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IN THE SUPREME COURT OF PENNSYLVANIA

Middle District

NO. 5 MAP 2015

HERDER SPRING HUNTING CLUB

Appellee,

v.

HARRY KELLER and ANNA KELLER, his wife; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF; JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARTIN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDI SUE HUTCHISON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE, DAVID KELLER; MICHAEL EGOLF, and their heirs, successors, executors, administrators and assigns,

Appellants.

BRIEF OF APPELLANTS

Appeal from the Superior Court's Judgment entered on May 9, 2014, at No. 718 MDA 2013 and reported at 93 A.3d 465, with reargument and reconsideration denied on July 11, 2014, reversing the Judgment entered on March 25, 2013 by the Court of Common Pleas of Centre County at No. 2008-3434

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STATEMENT OF JURISDICTION

Jurisdiction exists under 42 Pa.C.S. §§ 724(a) and 5105(d)(1). A copy of the allocatur order is attached as Appendix "A."

ORDERS AND DETERMINATIONS IN QUESTION

A. By the Pennsylvania Superior Court:

Judgment orders granting summary judgment and awarding subsurface rights in favor of appellees is vacated. This matter is remanded to the trial court to enter summary judgment and award subsurface rights in favor of appellant, Herder. Jurisdiction relinquished.

Judgment entered.

s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/9/2014

ORDER

AND NOW, this 11th day of July, 2014, IT IS HEREBY ORDERED:

THAT the application filed May 23, 2014, requesting reconsideration/reargument of the decision dated May 9, 2014, is denied.

PER CURIAM

B. By the Court of Common Pleas of Centre County:

ORDER

AND NOW, this 29th day of September, 2010, upon consideration of the Motion for Summary Judgment filed by Plaintiff, Herder Spring Hunting Club; said motion is hereby denied. Upon consideration of Defendants' Motion for Summary Judgment, said motion is hereby Granted; however, Plaintiff's claim that it has adversely possessed the property known as the Eleanor Siddons Warrant for a period in excess of twenty-one (21) years is still at issue before this Court.

BY THE COURT:

s/ Bradley P. Lunsford
Bradley P. Lunsford, Judge

ORDER

AND NOW, this 16th day of June, 2011, Plaintiff's Motion for Summary Judgment Regarding Plaintiff's Claim for Adverse Possession is hereby DENIED. Defendants' Motion for Summary Judgment Regarding Plaintiff's Claim for Adverse Possession is hereby GRANTED. Defendants' fee ownership of the subsurface rights of the Eleanor Siddons Warrant is affirmed.

BY THE COURT:

s/ Bradley P. Lunsford
Bradley P. Lunsford, Judge

The Superior Court's opinion (the "Opinion") has been reported at 93 A.3d 465 and is attached as Appendix "B." The trial court's opinions are unreported and are attached as Appendices "C" and "D."

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Appellate review for a grant of summary judgment is plenary. An appellate court may not disturb a summary judgment order except for legal error or manifest abuse of discretion. The appellate court must apply the same standard for summary judgment as the trial court. ***Yount v. Pennsylvania Dep't of Corr.*, 966 A.2d 1115, 1118 (Pa. 2009).**

STATEMENT OF QUESTIONS INVOLVED

1. By failing to strictly construe 72 P.S. § 5020-409 and by ignoring and/or misconstruing this Court's prior holdings, did the Superior Court err in ruling that a treasurer's sale for the collection of $79.42 in *ad valorem* taxes that occurred thirty-six years after the duly recorded severance of the subsurface oil and natural gas extinguished Appellants' interests where the tax deeds and related documents describe the assessed property as that held by the then-unseated surface estate owner and it is undisputed that there was no production or other basis upon which a valid assessment could be made of the reserved oil and gas?

   Answer: Yes. The Superior Court disagrees.

2. Did the Superior Court deny Appellants their due process rights under the United States and Pennsylvania Constitutions when it held that the 1935 tax sale divested them of their properly reserved oil and natural gas interests?

   Answer: Yes. The Superior Court disagrees.

3. Did the Superior Court overlook controlling authority which provides that a grantee is bound by prior exceptions and reservations cited in its deed?

Answer: Yes. The Superior Court disagrees.

4. Did the Superior Court exceed the scope of its appellate authority by making a factual finding that the Appellants' ancestors never notified the Centre County Commissioners of their severed oil and gas estate when the trial court found that there was no evidence one way or another as to whether such notice was provided?

Answer: Yes. The Superior Court disagrees.

STATEMENT OF THE CASE

I. Form of Action.

This case involves a dispute over who owns the oil and natural gas beneath a tract of unimproved real estate known as the Eleanor Siddons Warrant ("Property"). By an exception and reservation in a recorded deed given in 1899 by Harry and Anna Keller ("Kellers"), the oil and gas were severed from the Property's surface estate. Thereafter, through several conveyances made subject to the Kellers' 1899 reservation, Appellee Herder Spring Hunting Club ("Herder") acquired an interest in the Property in 1959. In 2008, approximately 50 years later, Herder filed a quiet title action contending that a treasurer's sale in 1935 for the

collection of $79.42 in real estate taxes extinguished the Kellers' 1899 reservation and that Herder now owns the Property's oil and natural gas.

On cross-summary judgment motions, the trial court held that absent oil and gas production, the Kellers' reserved estate was not subject to assessment and could not have been sold at the 1935 tax sale. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], pp. 6-7, 8-9). The trial court further ruled that because no evidence exists whether the Kellers or anyone else ever reported their reserved estates for taxation, and that any such records have been either not kept, lost or destroyed, Herder's title claim based on the **Act of March 28, 1806, 4 Sm.L. 346,** ***repealed and restated by*** **72 P.S. § 5020-409** ("Act of 1806"), failed as a matter of law. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 7). The trial court determined that Herder well knew of the Kellers' 1899 reservation and included language in its deed acknowledging it. (*Id.*, p. 8). Thus, the trial court granted summary judgment in favor of Appellants (the "Keller heirs") and affirmed they are the owners of the Property's oil and gas. (*Id.*, p. 10; 06/20/11 Tr. Ct. Op. & Or. [Ap. D], p. 5).

On May 9, 2014, the Superior Court vacated the trial court's summary judgment and remanded the matter with instructions to enter judgment in Herder's favor. ***Herder Spring Hunting Club v. Keller*****, 93 A.3d 465, 466 & 473 (Pa. Super. 2014) ("*****Herder II*****").** The Superior Court held that the 1935 tax sale extinguished the 1899 reservation because the Kellers had presumably failed to

comply with the Act of 1806 by not reporting their reservation of the subsurface interests. ***Herder II*, 93 A.3d at 469-473**. Hence, the Superior Court ruled that the Kellers' severed oil and gas estate was allegedly reunited with the Property's surface and conveyed by the 1935 tax sale even though the tax deed and related documents described the assessed and conveyed property as that held by the then-surface estate owner. ***Id.***

The Keller heirs challenge the Superior Court's determination as being legally incorrect and beyond the scope of appropriate appellate authority. Therefore, the Kellers request this Court to reverse the Superior Court's decision and reinstate the summary judgment orders in their favor.

II. Procedural History.

In 2008, Herder commenced this litigation, asserting two grounds on which it claimed to own the Property's oil and natural gas. (R. 12a-28a). First, Herder alleged that it had title to the subsurface interests based on a 1935 tax sale and the Kellers' purported failure to report their subsurface reservation to the county commissioners prior to such sale. (R. 19a). Second, Herder asserted that it had

adversely possessed the subsurface interests by executing and recording various oil and gas leases between 1973 and 1993.[1] (R. 20a-21a).

After cross-summary judgment motions were filed, the Centre County Court of Common Pleas rejected both of Herder's quiet title claims. (09/29/10 Tr. Ct. Op. & Or. [Ap. C]; 06/20/11 Tr. Ct. Op. & Or. [Ap. D]). Accordingly, by orders dated September 29, 2010 and June 16, 2011, the trial court entered summary judgment in favor of the Keller heirs and affirmed their title to the Property's oil, gas and other reserved interests. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 10; 06/20/11 Tr. Ct. Op. & Or.[Ap. D], p. 5).

On April 23, 2013, Herder appealed the summary judgment rulings, contending that the trial court erred regarding both of its claims.[2] ***Herder II*, 93 A.2d at 465, n. 1**. On May 9, 2014, the Superior Court ruled that the trial court erred on Herder's first claim for quiet title. ***Id.* at 469-473.** Thus, the Superior Court vacated the summary judgment orders and remanded the case with instructions to enter judgment in Herder's favor. ***Id.* at 466 & 473**.

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[1] Herder also claimed that it adversely possessed the oil and gas through its payment of taxes but later abandoned this claim. (R. 20a-21a, 227a-228a, 248a-251a).

[2] Initially, Herder appealed the summary judgment orders on July 28, 2011. However, on August 3, 2012, the Superior Court quashed that appeal as premature. *See* ***Herder Spring Hunting Club v. Keller*, 60 A.3d 556 (Pa. Super. 2012) ("*Herder I*").** Thereafter, once all remaining claims were resolved or withdrawn, Herder filed its April 23, 2013 appeal. ***Herder II*, 93 A.2d at 465, n. 1**.

On May 23, 2014, the Keller heirs requested reargument and/or reconsideration, which the Superior Court denied on July 11, 2014. (R. 260a-293a, 294a). The Keller heirs then petitioned for allowance of appeal which this Court granted on January 27, 2015. (R. 295a-410a; 01/27/15 Order [Ap. A]).

III. Prior Determinations.

Other than those identified in this Brief, the Keller heirs are unaware of any prior determinations in this case.

