BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor	)))))	DOCKET NO. 140001-EI FILED: November 24, 2014

OPC'S MOTION FOR TAKING OFFICIAL RECOGNITION

The Citizens of the State of Florida, through the Office of Public Counsel (OPC), pursuant to Rules 28-106.204 and 28-106.213(6), Florida Administrative Code, and Sections 120.569(2)(i), 90.202(2) and 90.203, Florida Statutes, and in accordance with the Order Establishing Procedure in this docket, respectfully request the Commission take Official Recognition of the following cases comprising decisional law from the Supreme Court of the State of Oklahoma:

A) Arrowhead Energy, Inc. v. Baron Exploration Co., 1996 OK 120, 930 P.2d, 181 (Okla. 1996)

B) Frost v. City of Ponca City, 1975 OK 141, 541 P.2d 1321 (Okla. 1975)

C) Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792 (Okla. 1941)

As good cause for granting of this motion, OPC states:

1) The Order Establishing Procedure in this Docket, Order No. PSC-14-0084-PCO-EI, requires notification in writing to all parties and Commission staff two business days prior to the scheduled hearing date identifying any materials for which the party seeks official recognition. The Order Establishing Procedure for Florida Power & Light Company's Deferred Issues, Order No. PSC-14-0439-PCO-EI, reaffirmed this requirement.

2) Section 120.569(2)(i), Florida Statutes, mandates notification to all parties of the request for official recognition and a requirement that all parties be given an opportunity to examine and contest the material.

3) Rule 28-106.213(6), Florida Administrative Code, mandates use of the judicial notice provisions found in Sections 90.201 through 90.203, Florida Statutes.

4) Section 90.202(2), Florida Statutes, states that decisional law of every other state of the United States may be judicially noticed.

5) Section 90.203, Florida Statutes, states judicial notice shall be taken of matters in Section 90.202, Florida Statutes, when adverse parties receive timely written notice of the request and sufficient information is provided to the court, the Commission in this instance, to take judicial notice of the matter.

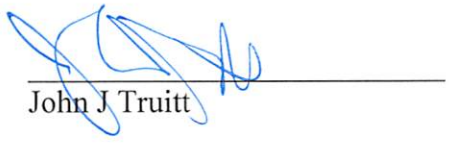
6) Copies of all three reported decisions from the Supreme Court of the State of Oklahoma are attached to this Motion. OPC asserts that reported decisions of the Supreme Court of the State of Oklahoma are, in and of themselves, sufficient information to enable the taking of judicial notice.

7) OPC conferred with counsel for FPL, FIPUG, and Florida Retail Federation regarding this motion. FPL, FIPUG, and Florida Retail Federation all indicated they do not object to this Motion for Taking Official Recognition.

WHEREFORE, for the foregoing reasons, OPC requests the Commission take judicial notice of the reported decisions from the Supreme Court of Oklahoma in the cases Arrowhead Energy, Inc. v. Baron Exploration Co., Frost v. City of Ponca City, and Sunray Oil Co., v. Cortez Oil Co.

Respectfully submitted this 24th day of November, 2014.

J.R. KELLY
PUBLIC COUNSEL



John J Truitt

Associate Public Counsel
Florida Bar No. 0084752
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Rm. 812
Tallahassee, FL 32399-1400
(850) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing OPC's Motion for Taking Official Recognition has been furnished by electronic mail and/or U.S. Mail on this 24th day of November, 2014, to the following:

Martha Barrera
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL32399-0850

John T. Burnett, Esq.
Dianne M. Triplett, Esq.
299 First Avenue North
St. Petersburg, FL 33701

John T. Butler
Assistant General Counsel
Florida Power & Light Co.
700 Universe Blvd. (LAW/JB)
Juno Beach, FL 33408-0420

Beth Keating, Esq.
Gunster Law Firm
215 South Monroe St., Suite 601
Tallahassee, FL 32301-1804

Michael Barrett
Division of Economic Regulation
FL Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

James D. Beasley, Esq.
J. Jeffrey Wahlen, Esq.
Ashley M. Daniels, Esq.
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32302

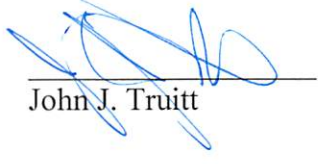
Jeffrey A. Stone, Esq.
Russell A. Badders, Esq.
Steven R. Griffin, Esq.
Beggs & Lane
P.O. Box 12950
Pensacola, FL 32591-2950

Robert Scheffel Wright, Esq.
John T. LaVia, III, Esq.
Gardner, Bist, Wiener, et. al
1300 Thomaswood Drive
Tallahassee, FL 32308

James W. Brew, Esq.
Brickfield, Burchette, Ritts & Stone, P.C.
10215 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201

Jon C. Moyle, Esq.
Moyle Law Firm, P.A.
118 N. Gadsden St.
Tallahassee, FL 32301

Ken Hoffman
Florida Power & Light Company
215 South Monroe St., Suite 810
Tallahassee, FL 32301-1858



John J. Truitt

Arrowhead Energy, Inc. v. Baron Exploration Co.

Supreme Court of Oklahoma

October 29, 1996, FILED

No. 86,171

Reporter
1996 OK 120; 930 P.2d 181; 1996 Okla. LEXIS 134; 67 O.B.A.J. 3297

ARROWHEAD ENERGY, INC.; WAYNE CLOUSER; CAROLE HERSCH; BILL MEADOWS; BRYAN KELLEY MOORE; DR. B.J. ATKINS; BERTON FLEENOR; ALBERT KRAUS, JR.; RUSSELL D. MELOY; PBS ENERGY PRODUCTION, INC.; BILL BREIT; RAY KRAUS; MILFORD CORPORATION; RICHARD W. PETTICREW; MATHIAS J. WALTERS REVOCABLE TRUST; and TEX-OK PRODUCERS, INC., Appellants, v. BARON EXPLORATION COMPANY; HOKE EXPLORATION CORPORATION, formerly BARON EXPLORATION COMPANY; ROBERT P. GWINN; LOBAR OIL CO.; ALPINE INVESTMENTS, INC.; and TRUMAN F. LOGSDON, Appellees.

Disposition: [***1] CERTIORARI PREVIOUSLY GRANTED. THE OPINION OF THE COURT OF APPEALS IS VACATED AND THE ORDER OF THE DISTRICT COURT DISMISSING THE CAUSE IS REVERSED.

