONTAINING SPACE.—*W,* owner in fee of a tract of land, conveyed it, excepting and reserving the ". . . oil, gas and brine and all minerals, except coal . . . the term 'mineral' as used herein does not include clay, sand, stone or surface minerals . . . . " to *T,* who reconveyed to *P,* subject to the exception stated. Thereafter, *W* leased said tract to *D,* ". . . for the purpose of searching for, exploring, drilling and operating for and marketing oil and gas. . . ." *W* and *D* later entered into a gas storage agreement, whereby *D* was given the right to use and occupy the Big Lime stratum underlying said tract, for the purpose of ". . . injecting and storing gas therein and removing gas therefrom. . . ." Pursuant to this agreement, *D* drilled a well to the Big Lime stratum but no oil or gas was produced therefrom, and later *D* piped gas from elsewhere for storage in said stratum. *P* sought to enjoin *D* from using the Big Lime stratum for storage of gas, alleging in his bill that there were no recoverable minerals in the Big Lime stratum, and hence *D* was guilty of a continuing trespass. *D* demurred. The circuit court sustained the demurrer, overruling the court of common pleas and certified the question to the supreme court of appeals. *Held,* that *W*'s deed operated to pass title through

T to *P* to the Big Lime stratum in which no recoverable minerals existed. Reversed and remanded. *Tate v. United Fuel Gas Co.*, 71 S.E.2d 65 (W. Va. 1952).

It can be readily seen that if the allegations of *D*'s answer that there are recoverable minerals in the Big Lime stratum are hereafter sustained by proof, a different result may ultimately be reached. Upon demurrer to the bill, it is submitted that the decision is probably correct. However, for purposes of speculation, we may carry the case a step further, by presenting a hypothetical case:

> *A* by deed conveys to *B*, with the same exception as in the principal case, but commercially recoverable gas exists in *X* stratum. *B* exhausts the gas from *X* stratum. *B* later pumps gas produced from another source into the previously exhausted stratum.

Such a situation presents the oft-debated question of: "What is the character of ownership and the extent of rights of an owner of mineral in place in and to the necessary and incidental underground vacuums, openings and passages that are made by removing the minerals and others which may be necessary for that purpose?" *Middleton v. Harlin-Wallins Coal Corp.*, 252 Ky. 29, 30, 66 S.W.2d 30 (1933).

The problem presented is whether in future cases dealing with the containing space for gas, our court, reasoning by analogy to cases concerning coal, will follow its decisions rendered in such cases decided on somewhat similar facts.

The great weight of authority in the United States and in England is to the effect that the grantee of the mineral in place has a "grant in fee simple of all such coal, and of *the space occupied by it*". (Italics supplied.) *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 22 Atl. 1035 (1891). This rule was modified by *Webber v. Vogel*, 189 Pa. 156, 42 Atl. 4 (1899), which held that the rule as stated was correct if there remained workable minerals in the seam, and the minerals were being mined in good faith. The courts of the United States, for the most part, have accepted this modification. See Note, 15 A.L.R. 957 (1921).

This seems to indicate that the containing space reverts to the grantor upon exhaustion of the mineral. Upon this assumption the

Virginia court in *Clayborn v. Camilla Red Ash Coal Co.,* 128 Va. 383, 105 S.E. 117 (1920) held that the grantor of a seam of coal is entitled to enjoin the grantee from using space vacated by extracting it, for the purpose of hauling coal from an adjoining tract, upon the theory that the ". . . right to mine and remove coal . . . [is] an 'incorporeal hereditament' . . . in the existence of which the grantee cannot put an additional burden on the servient estate. . . .'

In dealing with the problem of containing space, our court has apparently adopted the majority view. *Armstrong v. Maryland Coal Co.,* 67 W. Va. 589, 69 S.E. 195 (1910); *Robinson v. Wheeling Steel & Iron Co.,* 99 W. Va. 435, 129 S.E. 311 (1925). See DONLEY, LAW OF COAL, OIL AND GAS IN W. VA. AND VA. 201-5 (1951).

In the *Armstrong* case, by dictum, our court said that if the grantee of the mineral in place would leave some of the coal unmined he, as owner in fee of the coal, could thereby continue to use the containing space as he saw fit. Although this case cites as authority *Webber v. Vogel, supra* (which modifies the majority rule), the court apparently disregards the requirement of good faith on the part of the grantee.

In the *Robinson* case the grantee of the mineral was granted all the coal, limestone rock, ores, and minerals underlying land between a stratum near the top of the surface and the center of the earth. The court held that the grantee of the mineral was entitled to the use of the passage ways, and in fact had "entire and exclusive use of such space for all purposes".

From the foregoing analysis, it may be seen that the cases in West Virginia, while apparently conforming with the majority view, do not necessarily determine the decision of the hypothetical case.

W. VA. CODE c. 54, art. 1, § 2(c) (Michie, 1949) extends the right of eminent domain to "public utilities selling natural gas at retail in West Virginia." The right extends to the condemnation of property "for the injection, storage and removal of natural gas in subterranean oil and/or gas bearing stratum, which, as shown by previous exploration of the stratum . . . has ceased to produce or has been proved to be non-productive of oil and/or gas in substantial quantities. . . ."

Here the containing space for use in the storage of gas is

recognized by the legislature as a valuable property right, separate and distinct from the oil and gas. It is therefore arguable that such right should be expressly bargained for, and not be acquired by implication. Thus, in both the principal case and in the hypothetical case, the right to use the containing space for the storage of gas has independent significance. It is not an implied right, and if the mineral owner expects more in connection with his grant, he ought to stipulate for it.

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PARENT AND CHILD—RIGHT OF CHILD TO RECOVER IN TORT AGAINST PARENT.—*P*, a minor aged seven, sought damages for injuries caused by the alleged negligence of *D*, a partnership. *P*'s father was a member of the partnership. *Held*, on appeal, that a parent in his business or vocational capacity is not immune from a personal tort action by his unemancipated minor child. *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

The ancient common law did not, it appears, expressly deny to a child a right of action against his parent for personal injury negligently inflicted. *Villaret v. Villaret*, 83 App. D.C. 311, 169 F.2d 677 (1948); *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928). Common law conceptions of unity of the persons resulted in the rule that tort actions could not be maintained between husband and wife. HARPER, LAW OF TORTS 632 (1933); PROSSER, LAW OF TORTS 897 (1941). Evidently, due to the close resemblance of the relationships, many courts in the United States have erroneously upheld parental immunity as a common law doctrine. *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905); *Mataresee v. Mataresee*, 47 R.I. 131, 131 Atl. 198 (1925).

In this country prior to 1891, only three cases dealing with the tort liability of parents and persons in *loco parentis* had appeared. Inclination toward liability was expressed in all three. *Gould v. Christianson*, 10 Fed. Cas. 857, No. 5,636 (D.C.S.D.N.Y. 1836); *Nelson v. Johansen*, 18 Neb. 180, 24 N.W. 730 (1885); *Lander v. Seaver*, 32 Utah 114, 76 Am. Dec. 156 (1859).

Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891), is the leading case in the United States denying recovery to the child in an action