IV. Identity of Judges.

The names of the judges whose determinations are to be reviewed are: The Honorable Paula Francisco Ott, Judge, the Honorable Christine L. Donohue, Judge, and the Honorable William H. Platt, Senior Judge, the Superior Court of Pennsylvania; and the Honorable Bradley P. Lunsford, Judge, Centre County Court of Common Pleas.

V. Chronological Factual Statement.

In 1894, the Kellers[3] acquired the Property at a tax sale. (R. 17a). Five years later, the Kellers sold the Property but reserved unto themselves and their

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[3] Harry Keller served as a Centre County Court of Common Pleas Judge from 1926 to 1927. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 2, n. 1). Judge Keller died on March 2, 1927. *See* **Alaine Keisling, Ancestry.com's Obituary Index: K-L ¶ 27 (2004) (listing for "Harry Keller"),** available at *http://homepages.rootsweb.ancestry.com/~alaine/obitindex/k.html.*

heirs and assigns all of the Property's oil, gas and other subsurface interests.[4] (R. 18a, 62a-63a). The Kellers' deed containing their subsurface reservation was duly recorded on August 8, 1899. *Id.*

Thereafter, the Property's surface estate was conveyed three times, with the third being to Ralph Smith in 1922. (R. 18a, 66a-71a). On each of these occasions, deeds acknowledging the Kellers' reservation were duly recorded. *Id.*

In 1935, the Centre County Treasurer advertised the sale of Ralph Smith's interest in the Property for $79.42 of unpaid taxes. (R. 65a). By a June 10, 1936 deed, the Treasurer conveyed the assessed interest to the Centre County Commissioners after no bidder offered the upset price. (R. 17a-18a, 65a). The 1936 Treasurer's deed specifically identifies the conveyed property as "a tract of unseated land ... surveyed to Ralph Smith" and does not mention having assessed or conveyed any of the Kellers' reserved subsurface estate. (R. 65a).

By a June 3, 1941 deed, the Centre County Commissioners sold the Property's assessed interest to Max Herr. (R. 17a, 64a). Much like the 1936 Treasurer's deed, the 1941 Commissioner's deed identifies the conveyed property as "a certain tract of unseated land ... of which land the former owner or reputed

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[4] The full text of the Kellers' 1899 reservation is set forth in the opinions below. *See, e.g.*, ***Herder II*, 93 A.3d at 466-467**.

owner was Ralph Smith ... ." (R. 64a). The 1941 Commissioner's deed contains no reference to the Kellers' reserved estate. *Id.*

In 1959, Herder purchased from Max Herr's widow the interests conveyed by the 1941 Commissioner's deed. (R. 17a, 25a-28a, 72a-74a). At the time of this transaction, Herder's attorney[5] conducted a title search and discovered the Kellers' reservation. (R. 116a). To "cover" that reservation, Herder's counsel suggested adding the following clause which appears in Herder's deed:

> THIS CONVEYANCE IS SUBJECT TO ALL EXCEPTIONS AND RESERVATIONS AS ARE CONTAINED IN THE CHAIN OF TITLE.

(R. 116a; 09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 4).

Recently, it was discovered that the Property contains "a deep stratum of shale which contains natural gas." (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 4). In 2008, Herder sued to bar the Keller heirs from making any claim to the Property's subsurface and to declare Herder as the sole fee simple owner of the Property and its oil and gas. (R. 22a).

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[5] Herder's attorney was Richard Sharpe who served as a Centre County Court of Common Pleas Judge from 1978 to 1980. (R. 237a; 09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 4, n. 3).

VI. Brief Statement of the Lower Courts' Orders and Determinations.

A. *Trial Court's Summary Judgment Decisions.*

Before the trial court, two sets of cross-summary judgment motions were filed and decided regarding Herder's quiet title claims. The first set addressed Herder's quiet title claim based on the 1935 tax sale, whereas the second set addressed Herder's adverse possession claim. On both sets, the trial court denied Herder's summary judgment motions and granted the Keller heirs' cross-motions. (09/29/10 Tr. Ct. Op. & Or. [Ap. C]; 06/20/11 Op. & Or. [Ap. D]).

As for Herder's claim based on the 1935 tax sale, the trial court ruled that because no oil and gas has ever been produced from the Kellers' reserved estate, they could not have been assessed or sold for taxes. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], pp. 6-7, 8-9). The trial court supported its decision by noting this Court's ruling in ***F.H. Rockwell & Co. v. Warren County*, 77 A. 655, 666 (Pa. 1910) ("*Rockwell*"),** that "[a] mere naked reservation of oil and gas in a deed without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes," and this Court's admonition in ***Coolspring Stone Supply, Inc. v. County of Fayette*, 929 A.2d 1150, 1157, n. 9 (Pa. 2007) ("*Coolspring*"),** that "an enactment of the General Assembly is necessary for a tax to be valid" and that "there is no statutory authority that presently supports the real estate taxation of oil and gas interests." (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 6 & n. 5). Also, the trial court

cited this Court's decisions from the 1800's that "a tax sale for delinquent taxes conveys only that estate owned by the titleholder and covered by the assessment." (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 9). The trial court explained that the record before it included Herder's admission that the severed oil and gas interests were not assessed prior to the 1935 tax sale and that Herder "does not have any evidence that there has ever been production of the subsurface resources on the property since the recordation of the Keller reservation in 1899." (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 7). Accordingly, the trial court ruled that "[b]ecause the subsurface interest was never assessed for taxation purposes it could not have been sold for delinquent taxes," and "because the property was undisputedly unseated and was not under production at any time prior to the tax sale to Max Herr, the subsurface rights were not conveyed to Max Herr as the prior owner did not possess the subsurface rights." (09/29/10 Tr. Ct. Op. & Or. [Ap. C], pp. 7 & 9).

As for Herder's contention that the Kellers had failed to comply with the Act of 1806, the trial court ruled that Herder failed to establish that the Kellers had not reported their reserved interests to the Centre County Commissioners. (9/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 7). The trial court found "there is no evidence one way or another whether the Kellers ever reported their ownership interest for assessment purposes." *Id.* Also, the trial court noted there was no evidence that anyone in Centre County ever reported such reserved interests for taxation. *Id.*

Hence, the trial court ruled that Herder's claim of ownership based on the Keller's purported non-compliance with the Act of 1806 failed as a matter of law. *Id.*

On Herder's contention it should not be estopped from claiming that the 1935 tax sale extinguished the Kellers' reservation, the trial court noted that at the time of its acquisition, Herder knew of the reservation and included language in its deed acknowledging it. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 8). Also, the trial court rejected Herder's arguments that estoppel was inapplicable based on where the acknowledgment language appeared in its deed. *Id.* Instead, the trial court ruled "clearly [Herder] was aware of the reservation of subsurface rights no matter where it was included in the deed." *Id.* Thus, the trial court ruled that "[Herder] cannot claim [it was] unaware of the reservation as [its] attorney proposed the language to cover the exception that was added to [Herder's] deed." *Id.*

In light of its rulings, the trial court granted summary judgment in favor of the Keller heirs on Herder's quiet title claim based on the 1935 tax sale. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 8). Then, after deciding that Herder's adverse possession claim was legally insufficient, the trial court "affirmed" the Keller heirs' "fee simple ownership" of the Property's oil and gas. (6/20/11 Tr. Ct. Op. & Or., p. 5).

B. *Superior Court's Determination.*

On May 9, 2014, the Superior Court vacated the trial court's summary judgment orders on Herder's claim based on the 1935 tax sale.[6] ***Herder II*, 93 A.3d at 465-473.** According to the Superior Court, when the Kellers severed the oil, gas and other subsurface interests from the Property's surface estate in 1899, they had an express obligation under the Act of 1806 to inform the county commissioners of that severance. ***Id.* at 471-472.** Then, based on the "assumption" that the Kellers never reported their reserved estate to the commissioners based on the absence of "affirmative proof to the contrary," the Superior Court held that the assessment which led to the 1935 tax sale was an assessment on the Property as a whole. ***Id.* at 472-473.** Consequently, the Superior Court declared that Herder was the owner of the Property's oil and gas, and that the trial court erred in ruling otherwise. ***Id.* at 473.**

In making its determination, the Superior Court acknowledged that the Act of 1806 "d[oes] not specifically address the situation presented in this case," *i.e.*, the taxation of oil and gas interests duly severed from the unseated surface by the then reported fee owner. ***Id.* at 469.** However, rather than looking to the statute's

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[6] The Superior Court declined to address Herder's adverse possession claim but noted that it would fail based on the record before it. ***Herder II*, 93 A.3d at 473, n. 13.** Herder took no appeal from this determination. Accordingly, the trial court's summary judgment order as to that claim is final.

language and strictly construing it, the Superior Court relied on what it deemed to be the "state of the law, as it existed at the relevant periods" to determine what impact the Act of 1806 had on the 1935 tax sale. ***Id.* at 469-472**. Based on such "relevant case law," the Superior Court ruled that a "person who severed rights to unseated land was under an affirmative duty imposed by statute to inform the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independently valued," and that "[i]f information regarding the severance of rights to unseated property is not given to the commissioners, then any tax assessment for that unseated property must logically be based upon the property as a whole." ***Id.* at 471-472**. Further, the Superior Court noted that a deed's recording is not sufficient notice to the assessor or the commissioners "as they were not bound to search or examine the records." ***Id.* at 471.** Thus, the Superior Court held that "[i]f a parcel of unseated land was valued as a whole, and the taxes on that land were not paid, thereby subjecting that property to seizure and tax sale, then all that was valued, surface and subsurface rights, were sold pursuant to any tax sale, absent proof within two years, of the severance of rights." ***Id.* at 472**.