Core Terms

formation, district court, producing, rights, oil and gas, plaintiffs', Oil, cause of action, completion

Case Summary

Procedural Posture

Plaintiff energy companies sought review of a judgment of the Court of Appeals, Division 2 (Oklahoma), which affirmed a trial court order granting the motion of defendant exploration companies to dismiss the action for damages based on the alleged filing of a false or incorrect completion report with the Oklahoma Corporation Commission. Plaintiffs disputed defendants' claim that jurisdiction rested with the Corporation Commission.

Overview

Plaintiffs claimed that defendants intentionally filed an erroneous well completion report with the Oklahoma Corporation Commission misstating facts about a well's production source. Plaintiffs had an interest in an oil and gas leasehold adjacent to the well and maintained that defendants' illegal production caused drainage of production underlying plaintiffs' tract. Plaintiffs also alleged negligence per se, conversion of plaintiffs' hydrocarbons, and detrimental reliance on the information filed with the Corporation Commission. Defendants claimed that jurisdiction over the action was with the Corporation Commission rather than with the trial court. The district court agreed, and its determination was affirmed on appeal. On further review, the court reached a contrary conclusion. It found that the action involved private rights, which depended on whether defendants had violated a duty owed to plaintiffs. The court determined that public rights were not involved, except tangentially. It held that the case was a drainage case, involving private rights, and thus it did not require any determination to by the Corporation Commission under its authority to protect correlative rights.

Outcome

The court vacated the opinion of the appellate court and reversed the trial court's order dismissing the action.

LexisNexis® Headnotes

Energy & Utilities Law > Oil, Gas & Mineral Interests > Surface Use Interests

Real Property Law > Oil & Gas

HN1 Generally, under the law of capture, a landowner does not own migratory substances underlying his land, but rather has the exclusive right to drill for, produce or otherwise gain possession of such substances. Those rights include the right to reduce to possession oil and gas coming from land belonging to others.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Surface Use Interests

HN2 The function to be served by the Oklahoma Corporation Commission under oil and gas conservation statutes is to protect public rights in the development and production of oil and gas. The district court has jurisdiction to determine whether a defendant has illegally drained the reservoir and whether, if so, a cause of action for damages has been stated by a plaintiff.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN3 The district court has jurisdiction to determine the effect of failure to comply with an Oklahoma Corporation Commission rule.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Surface Use Interests

HN4 The right of the individual owner to take oil or gas from the reservoir in lawful operations is limited only by a duty to other owners not to injure the source of supply and not to take a disproportionate part of the oil and gas. The Oklahoma Corporation Commission is a tribunal of limited jurisdiction. Respective rights and obligations of parties are to be determined by the district court.

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Surface Use Interests

HN5 There are differences between a district court's jurisdiction to determine the legal effect of the Oklahoma Corporation Commission's rules and orders and the Commission's jurisdiction to interpret, clarify, amend and supplement its orders as well as resolving any challenges to the public issue of conservation of oil and gas.

Syllabus

District Court dismissed cause, determining that jurisdiction was with the Oklahoma Corporation Commission. The Court of Appeals affirmed by memorandum opinion. We previously granted certiorari and now vacate the Court of Appeals' opinion and reverse the order of the district court dismissing the cause.

Counsel: Richard K. Goodwin, Lawrence & Ellis, P.A., Oklahoma City, Oklahoma, For Appellants.

Tim W. Green, Oklahoma City, Oklahoma, For Appellees Gwinn and Lobar.

Gregory L. Mahaffey, Martha Martin, Mahaffey & Gore, P.C., Oklahoma City, Oklahoma, For All Other Appellees.

Judges: HARGRAVE, J. ALL JUSTICES CONCUR

Opinion by: HARGRAVE

Opinion

[182] CERTIORARI TO THE COURT OF APPEALS, DIV. 2**

MEMORANDUM OPINION

HARGRAVE, J.

[*P1] Plaintiffs have pled four causes of action against the defendants for both actual and punitive damages based on defendants' filing of a false or incorrect completion report with the Oklahoma Corporation Commission. The first cause of action alleges that the defendant Hoke, on behalf of the defendants, intentionally, [***2] wilfully and with malice aforethought filed an erroneous well completion report with the Oklahoma Corporation Commission stating that the Lumbers # 1 Well was producing from the Mississippi Chat formation, when it was actually producing from the Oswego formation. Plaintiffs are the owners of the oil and gas leasehold on the quarter-section adjacent to defendants' Lumbers # 1 well, and state that they drilled a well on their lease to a depth sufficient to test the Oswego and Mississippi Chat common sources of supply. Plaintiffs allege that illegal production by defendant has caused drainage of production underlying plaintiffs' tract.

[*P2] Plaintiffs' second cause of action asserts that defendants' production, in violation of Oklahoma Corporation Commission Rules and Procedures, constitutes negligence per se, violating plaintiffs' correlative rights. The third cause of action alleges conversion of plaintiffs' hydrocarbons and the fourth cause of action pleads detrimental reliance by plaintiffs on the information filed

with the Corporation Commission, stating that if plaintiffs had known that defendants' well was not producing from the Mississippi Chat formation but rather from the Oswego [***3] formation, they would not have drilled to the Mississippi Chat formation.

Defendants moved to dismiss, asserting that plaintiffs failed to state a claim because the law of capture precludes any liability on the part of the defendants. [1] Further, defendants argued that jurisdiction was with the Corporation Commission rather than with the district court. District Judge Neal Beekman, by order dated September 1, 1995, ruled that the Corporation Commission was "the state agency that has sole authority to make an initial finding under the fact situation presented to this Court." The trial judge stated that while it is well recognized that the Corporation Commission may not award damages for conversion, the Commission does adjust the equities between the parties and protects their correlative rights, citing ***Pelican Production v. Wishbone Oil & Gas, 746 P.2d 209 (Okla. App. 1987)***. The Court of Appeals, without citation of authority, affirmed. We granted plaintiffs' petition for certiorari.

[*P3] [***4] The crux of the matter involves private rights: whether defendants violated a duty owed to the plaintiffs. Public rights are not involved, except tangentially. We have stated that ***HN2*** the function to be served by the Corporation Commission under oil and gas conservation statutes is to protect public rights in the development and production of oil and gas. *Samson Resources Co. v. Corporation Commission, 702 P.2d 19, 21 (Okla. 1985)*. The fact that a determination whether defendants violated a duty owed to these plaintiffs may involve a determination whether the completion report, Form 1002A, filed with the Corporation Commission was erroneously or fraudulently filed, does not deprive the district court of jurisdiction. The district court has jurisdiction to determine whether the defendants have illegally drained the reservoir and whether, if so, a [**183] cause of action for damages has been stated by the plaintiffs.

[*P4] *Pelican Production v. Wishbone Oil & Gas, supra*, a Court of Appeals opinion relied upon by the trial judge, is not applicable. That case involved three wells that were allegedly producing illegally from the Red Fork formation. The Corporation Commission previously had determined [***5] that one of the wells was producing from the Hunton and not the Red Fork formation. That order became final. Subsequently, the losing party filed an action for damages for conversion of hydrocarbons in the district court, alleging that the three wells were producing from the Red Fork formation. The trial court dismissed the cause, treating it as an attempted collateral attack on an order of the Corporation Commission. The Court of Appeals stated that before a suit for conversion of hydrocarbons might proceed in district court, there must have been a determination by the Corporation Commission that hydrocarbons were being taken by defendant in violation of the Commission's spacing order. Accordingly, the Court of Appeals upheld the trial court's dismissal of the cause.

[*P5] In the case at bar there is no dispute regarding the formation from which the well is producing: the defendants do not deny that production is from the Oswego formation and have filed an amended well completion report form with the Corporation Commission reflecting that production is from the Oswego formation. There is no question that an incorrect completion report form was filed on the Lumbers # 1 well. ***HN3*** The district [***6] court has jurisdiction to determine the effect of failure to comply with a Commission rule. Plaintiff has alleged that defendant intentionally misrepresented the formation from which its well was completed and producing in order to deplete the reservoir, to plaintiffs' detriment. See, *Kingwood Oil Co. v. Corporation Commission, 396 P.2d 1008, 1010 (Okla. 1964)* ***HN4*** *(the right of the individual owner to take oil or gas from the reservoir in lawful operations is limited only by a duty to other owners not to injure the source of supply and not to take a disproportionate part of the oil and gas).* The Corporation Commission is a tribunal of limited jurisdiction. *Burmah Oil & Gas Co. v. Corporation Commission, 541 P.2d 834 (Okla. 1975)*. Respective rights and obligations of parties are to be determined by the district court. *Southern Union Production Co. v. Corporation Commission, 465 P.2d 454 (Okla. 1970)*. The case at bar is a drainage case, involving private rights, and does not require any determination to be made by the Corporation Commission under its authority to protect correlative rights.

[*P6] For discussion of district court versus Corporation Commission jurisdiction, see, [***7] *Tenneco Oil Co. v. El Paso Natural Gas, 687 P.2d 1049 (Okla. 1984)*, and its discussion in *Brumark Corporation v. Samson Resources Corporation, 57 F.3d 941, 945-947 (10th Cir. 1995)*,

[1] ***HN1*** Generally, under the law of capture, a landowner does not own migratory substances underlying his land, but rather has the exclusive right to drill for, produce or otherwise gain possession of such substances. *Frost v. Ponca City*, 541 P.2d 1321, 1323 (Okla. 1975). Those rights include the right to reduce to possession oil and gas coming from land belonging to others. See, *Atlantic Richfield Co. v. Tomlinson*, 859 P.2d 1088, 1095 (Okla. 1993).

discussing *HN5* differences between a district court's jurisdiction to determine the legal effect of Corporation Commission rules and orders and the Commission's jurisdiction to interpret, clarify, amend and supplement its orders as well as resolving any challenges to the public issue of conservation of oil and gas.

[*P7] **CERTIORARI PREVIOUSLY GRANTED. THE OPINION OF THE COURT OF APPEALS IS VACATED AND THE ORDER OF THE DISTRICT COURT DISMISSING THE CAUSE IS REVERSED.**

[*P8] **ALL JUSTICES CONCUR**

Frost v. City of Ponca City

Supreme Court of Oklahoma

October 21, 1975

No. 47326

Reporter
1975 OK 141; 541 P.2d 1321; 1975 Okla. LEXIS 538; 53 Oil & Gas Rep. 370

FROST et al., Appellants, v. CITY OF PONCA CITY, Appellee

Disposition: [***1] Certiorari granted, opinion of Court of Appeals vacated, judgment of trial court reversed and remanded with directions.

Core Terms

hydrocarbons, capture, landowners', police power, plaintiffs', accounting, substances, contends, regulations, parties, drill, destroy, exercise of police power, collecting, operations, hazardous, minerals, refined

Case Summary

Procedural Posture

Plaintiff landowners filed a class action against defendant city, requesting an accounting from the city for the total sum received by the city from the sale of certain hydrocarbons. The Court of Appeals (Oklahoma) reversed the judgment of the trial court and remanded the cause with directions to proceed with an accounting. The city petitioned for certiorari.

Overview

The landowners owned property in two additions located within the city. Refined hydrocarbons were located in a shallow sand underlying parts of the two additions. Gaseous vapors arose from the hydrocarbons. The city, acting pursuant to its police power, refused to allow the landowners to drill wells on their property. The city then drilled wells in the area and took other steps to produce, transport, and sell the hydrocarbons. The city kept all of the funds received from the hydrocarbons without accounting to the landowners. The city continued operations to prevent a recurrence of the hazardous condition. The court agreed with the landowners that the city exercised the landowners' right to capture the hydrocarbons and that the landowners became owners of the hydrocarbons after they were captured by the city. The city's continued possession of the captured substances exceeded the bounds of the police power. The city's failure to account to the landowners for the proceeds of the hydrocarbons deprived the landowners of property without due process of law and contravened *Okla. Const. art. II, § 24* and the *14th Amendment of the U. S. Constitution*.

Outcome

The court granted certiorari, vacated the opinion of the appellate court, and reversed the judgment of the trial court. The court remanded the cause with directions to proceed in accordance with the views stated in the court's opinion.

LexisNexis® Headnotes

Energy & Utilities Law > Oil, Gas & Mineral Interests > Absolute & Qualified Ownership

Governments > Local Governments > Police Power

Real Property Law > Estates > General Overview

HN1 Under the "law of capture" which obtains in Oklahoma, a landowner does not own migratory substances underlying his land, but has an exclusive right to drill for, produce, or otherwise gain possession of such substances, subject only to restrictions and regulations pursuant to police power. A landowner does not acquire title, or absolute ownership of the migratory substances, until the substances are reduced to actual possession by being brought to the surface and then controlled.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Absolute & Qualified Ownership

Energy & Utilities Law > Oil, Gas & Mineral Interests > Personalty & Realty Interests

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

Governments > Police Powers

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

Real Property Law > ... > Elements > Involuntary Acquisition & Diminution of Value > Takings

HN2 A mineral owner's right to reduce minerals to possession is a valuable property right. The state, or city, acting pursuant to its police power, may establish regulations that have the effect of regulating or abrogating in a measure the law of capture. However, these regulations may only restrict the landowner's right to capture minerals underlying his property, and may not authorize third persons to enter upon his premises and capture minerals underlying the same without compensating the landowner. To authorize a third person to enter upon a landowner's premises and exercise the right to capture minerals underlying the premises would constitute a taking of landowner's property. In the exercise of eminent domain private property is taken for public use and the owner is invariably entitled to compensation, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare.