The Superior Court noted that the Act of 1806 provides a remedy for a taxpayer's failure to comply, namely a four-fold increase in the tax assessment. ***Id.* at 471, n. 10**. However, the Superior Court refused to "retroactively apply that

provision where the courts of that era did not see fit to utilize the penalty in this circumstance." ***Id.*** Instead, the Superior Court surmised that the penalty applied only "in those situations where no tax sale had taken place." ***Id.***

The Superior Court rejected the contention that absent evidence of production or other value, the Kellers' reserved oil and gas interests could not be assessed or sold for taxes per this Court's decision in *Rockwell*. ***Id.* at 471, n. 11**. Instead, the Superior Court ruled that "the import of the Act [of 1806] is that it allows the tax assessors the opportunity to independently assess a value to severed rights." ***Id.*** Further, citing to ***Bannard v. New York State Natural Gas Corp.*, 293 A.2d 41 (Pa. 1972)**, the Superior Court held that any issue regarding an assessment's overvaluation based on the non-existence of oil and gas must be challenged within two years rather than collaterally attacked fifty years later. ***Herder II*, 93 A.3d at 471, n. 11.**

The Superior Court also dismissed any estoppel argument premised upon the title acknowledgment in Herder's deed. ***Id.* at 473**. Instead, the Superior Court concluded that because the 1935 tax sale had purportedly extinguished the Kellers' 1899 reservation, "there were no active exceptions or reservations in the chain of title." ***Id.*** Hence, the Superior Court held that "general language acknowledging the possibility of exceptions or reservation [does not] serve[] to re-sever that which had been united." ***Id.***

Significantly, the Superior Court acknowledged that its "resolution of this matter is at odds with modern legal concepts" and "may be seen as being unduly harsh." ***Id.* at 473**. However, according to the Superior Court, "at the time of the relevant transactions – the seizure of the property for failure to pay tax and the subsequent Treasurer's sale – this was the appropriate answer." ***Id.*** The Superior Court then concluded that, in its view, "[w]e do not believe it proper to reach back, more than three score years, to apply a modern sensibility and thereby undo that which was legally done." ***Id.***

SUMMARY OF THE ARGUMENT

Over one hundred and fifty years ago, this Court declared that courts "should not be wiser" than the legislature and must enforce tax statutes as they are written. In the early part of the twentieth century, this Court further explained that rules of property must be strictly adhered to and cannot be altered except by clear legislation and that a mere deed reservation of oil and gas underneath unimproved property does not create a taxable estate. Then, in 2002 and 2007, this Court ruled that under a strict statutory construction, the fugacious nature of oil and gas renders them non-taxable as "lands" because that term refers to only the earth's surface and any solid minerals attached thereto.

Despite these pronouncements, the Superior Court failed to strictly construe the Act of 1806 which, by its plain language, is limited to the taxation of "unseated

lands." Instead, the Superior Court ruled that the Kellers' severed oil and gas estate was divested thirty-six years after their pre-existing rights reservation was recorded by a treasurer's sale for the collection of $79.42 in taxes assessed solely against the interest held by the subsequent unseated surface owner. The Superior Court reached its conclusion even though, by reserving the oil and gas, the Kellers had not "becom[e] a holder of unseated lands" under the Act of 1806 and there has been no production or other basis upon which a valid assessment could be made of the severed oil and gas estate. The Superior Court's ruling ignores this Court's previous rulings and violates federal and state due process.

Also, the Superior Court exceeded its bounds as an appellate court by acting as a fact-finder. In this inappropriate role, the Superior Court used an "assumption" to find that the Kellers ignored the Act of 1806, rather than placing the burden on Herder to prove that such notice, to the extent required, was not provided. Using an adverse inference to prove a superior tax title has never been sanctioned by this Court and is contrary to established quiet title law.

Further, the Superior Court ignored the undisputed evidence that Herder well knew of the Kellers' 1899 reservation and agreed to make its deed subject to that exception. Hence, the Superior Court erred in reversing the trial court's ruling that Herder should be estopped from denying that superior title.

Accordingly, this Court should reverse the Superior Court's judgment.

ARGUMENT

I. THE SUPERIOR COURT IMPROPERLY RULED THAT THE 1935 TREASURER'S SALE FOR THE COLLECTION OF $79.42 IN REAL ESTATE TAXES EXTINGUISHED THE KELLERS' DULY RECORDED 1899 RESERVATION OF THE PROPERTY'S NON-PRODUCING AND NON-TAXABLE OIL AND NATURAL GAS.

The primary issue before this Court is whether a duly recorded severance of a nonproducing oil and gas estate underneath unimproved property can be divested through a subsequent tax sale which identifies the assessed real estate as that held by the then-surface estate owner. In vacating the summary judgment orders, the Superior Court ruled that between the two claimants (*i.e.*, one who claims title through a duly recorded deed reservation versus one who claims ownership through a tax sale in the name of the then-unseated surface owner), the tax sale claimant shall be deemed to have acquired title to both the surface estate and the previously severed oil and gas interests unless there exists "affirmative proof" of the severance holder's compliance with the Act of 1806 and/or post-tax sale challenge within two years. ***Herder II,* 93 A.3d at 471-473.** In reaching this conclusion, the Superior Court did not engage in any statutory construction of the Act of 1806 or other relevant tax statutes. Nor did the Superior Court follow this Court's prior holdings in *Rockwell* and ***Tide-Water Pipe Co. v. Bell*, 124 A. 351 (Pa. 1924)**. The Superior Court erred as a matter of law, and its judgment must be reversed.

A. ***By Failing To Strictly Construe The Act Of 1806, The Superior Court Wrongly Concluded That The Unseated Land Tax Statutes Impose A Reporting Duty Upon The Recorded Deed Owner Of A Non-Producing Oil And Gas Estate That Is Severed From The Subsequently Conveyed Unseated Surface Estate.***

When presented with an issue of statutory construction, "[a court's] task is to determine the will of the General Assembly using the language of the statute as [the] primary guide." ***Osprey Portfolio, LLC v. Izett*, 67 A.3d 749, 754 (Pa. 2012).** *See also* **1 Pa.C.S. § 1921(a) & (b).** "It is axiomatic that in analyzing a statute, a court must give effect to the plain meaning of the statute wherever the words of the statute are clear and free from ambiguity." ***Allebach v. Dept. of Fin. & Rev.*, 683 A.2d 625, 628 (Pa. 1996).** When there is no ambiguity, a statute's plain language cannot be disregarded under the pretext of pursuing its spirit. ***Com. v. Wilson*, 67 A.3d 736, 743 (Pa. 2013).**

Interpreting a tax statute requires a court to follow two additional principles. First, "[i]t is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon inhabitants, or their property, unless the power be plainly and unmistakably conferred." ***Breitinger v. City of Phila.*, 70 A.2d 640, 642 (Pa. 1950).** Second, "the grant of such right is to be strictly construed, and not extended by implication." ***Breitinger*, 70 A.2d at 642.** *See also* ***Central Pa. Lumber Co.'s Appeal*, 81 A. 204, 205 (Pa. 1911)** ("We have said that there is no such thing as taxation by implication and that all

authorities having to do with the valuation and assessment of land and the levy and collection of taxes must look to the statutes for their authority to act[.] This is settled law and needs no further discussion.") (citation omitted).

Accordingly, "taxing statutes ... must be strictly construed against the government, and any doubt or ambiguity in the interpretation of their terms must, therefore, be resolved in favor of the taxpayer." ***Tech One Assocs. v. Bd. of Prop. Assessment, Appeals & Review*, 53 A.3d 685, 696 (Pa. 2012).** ***See also*** **1 Pa.C.S. § 1928(b)** (tax statutes "shall be strictly construed"). Further, "[w]hile it is the duty of every citizen to bear his just share in supporting the government, he cannot be compelled to do so except in a way provided." ***Scranton v. O'Malley Mfg. Co.*, 19 A. 2d 269, 270-271 (Pa. 1941).** Therefore, "[a] tax law ... cannot be extended by construction to things not named or described as the subject of taxation." ***Boyd v. Hoyd*, 57 Pa. 98, 101 (1868).** Nor is it "the proper function of the [courts] to impose taxation, which is a species of confiscation, by a strained construction of doubtful legislation." ***Com. v. Lehigh Valley R. Co.*, 18 A. 406, 409 (Pa. 1889).**

Despite this controlling authority, the Superior Court did not strictly construe the Act of 1806 or any other pertinent tax statute before vacating the trial court's summary judgment orders. Had such construction been done, the Superior

Court would have discerned from the plain language of the Act of 1806[7] that the Legislature's intent was to address the reporting of only one taxable interest: "unseated lands." In neither the Act of 1806 nor any other relevant statute is the term "lands" defined. However, according to its plain and ordinary meaning,[8] "land" means "the solid part of the earth's surface not covered by water" and does not include oil and gas. ***Coolspring,* 929 A.2d at 1155-56.**[9] *See also* **Webster's American Dictionary of the English Language (online ed. 1828)** (definition of "Land") (reproduced as Appendix F). Therefore, under a strict construction, the Act of 1806 places a reporting duty only upon those "becoming a holder" of the "solid part" of the unimproved surface. *See* **72 P.S. § 5020-409** ("It shall be the duty of every person hereafter becoming a holder of unseated lands, ..."). Conversely, the Act imposes no reporting duty on an already reported fee owner who reserves title to the subsurface oil and gas when subsequently conveying the unimproved surface estate.

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[7] The full text of the Act of 1806 is attached as Appendix "E."

[8] Made applicable by **1 Pa. C.S. § 1502(b)**, the Statutory Construction Act of 1972 provides that "[w]ords and phrases shall be construed ... according to their common and approved usage[.]" **1 Pa. C.S. §1903(a)**.