Governments > Local Governments > Police Power

Real Property Law > Torts > Nuisance

HN3 The cost of abating threats to the public health, safety and welfare may be charged entirely to the person who, by his conduct, or the condition of his property, has brought about the occasion for exercise of the police power.

Contracts Law > Types of Contracts > Quasi Contracts

HN4 Contracts implied by law are a class of obligations that are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice.

Syllabus

Certiorari to the Court of Appeals, Division No. 2. Class action by landowners against municipality for accounting for amounts received by City from sale of hydrocarbons produced from wells drilled by City on landowners' property under its police power. The trial court entered summary judgment for City. Land-owners appealed and the Court of Appeals, Division 2, reversed and remanded with directions to proceed with accounting. City petitions for certiorari.

Counsel: Cohen & Pluess, Eagleton, Nicholson & Pate, Oklahoma City, for Ronald W. Frost and Richard R. Klinger.

Don Manners, Oklahoma City, for Hayden Sullivan Appellants.

Marland Johnson, City Atty., Ponca City, Maurice H. Merrill, Norman, for Appellee.

Judges: Berry, J. wrote the opinion. Williams, C.J., Hodges, V.C.J., and Davison, Irwin, Lavender, Simms, Doolin, JJ., concur. Barnes, J., not participating.

Opinion by: BERRY

Opinion

[*P1] [**1322] Plaintiffs, owners of property in two additions, Southside and Boggess, located within Ponca City, Oklahoma, filed a class action against the City. They requested [***2] an accounting from City for the total sum received by City from the sale of certain hydrocarbons.

[*P2] The parties stipulated refined hydrocarbons were and are still located in a shallow sand underlying parts of the two additions. Gaseous vapors arose from the hydrocarbons. The residents of area demanded City take action to protect residents in case of explosion. City, acting pursuant to its police power, refused to allow plaintiffs, and others similarly situated, to drill wells on their property. City then drilled 26 wells in the area and took other steps to produce, transport and sell the hydrocarbons. City kept all funds received from such hydrocarbons without accounting to plaintiffs. City has continued operations to prevent recurrence of hazardous condition. Continued safety of persons and property in the area require future operation of the wells, collection in tank trucks of refined hydrocarbons from collecting tanks, and skimming of sewer line ditches.

[*P3] There is nothing in record concerning source of the refined hydrocarbons, but plaintiffs' brief implies such substances escaped from nearby refineries.

[*P4] [**1323] The record indicates that some of City's wells are located [***3] upon property which belongs to some plaintiffs.

[*P5] The trial court found (1) City's ordinance preventing plaintiffs from drilling within the City limits, and City's refusal to grant variance to this ordinance, was a valid exercise of City's police power, (2) City under its police power had the right and obligation to remove the existing dangerous conditions in order to protect the public health and safety of the residents and property in the area, and (3) because of the valid exercise of City's police power, and the rule of capture as it exists in Oklahoma, plaintiffs and all others similary situated have no property interests in the hydrocarbons that have been removed.

[*P6] The Court of Appeals, Div. 2, reversed and remanded with directions to proceed with an accounting. The City petitions for certiorari.

[*P7] On appeal the parties agree City, in exercise of its police power, had authority to remove the hydrocarbons. The disagreement centers around plaintiffs' rights in the hydrocarbons after they were removed by City.

[*P8] The parties agree that ***HN1*** under the "law of capture" which obtains in Oklahoma, a landowner does not own migratory substances underlying his land, but has an exclusive right [***4] to drill for, produce, or otherwise gain possession of such substances, subject only to restrictions and regulations pursuant to police power. *Edwards v. Lachman, Okl., 534 P.2d 670*; *Carter Oil Co. v. State, 205 Okl. 541, 240 P.2d 787*; *Gruger v. Phillips Pet. Co., 192 Okl. 259, 135 P.2d 485*. A landowner does not acquire title, or absolute ownership of the migratory substances, until the substances are reduced to actual possession by being brought to the surface and then controlled. *Wright v. Carter Oil Co., 97 Okl. 46, 223 P. 835*; *Williams v. Phillips Pet. Co., Okl., 406 P.2d 474*.

[*P9] The parties agree the refined hydrocarbons were subject to capture, *West Edmond Salt Water Disposal Ass'n v. Rosecrans, 204 Okl. 9, 226 P.2d 965*, and that plaintiffs had the right to capture refined hydrocarbons underlying their lands subject only to existing police power regulations. They also agree that City, in exercise of its police power, adopted a valid Charter provision prohibiting plaintiffs from drilling wells or otherwise capturing hydrocarbons under their land.

[*P10] City contends this Charter provision destroyed plaintiffs' right to capture hydrocarbons underlying their [***5] property, and since plaintiffs have no right to capture the hydrocarbons, they have no claim to proceeds from production by City.

[*P11] Plaintiffs contend the police power is directed to restriction, regulations to prevent, and removal of hazardous conditions, and City, in exercise of police power, had authority to prohibit plaintiffs from removing the hydrocarbons, and authority to remove hydrocarbons itself.

[*P12] However, plaintiffs contend City, in removing the hydrocarbons, was exercising the landowners' right to capture, and landowners became owners of the hydrocarbons after they were captured by City. They contend City's continued possession of the captured substances exceeds the bounds of the police power, and City's failure to account to them for proceeds of the hydrocarbons deprives them of property without due process of law and contravenes *Art. II, § 24, Okla. Const.*, and the *14th Amendment of the U. S. Constitution*.

[*P13] We agree with plaintiffs. We have recognized ***HN2*** mineral owner's right to reduce minerals to possession is a valuable property right. *Wright v. Carter Oil Co., supra.* The state, or city, acting pursuant to its police power, may establish regulations which have "the [***6] effect of regulating or abrogating in a measure the law of capture." *Gruger v. Phillips Pet. Co., supra.* However, these regulations may only restrict the landowner's right to capture minerals underlying his property, and may not authorize third persons to enter upon his [**1324] premises and capture minerals underlying same without compensating landowner. To authorize a third person to enter upon a landowner's premises and exercise the right to capture minerals underlying the premises would constitute a taking of landowner's property. In *Phillips Petroleum Co. v. Corporation Commission, Okl., 312 P.2d 916*, we quoted from 29 C.J.S., Eminent Domain, § 6, as follows:

> "+ + + + in the exercise of eminent domain private property is taken for public use and the owner is invariably entitled to compensation, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare + + + +"

[*P14] Therefore, we conclude City's regulation prohibiting plaintiffs from drilling and producing the hydrocarbons

[***7] did not destroy plaintiffs' right to capture said hydrocarbons, but merely restricted such right. The hydrocarbons underlying the lands created a dangerous situation, and City, in exercise of its police power, was authorized to remove them in order to protect public safety. See Cummings v. Lobsitz, 42 Okl. 704, 142 P. 993. However, in so doing City was merely exercising the landowners' right to capture the hydrocarbons. When City acquired possession of the hydrocarbons, the landowners' ownership of the substances became absolute. Wright v. Carter Oil Co., supra. We find no authority which permits City to acquire ownership of the hydrocarbons it removed from landowners' premises.

[*P15] There is authority to effect city may in exercise of police power destroy, or require destruction of, landowner's property, even though it may have some value, if public health and safety requires the property to be destroyed. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204; Cummings v. Lobsitz, supra. Here City did not destroy landowners' property, but sold it.

[*P16] In certain circumstances the legislature may, in exercise of police power, [***8] provide for forfeiture and sale of contraband or property used in commission of crime. 37 O.S. 1971 § 548; Annotation, Forfeiture of Auto Used in Narcotics Crime, 50 A.L.R. 3d 172. However, the hydrocarbons were not contraband, and were not used in commission of a crime.

[*P17] We conclude landowners are entitled to an accounting.

[*P18] City further contends most plaintiffs had no wells upon their property. It contends persons upon whose property no wells were located are not entitled to share in the production because the various properties were never consolidated, communitized, unitized or pooled. It also asserts some hydrocarbons were produced from wells and other facilities located upon property which was not within the subdivisions, and plaintiffs should not be entitled to share proceeds from these hydrocarbons. It also contends it properly raised claim plaintiffs' cause of action was barred by statute of limitations, but trial court did not pass upon this issue because it determined plaintiffs had no right of recovery.

[*P19] We note the trial court has not ruled upon these issues and may consider them at the new trial.

[*P20] We further note City incurred various expenses in collecting, transporting [***9] and selling the hydrocarbons. The parties entered the following stipulation with regard to these expenditures:

> "It is agreed that the question of amount due, should it be determined the defendant is liable, shall be reserved until the accounting by the City + + + + is made and the sum, if any, to which the plaintiff and those similarly situated are entitled is determined; that in the determination of this question, the amount of the production of hydrocarbons from all sources, the cost of all operations engaged in by the defendant in the past and future, exercise of police power in the production, preserving and marketing of all products, and all costs [**1325] incurred by defendant as the result of the escape of said hydrocarbons shall be taken into consideration to the extent that principles of law require."

[*P21] Nevertheless, on appeal both parties present various arguments concerning City's right to allowance for expenses at the accounting.

[*P22] Plaintiffs' position is that the only cost which might be assessed against them is the license or regulatory fee required of persons in the City handling volatile substances such as gasoline or hydrocarbons.

[*P23] City contends that if there [***10] is to be an accounting, it is entitled to credit for all costs incurred in the operation. It further contends any order directing an accounting would be premature. In this regard it contends parties stipulated future operation of the wells, mechanical collection in tank trucks, and skimming from sewer line ditches will be necessary for continued safety of persons and property. It contends these activities will involve costs but future revenues will be infinitesimal. It contends it should be allowed to set off future costs against past revenues, and that it should not be required to account until all need for future cautionary action has come to an end, and the necessary cost can be ascertained. It submits there is no evidence concerning when need for cautionary action will come to an end.

[*P24] Plaintiffs concede City was authorized to drill wells and produce the hydrocarbons. There is no evidence indicating plaintiffs had facilities for storing the hydrocarbon products after City removed them, and there is no evidence indicating plaintiffs requested City to relinquish possession of hydrocarbons to them. Under these circumstances we conclude City was justified in producing and selling [***11] the hydrocarbons.

[*P25] If plaintiffs had conducted the operation, they would have incurred expenses for producing, transporting and selling the hydrocarbons, and would have incurred expense to prevent recurrence of the hazardous situation. To deny City credit for these expenditures would be unjust to other taxpayers in City. They would be required to bear expense of all operations to remove hydrocarbons from beneath plaintiffs' property, while plaintiffs would receive gross receipts from such operations. The other taxpayers would also be required to bear expense of future operations to protect plaintiffs' property from recurrence of hazardous condition.

[*P26] City cites various authorities to the effect *HN3* cost of abating threats to the public health, safety and welfare may be charged entirely to the person who, by his conduct, or the condition of his property, has brought about the occasion for exercise of the police power. *Stine v. Lewis, 33 Okl. 609, 127 P. 396*; *Chicago R. I. & P. Ry. Co. v. Taylor, 79 Okl. 142, 192 P. 349*; *Sproul v. State Tax Comm., 234 Ore. 579, 383 P.2d 754*.

[*P27] Further, we have recognized the doctrine of contracts implied in law. In *Anderson v. Copeland,* [***12] Okl., 378 P.2d 1006, we stated:

> "+++++ *HN4* contracts implied by law +++++ are a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice +++++"

See, also, *Berry v. Barbour, Okl., 279 P.2d 335*.

[*P28] We conclude reason and justice dictate that the law imply an obligation on part of plaintiffs to allow City to retain a portion of the proceeds to reimburse City for expenditures made to protect plaintiffs' property. City should be allowed to retain an amount sufficient to reimburse it for all reasonable expenses incurred by City in collecting, transporting, and selling the hydrocarbons, and a reasonable amount to reimburse City for future expenditures it will incur for purpose of preventing recurrence of the hazardous situation.

[*P29] [**1326] Certiorari granted. The opinion of the Court of Appeals is vacated. The judgment of trial court is reversed and remanded with directions to proceed in accordance with views enunciated herein.

[*P30] WILLIAMS, C.J., HODGES, V.C.J., and DAVISON, IRWIN, LAVENDER, SIMMS, DOOLIN, JJ., concur.

[*P31] BARNES, J., not participating. [***13]

Sunray Oil Co. v. Cortez Oil Co.

Supreme Court of Oklahoma

March 4, 1941, Decided

No. 29636.

Reporter
188 Okla. 690; 112 P.2d 792; 1941 Okla. LEXIS 116

SUNRAY OIL CO. v. CORTEZ OIL CO.

Subsequent History: [***1] Rehearing Denied April 8, 1941. Application For Leave To File Second Petition For Rehearing Denied May 6, 1941.

Prior History: Appeal from District Court, Seminole County; Bob Howell, Judge.

Injunction by the Cortez Oil Company against the Sunray Oil Company. Judgment for plaintiff, and defendant appeals. Reversed.