[9] In *Coolspring,* this Court explained that "[l]and is defined as, *inter alia*, 'the solid part of the earth's surface not covered by water' and as 'a specific part of the earth's surface.'" ***Coolspring,* 929 A.2d at 1155.** Accordingly, this Court held that given their fugacious nature, oil and gas do not constitute "land" because "neither oil nor gas is a solid structure on the earth's surface." ***Id.* at 1155-1156.**

This construction of the Act of 1806 comports with this Court's decision in ***Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals*, 814 A.2d 180 (Pa. 2002) ("*IOGA*").** In *IOGA*, this Court ruled that the General County Assessment Law does not authorize *ad valorem* taxation[10] of subsurface oil and gas interests. ***IOGA*, 814 A.2d at 184.** In reaching this conclusion, this Court specifically rejected the argument that a tax statute's reference to "lands" covers oil and gas. ***Id.*** Instead, this Court held that a typical layperson's understanding of the term "lands" refers to "surface rights" and that in light of their dissimilarities with the surface, oil and gas are not encompassed within the general meaning of that term. ***Id.*** Thus, under *IOGA*, "it is the elemental physical characteristics of a particular property, i.e., its structure and features, which are determinative of whether it constitutes [taxable 'lands']." ***Tech One*, 53 A.3d at 697.**

Admittedly, this Court has ruled that "*ad valorem* taxes on underground oil and gas reserves are invalid prospectively, *i.e.*, only from the date of the *IOGA* decision and not before." ***Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274, 283 (Pa. 2007)** *cert. denied*, 553 U.S. 1065 (2008). However, in *Oz Gas*, this Court did not declare that *IOGA* applies prospectively for all purposes. Instead, this Court addressed only whether "*IOGA* ... renders those taxes [previously paid

[10] As this Court explained in *Tech One*: "A*d valorem* means "according to value" and, thus, an *ad valorem* tax on property is a tax assessed which is proportional to the property's value." ***Tech One*, 53 A.3d at 694, n. 20** (citation omitted).

by Oz Gas] uncollectible retroactively for a three-year look-back period," such that the taxing authorities must pay back the collected taxes. ***Oz Gas*, 938 A.2d at 281**. Moreover, this Court justified its decision to apply *IOGA* prospectively because "[r]equiring a refunding of the taxes would cause substantial financial hardship to the communities involved." ***Id.*** *See also* ***id.* at 285** ("To apply such a decision retroactively, however, subjects the taxing entities to the potentially devastating repercussion of having to refund taxes paid, budgeted and spent by the entities for the benefit of all, including those who challenged the tax."). Thus, in *Oz Gas*, this Court ruled:

> To avoid the potentially devastating consequences to taxing entities, it is important that taxes collected pursuant to a valid statute remain valid unless and until otherwise determined by this Court. ... Accordingly, *IOGA* does not apply retroactively to invalidate taxes paid by Oz Gas for the three years prior to the issuance of that decision.

***Oz Gas*, 938 A.2d at 285**.

"[T]he general law of our Commonwealth continues to be, as it was at common law, that [this Court's] decisions announcing changes in law are applied retroactively, until and unless a court decides to limit the effect of the change, and that litigants have a right to rely on the change, ..." ***McHugh v. Litvin, Blumberg, Matusow & Young*, 574 A.2d 1040, 1044 (Pa. 1989).** However, "[r]etrospective application is a matter of judicial discretion which must be

exercised on a case-by-case basis." ***Blackwell v. Commonwealth, State Ethics Comm'n*, 589 A.2d 1094, 1099 (Pa. 1991)**. Further, once this Court interprets legislative language in a statute, that interpretation plainly may be afforded retroactive effect. ***Kendrick v. Dist. Attorney of Phila County*, 916 A.2d 529, 537-41 (Pa. 2007)**.

Unlike *Oz Gas,* this case involves no claim for reimbursement of *ad valorem* taxes collected before *IOGA*. Rather, the claims between the parties, both of whom are private litigants, concern only who owns the Property's subsurface oil and gas. Accordingly, *IOGA,* as explained by *Coolspring*, applies retroactively to the statutory interpretation issues in this case and supports the conclusion that the Act of 1806 imposes no reporting duty upon a known fee owner who subsequently reserves title to subsurface oil and gas when conveying the unseated surface.

In its Opinion, the Superior Court acknowledged that "[the Act of 1806 does] not specifically address the situation presented in this case." ***Herder II,* 93 A.3d at 469.** However, rather than engaging in a strict statutory construction of the taxing statute, the Superior Court relied upon three cases that appeared in the statute's annotations: namely, ***Hutchinson v. Kline,* 49 A. 312 (Pa. 1901); *Williston v. Colkett,* 9 Pa. 38 (1848)**; and ***Roaring Creek Water Co. v. Northumberland County Comm'rs*, 1 North. 181 (1889).** ***Herder II,* 93 A.3d at 469.** Yet, reliance on such cases is inappropriate because there is no ambiguity in

the statute's language. *See, e.g.*, ***Allebach*, 683 A.2d at 628** (rejecting reliance on case law when the tax statute's plain meaning is clear). *See also* ***Oliver v. City of Pittsburgh*, 11 A.3d 960, 965 (Pa. 2011)** ("Relatedly, it is well established that resort to the rules of statutory construction is to be made only when there is an ambiguity in the provision."). Also, none of the three cases engaged in any statutory construction of the Act of 1806. *See* ***Hutchinson*, 49 A. at 312; *Williston*, 9 Pa. at 38-39; *Roaring Creek*, 1 North. at 183.** This Court has previously refused to follow earlier decisions when such statutory construction is lacking. *See, e.g.*, ***Coolspring*, 929 A.2d at 1157, n.9**; ***IOGA*, 814 A.2d at 182, n.5.** *See also* ***Oliver*, 11 A.3d at 965** ("the fact that some decisions of the Court apply loose language cannot mean that the Court must always do so going forward, as this would institutionalize an untenable slippage in the law"). Thus, the Superior Court erred by relying upon these cases and not strictly construing the Act of 1806 in accordance with its unambiguous language.

Moreover, in *Williston* and *Roaring Creek*, there was no issue regarding a horizontal severance of the subsurface oil and natural gas. Rather, *Williston* involved 999 acres of unseated land reduced by sales to 600 acres but then mistakenly assessed and sold by the treasurer as 200 acres. ***Williston*, 9 Pa. at 38-39.** Prior to the tax sale, the then-owner of the 600 acres never advised the commissioners of the mistake but instead paid the tax assessment on the lower

acreage. ***Id.*** Thereafter, following a treasurer's sale, the owner argued that the tax sale purchaser acquired only 200 acres and not the full 600 acres. ***Id.*** On appeal, this Court disagreed and ruled that the entire 600 acres was sold to the tax sale purchaser. ***Id.***

Although this Court ruled in *Williston* that the Act of 1806 created a "duty [by] the holder to give the commissioners an accurate description of the unseated land held by him," this Court never stated that such duty exists upon one who horizontally severs the oil and gas from the unseated surface estate. ***Id.*** Moreover, this Court emphasized that the taxpayer "brought the evil on himself" by remaining "silent for his own advantage, when truth and the interest of the public required him to speak." ***Id.* at 39**. Here, in contrast, the Kellers recorded their severance of the Property's underlying oil and gas in the county recorder's office approximately 36 years before the 1935 tax sale, thereby notifying "all the world of the fact of severance." ***Delaware & Hudson Canal Co. v. Hughes*, 38 A. 568, 569 (Pa. 1897)**. Hence, *Williston* is factually and legally inapposite to this case. *See* ***Lance v. Wyeth*, 85 A.3d 434, 453 (Pa. 2014)** (explaining that a judicial decision's holding is to be read against its facts, a precept that protects against the "unintentional extension of governing principles beyond scenarios to which they rationally relate").

In *Roaring Creek*, the issue concerned the taxability of six tracts of unseated land, of which the water company held title to only the surface. ***Roaring Creek*, 1 North. at 181.** According to the water company, its surface interests in all six tracts were not subject to real estate taxation because the properties were purportedly necessary to its operation as a public utility. ***Id.* at 181-182.** However, the trial court ruled that only two tracts were necessary to the water company's operations and permitted the tax sales to proceed against the remaining four lots. ***Id.* at 183.** Even though no issue had been raised regarding the subsurface interests, the trial court then made the comments quoted by the Superior Court in its Opinion below. ***Id.*** The trial court's comments in *Roaring Creek* were not explained or supported by any cited authority. ***Id.*** Accordingly, the quoted comments are dicta and have no precedential value. *See* ***Pierro v. Pierro*, 252 A.2d 652, 653 (Pa. 1969)** (dicta in trial court opinion "does not establish the law of the case."). Like *Williston*, *Roaring Creek* does not constitute binding precedent on the proper construction of the Act of 1806.

As for *Hutchinson*, that case involves a *per curiam* affirmance of a trial court's decision without a separately written opinion by this Court. *See* ***Hutchinson*, 49 A. at 319** ("PER CURIAM: This judgment is affirmed on the opinion of the learned judge below."). This is important because "even where this Court should affirm on the opinion of the lower court, the *per curiam* order is

never to be interpreted as reflecting this Court's endorsement of the lower court's reasoning in discussing additional matters, in dicta, in reaching its final disposition." ***Commonwealth v. Tilghman*, 673 A.2d 898, 904 (Pa. 1996)**. In *Hutchinson,* the arguments raised to this Court were limited to whether the land was seated or unseated and whether the defendant could purchase the oil and gas estate at the tax sale in violation of his contract to pay the assessed taxes that led to the sale. ***Hutchinson*, 49 A. at 318.** The proper construction of the Act of 1806 was not an issue brought to this Court's attention. ***Id.*** Nor was this Court asked to address whether notice under the Act of 1806 is satisfied by the public recording of a deed containing an oil and gas reservation.[11] ***Id.*** Thus, *Hutchinson* does not have precedential value beyond its final disposition of the issues raised on appeal.[12]

Also, the trial court's dicta in *Hutchinson* regarding the confiscation of one's severed subsurface estate based on the Act of 1806 is contrary to the statute's sole penalty. As the Act of 1806 clearly states, the government's remedy for one's failure to report is the assessment and collection of a four-fold tax penalty. **72 P.S. § 5020-409**. As this Court explained over one hundred and fifty years ago:

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[11] The trial court in *Hutchinson* cites no authority for its holding on this issue. ***Hutchinson*, 49 A.at 312**. Moreover, its position is contrary to federal and state due process. *See, infra.*, p. 45. In the present case, there is no indication or even suggestion that the Kellers acted to "hide" the severance of the subsurface estate; the deed was publicly filed.