Disposition: Judgment and decree reversed.

Core Terms

oil, oil company, salt water, sand, injunction, formation, oil and gas, fault line, disposal, drilled, fault, expert witness, mineral, feet, probability, holder, trap, speculative, tract, northwest, ownership, surface, rights, oil production, owner of land, southeast, enjoined, grantee, decree, mineral rights

Case Summary

Procedural Posture

Defendant oil company appealed the judgment of the District Court, Seminole County (Oklahoma), which enjoined the oil company from using a well for disposal of salt water drilled for oil and gas on a tract of land in which plaintiff, mineral rights holder, and also an oil company, held an interest.

Overview

The oil company argued on appeal that the trial court erred by overruling its demurrer to the evidence and in overruling its motion for judgment at the close of the evidence. The oil company also argued that the injunction should not have been issued because the evidence did not show that the acts enjoined were in violation of the holder's legal rights. The court found that the holder only had rights to minerals found upon the land at issue and all other rights remained in the property's owner. The holder, however, argued that the oil company's act of pumping water beneath the property affected the holder's ability to find oil on the property, thereby, affecting its mineral rights. The court found that, though expert testimony on this issue was conflicting, the record showed that there was no probability that any possible oil-producing formation existed in the land that would materially affect to the holder's right. Thus, injunctive relief was inappropriate and no claim could be maintained.

Outcome

The court reversed the order issuing the injunction and dismissed the holder's claim.

LexisNexis® Headnotes

Energy & Utilities Law > ... > Conveyances > Mineral Interests > General Overview

Energy & Utilities Law > Discovery, Exploration & Recovery > General Overview

Energy & Utilities Law > Discovery, Exploration & Recovery > Exploration Obligations & Rights

Energy & Utilities Law > Financing > Grants & Reservations > General Overview

Energy & Utilities Law > ... > Coal Supply Contracts > Coal Mining > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Nonpossessory & Possessory Interests

Energy & Utilities Law > Oil, Gas & Mineral Interests > Personalty & Realty Interests

HN1 A grantee in a mineral grant of the nature here involved does not acquire ownership of oil and gas in place.

Oil and gas, unlike ore and coal, are fugacious and are not susceptible of ownership distinct from the soil. This type of grant is not a grant of the oil and gas in the land, but of such part thereof only as the grantee may find and reduce to possession. It vests no title to any oil or gas, which he does not extract and reduce to possession, and hence no title to any corporeal right or interest. It is now generally held that oil and gas are not capable of distinct ownership in place. The right granted is that of ingress and egress, together with the right to use so much of the surface as may be necessary to explore for oil and gas, and if either be discovered, to reduce same to possession, whereupon such part of the oil as the grant may provide becomes the personal property of the grantee. This right, however, is subject to legislative control against waste.

Real Property Law > Estates > Present Estates > Fee Simple Estates

HN2 Subject to the rules of law with reference to due care, the owner of land ought not to be prohibited from the full use and benefit of his land so long as he does not by such use injure or damage other persons.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN3 An injunction will not issue to protect a right not in esse and which may never arise, or to restrain an act which does not give rise to a cause of action. A complainant is not entitled to an injunction where the alleged damage is merely nominal, theoretical, or speculative. As a general rule complainant must establish as against defendant an actual substantial injury. It is not sufficient ground for injunction that the injurious acts may possibly be committed or that injury may possibly result from the acts sought to be prevented; but there must be at least a reasonable probability that the injury will be done if no injunction is granted, and not a mere fear or apprehension of same. The facts necessary for granting relief by injunction must be established at least by a preponderance of the evidence. It is said that the right to the injunction must be established "with certainty;" that the evidence must be "clear," "clear and convincing," "clear and satisfactory;" that the right must be supported by the "clearest" proof.

Headnotes/Syllabus

Headnotes

1. OIL AND GAS--*Mineral deed ineffective to convey title to oil and gas in place.*

A grant conveying an interest in the oil and gas rights only in land, together with the right of ingress and egress and the right to use so much of the surface as may be necessary to explore for and produce oil or gas, conveys no title to the oil or gas which may penetrate the strata underlying the surface of the land.

2. SAME--*Right of owners of land to full use and benefit thereof.*

Subject to the rules of law with reference to due care, the owners of land should not be prohibited from the full use and benefit of such land.

3. INJUNCTION--*Writ not issued to protect right not in esse and which may never arise.*

An injunction will not issue to protect a right not in esse and which may never arise, or to restrain an act which does not give rise to a cause of action.

4. SAME -- *Writ not issued when alleged damage merely nominal or speculative.*

A complainant is not entitled to an injunction when the alleged damage is merely nominal, theoretical, or speculative. It is not sufficient ground for injunction that injury may possibly result from the acts sought to be prevented, but there must be a reasonable probability that the injury will be done if no injunction is granted, and not a mere fear or apprehension of same. *Simons v. Fahnestock, 182 Okla. 460, 78 P.2d 388*.

5. SAME -- *Evidence held not to prove probability of injury to mineral rights of plaintiff from use of abandoned oil well for disposal of salt water by oil producer.*

Record examined, and *held:* Evidence insufficient to sustain the decree granting an injunction.

Counsel: Edward Howell, of Oklahoma City, R. J. Roberts, of Wewoka, Paul E. Taliaferro, and Forney Hutchinson, both of Tulsa, and Busby, Harrell & Trice, of Ada, for plaintiff in error.

Marvin T. Johnson, of Tulsa, for defendant in error.

Judges: RILEY, J. WELCH, C. J., and OSBORN, BAYLESS, GIBSON, and DAVISON, JJ., concur. ARNOLD, J., concurs specially. CORN, V. C. J, and HURST, JJ., dissent.

Opinion by: RILEY

Opinion

[*690] [**793] RILEY, J. This is an appeal from a judgment and decree of the district court of Seminole county, enjoining Sunray Oil Company from using a well for disposal of salt water drilled for oil and gas on a tract of land in which Cortez Oil Company owned an undivided one-fourth mineral interest.

Prior to April, 1939, Burke-Greis Oil Company, and Rogers and Rogers, who held an oil and gas lease on the 80 acres, SE 1/4 of the NW [***2] 1/4 and the SW 1/4 of the NE 1/4 of section 12, township 6 north, range 5 east, in Seminole county, had drilled on the leased area a test well for oil and gas. (Southwest ten acres of the SW 1/4 of the NE 1/4 of said section.) The well was drilled through the formation known as the Cromwell sand, encountered at a depth of about 3,045 feet, and through the Wilcox sand, found at about 4,000 feet. No oil or gas was found, and the well was abandoned and was about to be [*691] plugged. The Cromwell sand there was 105 feet thick and saturated with salt water. Sunray Oil Company obtained an assignment of the oil and gas lease covering the ten-acre tract upon which the well was located, also it obtained from Genevieve Greer, owner of the surface rights and 53/80 of the mineral interest, a license to use the well for the disposal of salt water produced from other wells in the vicinity.

Sunray Oil Company "plugged" the well back to the bottom of the Cromwell sand, cemented casing from the surface to about the top of the Cromwell sand, cleaned the well out and tested it for oil and gas, and found none. The well was "swabbed" out and salt water rose in it 1,800 feet.

Sunray Oil Company [***3] owned and was operating oil and gas wells some distance from this well which were producing salt water in considerable quantities and was disposing thereof by piping it into the well here involved, when Cortez Oil Company commenced this action to enjoin the Sunray Oil Company from so using said well.

Permanent injunction was granted, and Sunray Oil Company appeals.

On appeal Sunray Oil Company contends error in overruling its demurrer to the evidence and in overruling defendant's motion for judgment in its favor at the close of all the evidence, and error in granting the injunction, for the reason that the evidence does not show that the acts enjoined were in violation of plaintiff's legal rights.

Right of Cortez Oil Company herein is derived solely from its mineral grant.

HN1 A grantee in a mineral grant of the nature here involved does not acquire ownership of oil and gas in place. Oil and gas, unlike ore and coal, are fugacious and are not susceptible of ownership distinct from the soil. A grant of the nature of that of Cortez Oil Company is not a grant of the oil and gas in the land, but of such part thereof only as the grantee may find and reduce to possession. It vests no title [***4] to any oil or gas which he does not extract and reduce to possession, and hence no title to any corporeal right or interest. *Priddy v. Thompson, 204 F. 955*.

It is now generally held that oil and gas are not capable of distinct ownership in place. *Rich v. Doneghey et al., 71 Okla. 204, 177 P. 86*; *Cuff v. Koslosky, 165 Okla. 135, 25 P.2d 290*.

The right granted is that of ingress and egress, together with the right to use so much of the surface as may be necessary to explore for oil and gas, and if either be discovered, to reduce same to possession, whereupon such part of the oil as the grant may provide becomes the personal property of the grantee. This right, however, is subject to legislative control against waste. *Rich v. Doneghey, supra.* This right of the Cortez Oil Company was not exclusive. The same right is shared by the owner of the land. All other rights to the land and the use thereof remain in the owner. The rights acquired by Cortez Oil Company were not terminated. Sunray Oil Company expressly agrees that Cortez has the same right to use the land for the same purpose as it, and even the same well, subject to payment of [***5] reasonable share of expense.

But Cortez Oil Company asserts that there is a possibility that oil or gas may be found in some other sand under said 80-acre tract, and possibly in the same sand at locations other than the one in the particular ten acres where the well in question is located, that the act of Sunray Oil Company in placing salt water in the well might possibly result in the salt water escaping into other formations containing oil or gas and might force such oil or gas from said land, and might likewise force such oil or gas as might exist in the same sand at some other location from said land, and thus prevent Cortez [**794] Oil Company from ever [*692] finding or producing oil or gas under its mineral grant.

The question is whether the judgment or decree granting the permanent injunction is clearly against the weight of the evidence.

There is no substantial conflict in the evidence as to what has been done in an effort to produce oil from the land in question and from land in the vicinity.

The oil field known as the North Grayson field, so far as oil or gas has been produced, lies south and east, principally south of the 80 acres in which plaintiff has its [***6] interest. Numerous expert witnesses, geologists, petroleum engineers, and experienced producers of oil and gas, testified in the case. The expert witnesses all agree a "fault" extends along the northwest line of the producing area, running in a southwest to northeast direction from near the center of section 14, slightly over a mile southwest from the well in question, northeast and crossing near the southeast corner of the 80-acre tract involved, and thence northeast for some distance. (A "fault" is defined by some of the witnesses as a break in the formation where one part of the strata has moved without respect to the other part of the formation.) In other words, a formation of a given kind is found at one depth on one side of the "fault line," and at another depth on the other side. A number of wells had been drilled north and west of the so-called fault line. In some wells the Cromwell sand was encountered at various depths ranging around 3,100 feet. In those to the south and west it was found at a slightly higher level, and in those drilled to the northeast on the northwest side of the fault line it was found at a slightly lower level. In other wells further northwest the Cromwell [***7] sand was not found.

The well involved herein was drilled a short distance north and west of the fault line. No oil or gas was found in any of the wells drilled north and west of the "fault line."

South and east of the fault line numerous wells have been drilled to what is known as the "Simpson Dolomite" formation, encountered there at about 3,800 feet. No Cromwell sand was found in any of the wells drilled south and east of the fault line.

It appears clearly, and all the expert witnesses agree, that there is no possibility of finding oil or gas in the Cromwell sand or any formation connected therewith on the 80-acre tract, unless it be found in what is known as a "trap." That is a place where the sand has formed in a dome, higher than the common level, sealed above by an impervious formation and below by the salt water. Whether such a formation exists within the 80-acre area is a matter of speculation.

The expert witnesses do not agree on what might happen, if such a "trap" exists, by placing additional salt water in the "disposal" well. Expert witnesses for Cortez Oil Company say that it might drive the oil or gas out of such a "trap." The expert witnesses for Sunray Oil Company [***8] say that this would be impossible for the reason that if such "trapped" oil or gas does exist it must be already sealed off from below by the existing salt water, and that additional salt water would have no effect.

The evidence is that the "bottom hole pressure" in the disposal well plugged to the bottom of the Cromwell sand was about 900 pounds to the square inch. Since salt water weighs something of .45 pounds to each foot in depth, this indicates that the place where the salt water enters the Cromwell sand formation in the area north and west of the fault line must be about 2,000 feet higher than the bottom of the Cromwell sand at the place where the disposal well is located. From this it clearly appears that the theory of defendant's expert witnesses on this question is more reasonable than that of plaintiff's witnesses, for the reason that if such "trapped" oil exists, it must have been forced into [*693] the "trap" by pressure of the salt water in the past, and must have been effectively sealed in the "trap" by impervious formation above and the pressure of the salt water from below. Running additional salt water into the Cromwell sand formation could do no more than raise [***9] the general water level within the area and thus raise the pressure of the salt water below.

Since the only interest of Cortez Oil Company in the land itself is the right to explore for and produce oil or gas therefrom, plaintiff cannot be injured on the theory of forcing "trapped oil or gas" from such "traps" if any exist, and such existence is purely speculative.