[12] Unlike the Superior Court, the trial court below recognized *Hutchison*'s limited precedential value by citing it only on the issue of what constitutes seated versus unseated land. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 2, n. 1).

> Owners of unseated lands are for the most part non-residents, far away from their property. Under these circumstances, to erect the high standard of diligence thus set up for us, where the penalty of its non-observance is so greatly disproportioned, as is the loss of a man's whole estate to the pittance of tax imposed upon it, is to exact a duty most onerous, and higher than the law itself has given us. ***The penalty of the law for a failure to make a return of land for taxation is fourfold taxation, but not confiscation of estate. We should not be wiser than the law.***

***Philadelphia v. Miller,* 49 Pa. 440, 450 (1865)** (emphasis added). *See also* ***Strauch v. Shoemaker*, 1 Watts & Serg. 166, 178 (1841)** (Huston, J., dissenting) ("The law does not confiscate a man's land although he does not return it to the commissioners, and they do not know of it and do not tax it. The Act of 1806 directs that if land is not returned by the owner and not taxed, a fourfold tax may be assessed on it when discovered; this penalty may be imposed, but no other.").[13]

Under Pennsylvania law, the remedies provided for in a taxing statute are exclusive and "no other remedy than that afforded by the statute can be used." ***Derry Tp. Sch. Dist. v. Barnett Coal Co.*, 2 A.2d 758, 760 (Pa. 1938).** *See also* ***Schmuck v. Hartman,* 70 A. 1091, 1093 (Pa. 1910)** ("Taxation is purely for the legislature. The judiciary can enforce it only as the legislature directs it to be enforced."). Indeed, at the time *Hutchinson* was decided, Section 13 of the Act of

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[13] Justice Huston's dissent was cited with approval in ***Auman v. Hough*, 31 Pa. Super. 337 (1906)**, wherein the Superior Court stated that "the dissenting opinion of Huston, J., is worthy of consideration in connection with the modern decisions." ***Auman*, 31 Pa. Super. at 346**.

March 21, 1806 provided that: "In all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of said acts shall be strictly pursued. ..." **Act of March 21, 1806, 4 Sm. 326, P.L. 558, § 13, 46 P.S. § 156, *repealed* 1972, Dec. 6, P.L. 1339, No. 290, § 4, imd. effective**. Consequently, because the Act of 1806 provides only for the assessment of a four-fold tax and not a title divestiture, the trial court's dicta in *Hutchinson* – which imposes a different remedy – is contrary to the Act of 1806 and Pennsylvania law.

In its Opinion, the Superior Court does not dispute that the Act of 1806 provides for only a four-fold tax penalty. ***Herder II*, 93 A.3d at 471, n. 10.** Nevertheless, the Superior Court refused to "retroactively apply that provision where the courts of that era did not see fit to utilize the penalty in this circumstance." ***Id.*** Instead, the Superior Court surmised that "the four-fold penalty was to be imposed in those situations where no tax sale had taken place." ***Id.*** However, as the *Philadelphia* case illustrates, the Superior Court presumption is incorrect. ***Philadelphia*, 49 Pa. at 450. *See also Harper v. Farmers' & Mechanics' Bank*, 7 Watts. & Serg. 204, 213 (Pa. 1844)** (when one fails to comply with the Act of 1806, "he renders his unseated land liable to a fourfold tax as a punishment for his neglect."). Therefore, to the extent that the Act of 1806 applies to the Kellers' reserved oil and gas interests, which is denied, the Superior

Court erred in relying upon *Hutchinson* and otherwise construing the Act 1806 as providing for a remedy beyond the four-fold tax penalty. Again, as this Court instructed approximately thirty-six years prior to *Hutchinson*, "we should not be wiser than the law." ***Philadelphia*, 49 Pa. at 448.**

Prior to the $79.42 tax assessment that led to the 1935 tax sale, there was absolutely no production of the Property's oil and natural gas. (R, 216a; 9/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 9). Therefore, if such subsurface interests were reportable under the Act of 1806 as the Superior Court opines, then they had no value at the time of such assessment. *See, e.g.*, ***New York State Nat'l Gas Corp. v. Swan-Finch Gas Devel. Corp.*, 278 F.2d 577, 580 (3d Cir. 1960)** (natural gas could not be valued "until after the process of hydraulic fracturing was invented in 1949 [when] it became possible to ascertain the presence of natural gas in commercially significant quantities"). As such, at the time of the 1935 tax sale, no real estate tax, including a four-fold penalty, would have been due for the Kellers' reserved oil and gas estate. ***Rockwell*, 77 A. at 666.** Hence, the dispossession of such non-taxable interests through a tax sale of the unseated taxable surface estate, as the Superior Court holds, does not comport with the tax statutes' fundamental purpose of collecting taxes. *See* ***Hess v. Westerwick*, 76 A.2d 745, 748 (Pa. 1950)** ("the purpose of tax sales is not to strip the taxpayer of his property but to insure the collection of taxes"); ***Laird v. Hiester*, 24 Pa. 452, 464 (1855)** ("The unseated

land laws are intended to enforce the payment of taxes, ..."); ***Harper,* 7 Watts. & Serg. at 214** ("The only object of the several Acts on this subject [including the Act of 1806] is to secure the payment of taxes, ...").

When the Act of 1806 is strictly construed, the trial court correctly ruled that Herder's reliance on any purported failure by the Kellers to further report their duly recorded, severed oil and gas interests fails as a matter of law. By ruling otherwise, the Superior Court committed error and its decision must be reversed.

B. The Superior Court Failed To Follow The Controlling Aspects of **Rockwell** *And Misapplied* **Bannard** *Which No Longer Represents Pennsylvania Law On The Taxability Of Oil And Gas Interests.*

If reliance upon the cases that existed at the time is appropriate, then the Superior Court overlooked authority, controlling during the 1935 tax sale, which holds there must be a definitive estate that is both subject to taxation and being taxed by the taxing authorities in order for a tax sale to be valid. ***Rockwell,* 77 A. at 666.** In *Rockwell*, which was decided nine years after *Hutchinson,* this Court held that "the right to tax depends upon the valuation and assessment of a definite estate in land" and that "a mere naked reservation of oil or gas estate in a deed without any other facts to base a valuation upon is not sufficient to warrant the

assessment of taxes." ***Id.*** In other words, "if there be no oil and gas there is no real estate to be taxed." ***Id.***[14]

In ***Coolspring***, this Court explained that *Rockwell* is not controlling authority on whether subsurface oil and gas underlying unseated land are subject to *ad valorem* taxes because *Rockwell* "did not contemplate whether any particular statutory provision permitted the taxation of oil and gas interests." ***Coolspring*, 929 A.2d at 1157, n.9**. Hence, *Rockwell*'s statements that subsurface oil and gas can be taxed as "an estate in land" does not answer whether such interests were actually taxable under the statutes in effect at the time of the 1935 sale. Instead, the answer to that question comes solely from an examination of the statutes' plain language which by their use of the term "land" reveals the legislature's intent to tax only the "solid part" of the unimproved surface and not any subsurface oil and gas. *See,* Argument I.A, *supra.*, pp. 20-33. However, at the time of the 1935 tax sale, *Rockwell* was controlling authority on when a taxable estate is created. Therefore, to the extent that the Act of 1806 is considered to be ambiguous and/or reliance on case law is appropriate, the holding of *Rockwell* - that a mere reservation of oil and gas rights does not create a taxable estate without production or some other evidence upon which to base a valuation – would be a part of the Act

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[14] The absence of a taxable estate renders any resulting tax sale void. ***Boulton v. Starck*, 85 A.2d 17, 19 (Pa. 1951).**

of 1806 at the time of the 1935 tax sale and requires the existence of such valuation evidence before any duty to report arises under that statute.

In its Opinion, the Superior Court attempts to distinguish this aspect of *Rockwell* by relying upon a quote from this Court's decision in *Bannard*. ***Herder II*, 93 A.3d at 472, n. 11.** However, in *Bannard,* this Court did not engage in any statutory construction of the Act of 1806. ***Bannard*, 293 A.2d at 46-51.** Thus, much like *Rockwell*, the Court's rulings in *Bannard* regarding the taxability of oil and gas interests have been over-ruled by the *IOGA* and *Coolspring* decisions and are no longer controlling. *See* Argument I.A, *supra.*, pp. 22-25.

Further, *Bannard* involved an ownership dispute of the underlying oil and gas rights based on unseated and seated mineral tax assessments. ***Id.* at 44-45.** Conversely, this case involves whether subsurface oil and gas were covered by tax assessments made solely in the name of the then-unseated surface estate owner. Hence, *Bannard* does not control the issues in this case. *See* ***Lance*, 85 A.3d at 453; *Oliver*, 11 A.3d at 966.**

Nevertheless, this Court in *Bannard* reaffirmed the principles that remain controlling in *Rockwell*: namely, "a purchaser at a tax sale acquires only that which is assessed ...whether the land or estate being sold is seated or unseated"; and "an assessor can tax only that which has value" and "if no gas or oil exists,

the mineral rights should not be taxed as if they did." ***Bannard*, 293 A.2d at 49**. Consequently, *Bannard* does not support the Superior Court's ruling.