Another question upon which the expert witnesses disagree is the possibility of salt water escaping through the fault line into other sand either above or below the Cromwell formation from which oil or gas might possibly be produced and forcing out such oil or gas as might exist.

[**795] Cortez Oil Company's expert witnesses testify there is a possibility that salt water placed in the "disposal" well might find its way to the fault and up or down the fault line into the other sand. Sunray Oil Company's expert witnesses testify there is no such possibility, that in the Mid-Continent field fault lines are generally impervious and no water ever finds its way up or down such fault lines.

In this case the lower and upper sands north and west of the fault line have been thoroughly tested and no oil or gas has been found. [***10] It seems that if it were possible for salt water to pass down the "fault" into the lower sand, that would already have been done. Salt water with a pressure of 900 pounds already existed in the Cromwell sand northwest of the fault. If the fault were pervious, this enormous pressure would probably have long since forced the salt water existing in the Cromwell sand into lower sand formations having contact with the fault line. This would in measure be true as to higher sands up to 2,000 feet above the Cromwell sand.

The oil from wells in the North Grayson pool southeast of the fault line is produced from what is known as the Simpson Dolomite, found at about 3,800 feet. This is 700 feet lower than the Cromwell sand formation found northwest of the fault line. It is from this formation that Sunray Oil Company is producing oil and from which the salt water comes that is sought to be placed in the disposal well.

If this salt water comes through the fault line from the Cromwell sand north and west of said line, it was coming through before defendant placed any salt water in the disposal well.

There is one location at the extreme southeast corner of the 80-acre tract where it is said to [***11] be possible that Cortez Oil Company might drill a producing well. This is south and east from the line where the fault line passes through the southeast ten acres of the 80-acre tract. Such a well would have to be drilled near the fault line and on the southeast side thereof. Oil probably would not be there found in the Cromwell sand for the reason that it has been proved that no Cromwell sand exists south and east of the fault. The only possible source for oil at that location would be in the Simpson Dolomite. Salt water already exists in that formation. If the theory of plaintiff's witnesses, that salt water might pass down and through the fault into the Simpson Dolomite formation and force therefrom any oil that may be therein, be accepted, and, if this were possible, the Cromwell sand northwest of the fault being already fully saturated with salt water, it would follow that salt water would have already permeated into the Simpson Dolomite formation and forced all the oil therefrom. It is apparent, however, that this is not true, because the oil has not as yet been forced out of the Simpson Dolomite formation, since plaintiff and others are producing oil (and salt water) therefrom.

[***12] It is apparent, then, that if any oil is to be found at the location mentioned, there is no connection between the [*694] Cromwell sand formation found on the northwest side of the fault line and the Simpson Dolomite formation found southeast of said fault line.

From the record as a whole it clearly appears that there is no probability that any possible oil-producing formation exists in the land in question which would be materially affected to plaintiff's detriment by the use of the well in question for the disposal of salt water by defendant.

In *Tidal Oil Co. et al. v. Pease et al., 153 Okla. 137, 5 P.2d 389*, in discussing the question of disposal of salt water, it is said:

HN2 "Subject to the rules of law with reference to due care, the owner of land ought not to be prohibited from the full use and benefit of his land so long as he does not by such use injure or damage other persons."

So in this case Genevieve Greer, being the owner of the land, subject only to the oil and gas lease, and subject to the one-fourth interest in the oil and gas and other mineral rights owned by plaintiff, has the right to so use the surface and substrata of her land as she sees fit, [***13] or permit others so to do, so long as such use does not injure or damage other persons.

HN3 "An injunction will not issue to protect a right not in esse and which may never arise, or to restrain an act which does not give rise to a cause of action. . . ." 32 C. J. 34.

A complainant is not entitled to an injunction where the alleged damage is merely nominal, theoretical, or speculative. 32 C. J. 50.

As a general rule complainant must establish as against defendant an actual substantial injury. 32 C. J. 49; *Duggan v.* [**796] City of Emporia, 84 Kan. 429, 114 P. 235.

In *Simons et al. v. Fahnestock et al., 182 Okla. 460, 78 P.2d 388*, it is held:

"It is not sufficient ground for injunction that the injurious acts may possibly be committed or that injury may possibly result from the acts sought to be prevented; but there must be at least a reasonable probability that the injury will be done if no injunction is granted, and not a mere fear or apprehension of same."

The facts necessary for granting relief by injunction must be established at least by a preponderance of the evidence.

It is said that the right to the injunction must be established "with certainty"; [***14] that the evidence must be "clear," "clear and convincing," "clear and satisfactory"; that the right must be supported by the "clearest" proof, etc. 32 C. J. 350.

Summed up, the various statements as to proof necessary, as shown by the cases cited in the text, are in substance that every material fact essential to authorize the issuance of an injunction must be established to a reasonable certainty, or at least a reasonable probability, by clear, convincing, and satisfactory evidence, and the injunction Should be denied where the evidence is such as to leave in doubt the existence of any fact necessary to authorize the issuance of the injunction.

Plaintiff cites a number of cases in support of its claim that the injunction was rightfully granted. But in every case cited, all the essential facts were sufficiently established.

In the instant case the alleged injury anticipated by plaintiff which it seeks to have enjoined is highly speculative, uncertain, and imaginary.

Plaintiff has failed to prove to any degree of certainty or probability that it will be injured in any way by the acts of defendant of which it complains.

From the record as a whole, the evidence is insufficient to [***15] support the decree.

The judgment and decree are reversed, with directions to dismiss.

WELCH, C. J., and OSBORN, BAYLESS, GIBSON, and DAVISON, JJ., [*695] concur. ARNOLD, J., concurs specially. CORN, V. C. J, and HURST, JJ., dissent.

Concur by: ARNOLD

Concur

ARNOLD, J. (specially concurring). A mineral deed creates a separate, limited estate in the land. The Cortez Oil Company, therefore, has a limited estate in the land and has co-equal rights with the fee owner to the extent of the limited purposes set forth in the mineral deed. Both the fee owner and the Cortez Oil Company have a right to the use of the land, the Cortez Oil Company being limited by the purposes set forth in its deed. Both the fee owner and the Cortez Oil Company can protect this right from invasion and damages by the other or his assigns or any third person. The fee owner can permit such a special use by the Sunray Oil Company as herein involved so long as such use does not impair the limited estate of the Cortez Oil Company. The ownership of oil and gas in place is not involved herein. The only question presented here, therefore, is whether the evidence introduced by the Cortez Oil Company is sufficient to show that [***16] its estate will be damaged by such special use.

I think the opinion is correct in holding that said evidence is speculative and does not show even a probability of damage to the Cortez Oil Company, and that, therefore, injunctive relief should have been denied.