Further, the Superior Court's Opinion overlooks several key undisputed facts, including without limitation that: (1) there has been no production of the Kellers' oil and gas estate; (2) the $79.42 assessment which led to the 1935 tax sale was in the name of Ralph Smith, the then-surface estate owner; and (3) there are no records of any reserved subsurface estates being taxed by Centre County at the time of the 1935 tax sale. (R. 226a & 228a, 65a; 09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 7). These facts are important because a tax sale for delinquent taxes conveys only that estate owned by the titleholder and covered by the assessment. ***Miller v. McCollough*, 104 Pa. 624 (1884); *Brundred v. Egbert*, 164 Pa. 615 (1894).** Therefore, even if the Act of 1806 is properly construed to apply to the Kellers' reserved oil and gas estate, which is denied, the Kellers would have no duty to report their subsurface interests absent production of their reserved oil and gas interests or other valuation to support any such assessment.

The Superior Court committed reversible error by not following the controlling aspects of *Rockwell* and by misconstruing *Bannard.* The Superior Court's judgment must be reversed.

C. *The Superior Court Has Overlooked Controlling Authority Holding That "Title Washing" Of Unseated Lands Does Not Destroy Duly Recorded Prior Estates Or Interests, Whether Or Not They Are Separately Taxable.*

In its Opinion, the Superior Court purports to have "examine[d] the state of the law as it existed at the relevant periods" in order to understand how a recorded severance of the Property's subsurface oil and natural gas estate affects subsequent transfers of title. ***Herder II*, 93 A.3d at 469.** Yet, the Superior Court failed to consider this Court's decision in *Tide-Water*. This error is significant because it led the Superior Court to mistakenly conclude that a duly severed estate or interest, whether taxable or not, can be reunited with the unseated taxed surface under the guise of "title-washing." This Court in *Tide-Water* rejected this theory after examining the pertinent unseated land tax statutes which limit "title-washing" to the assessed owner's taxed estate or interest.

In *Tide-Water*, the plaintiff oil company recorded in 1882 a right-of-way for the construction and maintenance of petroleum pipes upon certain unseated land owned by the property's then fee owners. ***Tide-Water*, 124 A. at 352.** In 1918, the unseated land was sold for unpaid taxes assessed years after the right-of-way was recorded. ***Id.*** As part of the tax sale, neither the right-of-way nor the oil company was mentioned. ***Id.*** After the defendant purchased the property at the tax sale and waited for the two-year redemption period to expire, he brought an ejectment action against the oil company, claiming that he held title to the whole property

under the unseated law tax statutes which defendant asserted had divested the oil company's right-of-way. ***Id.* at 353 & 355.**

On appeal, this Court disagreed, "being of the opinion that [the oil company]'s title to the right-of-way has not been lost." ***Id.* at 353.** In reaching this conclusion, this Court recognized it was debatable whether a right of way was an actual easement. ***Id.* at 354.** However, declaring it "unnecessary ... to pursue this curious difference of opinion," this Court began its analysis by emphasizing the principle that "courts should strictly adhere [to a rule of property] unless it is altered by legislation." ***Id.*** Following this principle, this Court examined whether a buyer of property burdened with a right of way takes title subject to that burden. ***Id.*** Recognizing that property law would subject a buyer to the right of way even if the property was publicly sold, this Court then considered "whether or not the rule is inapplicable, where, as here, title has been acquired at a treasurer's sale of unseated land, for taxes which accrued long after the right of way was granted[.]" ***Id.***

Much like the Superior Court held below, the defendant in *Tide-Water* argued that the unseated land tax statutes compel the conclusion that the treasurer's sale conveyed title to the "whole" property. ***Id.* at 355.** In rejecting defendant's position, this Court acknowledged that under Section 5 of the **Act of April 3, 1804, 4 Sm. L. 201, P.L. 517, 72 P.S. §6044, *repealed* 1949, April 6, P.L. 400, No. 47,**

§ 1 ("Act of 1804"),[15] "a sale of unseated land for taxes ... vests the title, when regularly made, in the vendee, to the exclusion of all claimants to the land of a prior date." ***Tide-Water*, 124 A. at 355.** This Court explained, however, that as written the unseated land tax statutes divest only those prior claimants to the estate and interest of the real owner of the unseated land assessed and sold, and not others whose estates or interests were duly severed and recorded prior to the assessment, regardless of whether they were separately reported and taxed. ***Id.*** As this Court stated:

> It is the "estate and interest . . . [of] the real owner or owners" of the land sold, which passes by the sale, and not some other estate or interest, which the "real owner or owners" did not have. The default of "the real owner or owners" was the failure to pay taxes on the [unseated] land, which they owned and which was subject to the right-of-way; the title which the purchaser acquired was the title of that "real owner or owners," and not also an interest of some other owner, not taxed or referred to in the statute.

Id.

It is a well-established rule of property that "oil and natural gas can be severed from the ownership of the surface by grant or exceptions as separate

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[15] Section 5 of the Act of 1804 provides: "That sales of unseated ***lands*** for taxes . . . shall be in law and equity valid and effectual, to all intents and purposes, to vest in the purchaser or purchasers of ***lands*** sold as aforesaid, all the estate and interest therein, that the real owner or owners thereof had at the time of such sale, although the ***land*** may not have been taxed or sold in the name of the real owner thereof." (emphasis added).

corporeal rights" and that "a freehold of inheritance may be created [in oil and gas]." ***Erie v. Public Service Com.*, 123 A. 471, 474-475 (Pa. 1924)**. Moreover, as this Court ruled in *Rockwell,* an owner's right to sever oil and gas from the surface estate by a recorded exception/reservation is unaffected by any differences that may exist in a taxing authority's power to levy and collect taxes on unseated versus seated lands. ***Rockwell*, 77 A. at 665-66**. Thus, a duly recorded deed which severs the oil and gas from the unseated surface estate creates a separate property interest or estate that any subsequent surface estate purchaser has notice of and whose title would be subject to as a matter of property law. ***Id.***

Here, the Kellers followed this well-established rule of property by including their 1899 reservation in their recorded deed, thereby creating a separate property interest or estate which no longer was owned by the subsequent surface estate owner or its successors-in-interest. At the time of its acquisition, Herder recognized this and included language in its deed acknowledging the Kellers' 1899 reservation. Neither the Act of 1806 nor any other legislation has abrogated this rule of property or otherwise advised the Kellers or their heirs that their recorded oil and gas estate could be divested through a tax sale made in the name of the then-surface estate owner. By ruling that the 1935 tax sale divested the Kellers' duly recorded oil and gas estate, the Superior Court failed to strictly adhere to this rule of property as mandated by this Court in *Tide-Water*.

In its Opinion, the Superior Court justified its ruling by noting that there is no affirmative evidence either before the tax sale or in the tax sale deeds themselves regarding the Kellers' 1899 reservation. ***Herder II*, 93 A.3d at 473.** Also, the Superior Court found it significant that no redemption of the Kellers' reserved estate occurred within two years of the 1935 tax sale. ***Id.*** However, in *Tide-Water,* this Court found both of these facts to be immaterial. ***Tide-Water*, 124 A. at 352.** Instead, this Court strictly adhered to property law and construed the unseated land laws in accordance with their plain language. ***Id.* at 354-355.**

The Superior Court failed to abide by *Tide-Water.* Nor did the Superior Court examine or strictly construe the Act of 1804, like this Court did in *Tide-Water*. The Superior Court's judgment must be reversed.

II. THE SUPERIOR COURT'S DECISION VIOLATES DUE PROCESS UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS BY IMPROPERLY DEPRIVING THE KELLERS AND THEIR HEIRS OF THEIR DULY RECORDED PROPERTY WITHOUT ACTUAL NOTICE.

In its Opinion, the Superior Court ruled that the 1935 tax sale divested the Kellers and their heirs of their duly recorded title to the subsurface oil and gas estate despite the lack of any evidence of actual notice being provided to them that their property rights were subject to seizure and sale for failure to pay taxes. ***Herder II*, 93 A.3d at 473.** By doing so, the Superior Court has deprived the

Kellers and their heirs of their due process rights under the United States and Pennsylvania Constitutions.

Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." ***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).** The notice required to comply with the Due Process Clause must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." ***Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983).**

Similarly, under Pennsylvania law, due process dictates that an owner shall not be deprived of his property by failure to perform a duty imposed by law (*i.e.*, pay taxes), unless he has notice or an opportunity to discharge the duty (*i.e.*, through the issuance and delivery of a valid assessment). ***Norris v. Delaware, Lackawanna & Western R.R. Co.*, 66 A. 1122, 1125 (Pa. 1907).** Hence, "[i]t is hornbook law that, absent a delinquency in the payment of taxes, a tax sale based upon such delinquency must fall." ***Albert v. Lehigh Coal & Navigation Co.*, 246 A.2d 840, 847 (Pa. 1968).** This result is appropriate because "[t]he purpose of tax

sales is not to strip the taxpayer of his property but to insure the collection of taxes." ***Hess*, 76 A. at 748**.

Accordingly, it is a well-established principle of both federal and Pennsylvania constitutional law that notice by publication alone is forbidden regarding persons whose identities are known or easily ascertainable. ***Mullane*, 339 U.S. at 318; *Tracy v. Chester County Tax Claim Bureau*, 489 A.2d 1334, 1338 (Pa. 1985); *First Pa. Bank, N.A. v. Lancaster County Tax Claim Bureau*, 470 A.2d 938, 941 (Pa. 1983).** Rather, notice by publication is permissible only where the names, interests and addresses of persons are unknown and cannot reasonably be ascertained. ***City of N.Y. v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953); *Mullane*, 339 U.S. at 315-317.** As this Court noted in *Tracy*:

> The collection of taxes, however, may not be implemented without due process of law that is guaranteed in the Commonwealth and federal constitutions; and this due process, as we have stated here, requires at a minimum that an owner of land be actually notified by government, if reasonably possible, before his land is forfeited by the state. Reasonable efforts to effect actual notice were not carried out in this case, and the tax sale of this property must be set aside.

***Tracy*, 489 A.2d at 1338.**

Nor can this constitutional deficiency be saved by the legal fiction that taxes for unseated land are assessed solely against the property *in rem*. *Mullane* itself

clarified this, holding that the distinction is irrelevant to due process. As the *Mullane* Court explained:

> [W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.

***Mullane,* 339 U.S. at 312-13.** Thus, "whatever the technical definition of its chosen procedure," a State still must "accord[] full opportunity to appear and be heard." ***Id.* at 313.**

Here, the Kellers' 1899 reservation was undisputedly recorded in the county recorder's office. (09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 3). Nevertheless, Herder proffered no evidence as part of its summary judgment motion that the Kellers or their heirs were given actual notice of either the 1935 tax sale or its underlying assessment. (R. 117a-143a). Despite the lack of actual notice, the Superior Court ruled that the 1935 tax sale divested them of their duly reserved oil and gas rights. ***Herder II,* 93 A.3d at 473.** By so ruling, the Superior Court violated the Keller

heirs' federal and state due process rights. ***Mennonite*, 462 U.S. at 795; *Tracy*, 489 A.2d at 1338.**

In its Opinion, the Superior Court supported its decision by quoting the trial court's statement in *Hutchinson* to the effect that "[the tax assessor and county commissioners] were not bound to search or examine the records [of the county recorder]." ***Herder II*, 93 A.3d at 471.** However, no authority is cited in *Hutchison* for this proposition. ***Hutchinson*, 49 A.at 312**. Moreover, both this Court and the United States Supreme Court have rejected such a position and have expressly ruled that due process mandates where a taxing authority conducts a tax sale, the authority must check the public records, including those held by the county recorder, and send actual notice to all persons disclosed by such records. *See., e.g.,* ***Mennonite*, 462 U.S. at 795; *First Pa. Bank*,470 A.2d at 942.** Therefore, the Superior Court erred by holding that the Centre County assessor and commissioners were not bound to take notice of the Kellers' 1899 reservation.

The Superior Court acknowledged in its Opinion that its decision is "unduly harsh" but that it was not willing to apply "a modern sensibility" to what purportedly was "legally done" by the 1935 tax sale. ***Herder II,* 93 A.3d at 473.** No explanation is given by what the Superior Court means by the term "modern sensibility." ***Id.*** To the extent that the Superior Court implies that due process did not exist in 1935 and that a nontaxable, duly recorded oil and gas estate could be

sold as part of a tax sale and then re-united with the taxable unseated surface estate without actual notice to the oil and gas estate owner, the Superior Court erred.

As early as 1847, this Court has recognized that no person shall lose his property without due process. ***Brown v. Hummel*, 6 Pa. 86, 91 (1847).** ***See also Williston*, 9 Pa. at 39** ("The public interest and public policy require that fair effect should be given to the laws with respect to unseated lands, so as not to sacrifice the interest of the holder without a reasonable opportunity of notice.").[16] As the United States Supreme Court noted in 1912:

> The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50) and has been recognized since the Revolution as among the safest foundations of our constitutions. Whatever else may be uncertain about the definition of the term 'due process of law' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing[.]

***Ochoa v. Hernadezy Morales*, 230 U.S. 139, 161 (1912)** (*quoted with approval in* ***Hess*, 76 A.2d at 748**).

Further, although an unseated landowner could cure any title defects by defaulting on assessed real estate taxes and purchasing the unseated land at the tax

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[16] Although it discussed *Williston*, the Superior Court failed to recognize its application of due process to tax sales. *See* ***Herder II*, 93 A.2d at 470.**

sale, ***Coxe v. Gibson*, 27 Pa. 160, 165 (1856),** this Court made clear well before the 1935 tax sale that such "title washing" does not destroy any prior recorded property interests or estates that were not held by such assessed landowner. ***Tide-Water*, 124 A. at 355.** Instead, the only interest that one acquires at a tax sale of unseated land is "the 'estate and interest ... [of] the real owner or owners' of the land sold, ... and not some other estate or interest, which the 'real owner or owners' did not have." ***Id.*** Here, the tax deeds describe the conveyed property as that of Ralph Smith, and it is undisputed that Mr. Smith's interest was limited to its surface and did not include the Kellers' reserved oil and gas interests. (R. 64a-65a, 67a). Consequently, as a matter of due process, the surface estate is the only title that was "washed" by the 1935 tax sale.

In its Opinion, the Superior Court held that the Kellers and their heirs "had two years from the delivery of the title to Herr, the purchaser at the tax sale, to make known their claim." ***Herder II*, 93 A.3d at 473.** However, the defect arising from the lack of actual notice to the Kellers and their heirs was compounded in this case by a lack of a description of the Kellers' oil and gas estate in the tax deeds or any prior indication that such subsurface estate was being assessed or sold. (R. 64a-65a). Consequently, neither the Kellers nor their heirs, several of whom were

attorneys or judges by profession,[17] had any way of knowing that their reserved oil and gas interests had been purportedly taxed and sold or that they had "to make known their claim" beyond the recording of the Kellers' 1899 reservation. Moreover, because oil and natural gas do not fall within the plain and ordinary meaning of the term "land,"[18] and they were not taxable or otherwise subject to assessment or a duty to report under the Act of 1806, the Kellers and their heirs did not need to redeem their subsurface interests and their failure to do so does not support a claim of title via a tax sale. ***Albert*, 246 A.2d at 847** (even though almost 100 years had passed since the tax sale was held, "if any of the tax sales were void for want of authority to make them ... the landowner need not redeem it and his failure to do so is not a matter on which [a tax purchaser] could rely.").

By ruling that the 1935 tax sale divested the Kellers' 1899 reservation, the Superior Court violated the due process rights of the Kellers and their heirs. Accordingly, this Court must reverse the Superior Court's judgment.

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[17] See, e.g. **J. H. Beers, Commemorative Biographical Record of Central Pennsylvania: Including the Counties of Centre, Clearfield, Jefferson and Clarion: Containing Biographical Sketches of Prominent and Representative Citizens, Etc., 56-57 (1898) (bio of "Col. Daniel Schneck Keller")**, available online at http://files.usgwarchives.net/pa/centre/bios/keller-dan-s.txt; **Frank M. Eastman, Courts and Lawyers of Pennsylvania, A History 1623-1923, Vol. IV, 376-377 (1922) (bio of "Henry (Harry) Keller"); Montana Courts: 1989 Judicial Report 30 (1990) (bio of "Robert S. Keller").**

[18] *See supra.*, n. 9.

III. THE SUPERIOR COURT EXCEEDED ITS APPELLATE AUTHORITY BY IMPROPERLY ACTING AS A FACT-FINDER.

In its Opinion, the Superior Court found as a matter of fact that "the Kellers never informed the county commissioners of their retention of the subsurface rights to the land after selling the surface rights." ***Herder II*, 93 A.3d at 472-473.** The Superior Court made this determination despite the trial court's finding there was no evidence whether the Kellers informed the county commissioners of their severed oil and gas rights. ***Id.*** As a result, the Superior Court overstepped its bounds as an appellate court and acted as a fact-finder, in contravention of controlling authority. See ***Lawner v. Engelbach*, 249 A.2d 295, 297 (Pa. 1969)** ("At the appellate level it is not our duty to find the facts but to determine whether there is evidence in the record to justify the trial court's findings of fact.").

Additionally, the Superior Court's finding on the Keller heirs' alleged "lack of proof of notice of severance" runs contrary to Pennsylvania law which provides there is no duty on a taxpayer to see that the proper books are kept, or that they are properly kept and securely preserved, by the requisite public authorities and/or officials. ***Knupp v. Syms*, 494 50 A. 210, 212 (Pa. 1901)**. Thus, when records are lost or destroyed by the requisite taxing authorities, a taxpayer cannot lose his property because of his failure to prove that which has been lost or destroyed. ***Knupp*, 494 50 A. at 212.** Here, the trial court ruled there exists no evidence whether the Kellers informed the county commissioners of their severed oil and

gas rights. That finding must be accepted on appeal absent abuse of discretion. ***Capek v. DeVito,* 767 A.2d 1047, 1048 n.1 (Pa. 2001).** Consequently, the Superior Court erred in placing an "affirmative" burden on the Keller heirs to offer direct proof that the Kellers gave notice of their severance to the commissioners. Instead, as the party seeking quiet title based on a tax title, Herder had to offer direct proof that the Keller heirs gave no such alleged notice to the extent required. ***Blumner v. Metropolitan Life Ins. Co.,* 66 A. 2d 245, 248 (Pa. 1949)** (in a quiet title action, a plaintiff must recover on the strength of its title or interest and not upon the weakness of the defendant's title). Hence, using an adverse inference or assumption to prove a superior title via the 1935 tax sales is contrary to Pennsylvania law.

Further, the Superior Court seeks to justify its finding of the Kellers' purported lack of reporting by noting "it remains that the tax deeds do not reflect that any interest in the land less than a fee simple was ever assessed." ***Herder II,* 93 A.3d at 473.** However, not only has the Superior Court made factual determinations concerning the property purportedly conveyed by the tax deeds, but also such findings are contrary to the language of the 1936 Treasurer's deed and the 1941 Commissioner's deed. Neither deed mentions conveying a "fee simple" interest to the whole Property. Instead, the deeds identify the conveyed real estate as "unseated land" surveyed or belonging to "Ralph Smith." (R. 64a-65a).

Accordingly, the trial court did not abuse its discretion in holding that only Ralph Smith's surface estate interest was sold by the 1935 tax sale, and the Superior Court committed error in finding otherwise.

Moreover, the Superior Court ignored its own prior decision in which it held that to prove that the requisite notice under the Act of 1806 was not given, a party claiming title based on such failure must submit evidence that the unseated land was assessed to an "unknown owner." ***Northern Coal & Iron v. Burr,* 42 Pa. Super. 638, 643 (1910).** In the situation of an "unknown owner," the fact that the local taxing authority was assessing the "whole" unseated taxable estate and did not receive the requisite notice of any unseated land ownership is proven. ***Id.*** But, where, as in this case, the assessment is made in the name of the known subsequent owner of the severed unseated surface, one fails to prove that notice under the Act of 1806 was not given. ***Id.* at 643-44.**

Further, logic dictates that where the tax assessment records show that an assessment was made only in the name of the known owner of the severed surface estate, then the absence of the unseated subsurface estate in the tax assessment records does not prove that any Act of 1806 notice, to the extent applicable,[19] was not given. It is equally plausible that notice was provided to the commissioners but

[19] *See* Argument I.A-C, *supra*., pp. 19-41.

that no taxable estate existed because either the local taxing authority was not making assessments against the oil and gas interests or lacked a sufficient basis to value such interests under the dictates of *Rockwell*.

Here, after they purchased the Property at a tax sale, the Kellers (one of whom became a county judge) held fee simple title to the Property for five years before they severed the oil, gas and other subsurface interests from the unseated surface estate. There is no evidence that the Kellers failed to report their then-fee ownership of the Property's "whole" to the Centre County Commissioners during this five-year period, and the existence of assessments and the lack of any tax sales during their five years of full ownership support the conclusion that the Kellers did, in fact, report their fee ownership under the Act of 1806. Also, after the Kellers reserved the oil, gas and other subsurface interests in 1899, there is no evidence that the subsequent surface estate owners failed to report their limited ownership interest in the Property. Instead, the existence of assessments and the lack of any tax sales during the thirty-five years between the Kellers' 1899 reservation and the 1935 tax sale support the conclusion that then-surface estate owners duly reported their limited ownership interest under the Act of 1806.

Further, it is illogical to assume that the subsequent surface estate owners reported to the county commissioners that they owned more than what they held (*i.e.*, the whole versus just the surface), because that would mean that the surface

estate owners paid more than what they owed in taxes.[20] There is no evidence that any of the subsequent surface estate owners ever contended that the real estate tax assessments were overstated because they included the Kellers' reserved oil, gas and other subsurface interests. Logic dictates that the Centre County Commissioners knew of the Kellers' 1899 reservation at all times but did not assess the oil and gas estate because Centre County either was not making assessments against such interests or lacked a sufficient basis to value such interests under the dictates of *Rockwell.* Therefore, the Superior Court's "assumption" that the Kellers failed to report their reserved interest (to the extent they had to do so under the Act of 1806, which is denied) and that, as a result, the Centre County Treasurer sold the "whole" Property for $79.42 in unpaid real estate taxes is contrary to the facts found by the trial court based on the relative inferences that must be drawn given the cross-motions for summary judgment and the parties' respective burdens of proof in the underlying quiet title action.

Here, the Superior Court exceeded its appellate authority and became a fact-finder. If the Superior Court believed that the record did not contain sufficient evidence on a particular point to warrant summary judgment in favor of the

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[20] As noted previously, the Kellers' reserved oil and gas estate was not subject to taxation due to either the lack of clear statutory authorization or because it had no value based on its non-production prior to any assessment. *See* Argument I.A-C, *supra*., pp. 19-41. As such, the oil and gas interests were not taxable and, as Herder conceded before the trial court, were not assessed at any time after the recording of the Kellers' 1899 reservation. (R. 226a).

Kellers, it should have remanded the matter to the trial court for an evidentiary hearing on that issue. ***Lawner*, 249 A.2d at 299.** The Superior Court did not do that, choosing instead to rely on an assumption. This is reversible error which this Court cannot sanction.

IV. THE SUPERIOR COURT OVERLOOKED CONTROLLING AUTHORITY HOLDING THAT A GRANTEE IS BOUND BY PRIOR EXCEPTIONS AND RESERVATIONS CITED IN ITS DEED.

As the trial court found, Herder well knew of the Kellers' 1899 reservation. (R. 116a; 09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 4). In fact, to "cover" that reservation, Herder's counsel suggested that Herder's deed include "a specific clause making the conveyance subject to all exceptions and reservations as are contained in the chain of title." *Id.* Given these facts, the trial court agreed with the Keller heirs that Herder should be estopped from claiming that the 1935 tax sale extinguished the 1899 reservation. *Id.*

On appeal, the Superior Court ignored these undisputed facts and held that because the 1935 tax sale purportedly extinguished the 1899 reservation, "there were no ***active*** exceptions or reservations in the chain of title." ***Herder II*, 93 A.3d at 473.** However, nothing in Herder's deed limits its conveyance to "active" exceptions or reservations. Instead, Herder's deed states it is "subject to ***all*** exceptions and reservations as are contained in the chain of title." (R. 73a). Further, to the extent there exists any ambiguity in what the parties meant by such

language, the evidence before the trial court undisputedly revealed that Herder understood that such language included the Kellers' 1899 reservation. *See, e.g.*, ***New Charter Coal Co. v. McKee,* 191 A.2d 830, 834 (Pa. 1963)**(when a deed contains an ambiguous reservation clause, the parties' intentions are determined not only from the written instrument but also from the surrounding circumstances). Therefore, the Superior Court erred in re-writing Herder's deed to restrict it to only "active" exceptions or reservations.

Further, although the Superior Court sought to uphold its ruling by stating that "[n]either the Act of 1806 nor any case law interpreting the Act allow for the preservation of a reservation of land rights through the deed only after a tax sale," ***Herder II*, 93 A.3d at 473**, the Superior Court overlooked the fact that the Act of 1806 is not the controlling authority. Instead, the issue is one of property law.

"It is a well[-]established principle that one claiming under a deed is bound by any recognition it contains of title in another." ***Elliott v. Moffett*, 74 A.2d 164, 167 (Pa. 1950)** (*citing* ***Olwine v. Homan,* 23 Pa. 279, 284 (1854)**, and ***Masters v. United Mine Workers*, 22 A.2d 70, 72 (Pa. Super. 1940))**. As the trial court found, at the time of its deed, Herder well knew of the Kellers' 1899 reservation, and to "cover" that reservation, Herder's deed included "a specific clause making the conveyance subject to all exceptions and reservations as are contained in the chain of title." (R. 116a; 09/29/10 Tr. Ct. Op. & Or. [Ap. C], p. 4). As a matter of

property law, Herder is now estopped from disavowing its recognition of the Kellers' 1899 reservation. ***Elliott*, 74 A.2d at 167**. By overlooking and failing to apply this controlling authority, the Superior Court committed reversible error.

CONCLUSION

For the reasons stated herein and at oral argument, if permitted, the Keller heirs respectfully request that this Court reverse the Superior Court's judgment and reinstate the trial court's summary judgment in their favor.

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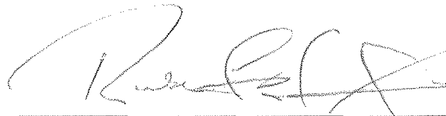
The undersigned certifies that the foregoing Brief of Appellants complies with the word count limitation set forth in Pennsylvania Rule of Appellate Procedure 2135 and contains 13,976 words.



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APPENDIX A – JANUARY 27, 2015 ORDER GRANTING ALLOCATUR

M.D. Appeal Dkt.
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FILED
1/27/2015
Supreme Court
Middle District

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

HERDER SPRING HUNTING CLUB, Respondent v. HARRY KELLER AND ANNA KELLER, HIS WIFE; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF; JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARTIN EGOLF; MARY LYNN COX; ROBERT EGOLF; NATHAN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDI SUE HUTCHISON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE; DAVID KELLER; STEPHEN RICHARD KELLER; MICHAEL EGOLF, THEIR HEIRS, SUCCESSORS, EXECUTORS, ADMINISTRATORS, AND ASSIGNS, AS WELL AS ANY OTHER PERSON, PARTY OR ENTITY, Petitioners	No. 556 MAL 2014 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 27th day of January, 2015, the Petition for Allowance of Appeal is **GRANTED**. The issues are:

(1) By failing to strictly construe [72 P.S. § 5020-409] and by ignoring and/or misconstruing this Court's prior holdings, did the Superior Court err in ruling that a tax sale that occurred thirty-six years after the duly recorded severance of the subsurface oil and gas estate extinguished [p]etitioners' interests where the tax deed and related documents described the assessed property as being that held by the then[-]unseated surface estate owner and when it is undisputed that there was no prior production or other basis upon which a valid assessment could be made of the reserved oil and natural gas interests?

(2) Did the Superior Court deny the [p]etitioners' due process rights under the United States and Pennsylvania Constitutions when it held that the 1935 tax sale divested [p]etitioners of their properly reserved oil and natural gas interests?

(3) Did the Superior Court overlook controlling authority which provides that a grantee is bound by prior exceptions and reservations cited in its deed?

(4) Did the Superior Court exceed the scope of its appellate authority by making a factual finding that the Kellers never notified the Centre County Commissioners of their severed oil and gas estate when the trial court found that there was no evidence one way or another as to whether such notice was provided?

A True Copy Elizabeth E. Zisk
As Of 1/27/2015

Attest:
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX B - MAY 9, 2014, SUPERIOR COURT OPINION

2014 PA Super 100

HERDER SPRING HUNTING CLUB	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	
v.	
HARRY AND ANNA KELLER	
Appellee	No. 718 MDA 2013

Appeal from the Judgment Entered July 12, 2011
In the Court of Common Pleas of Centre County
Civil Division at No(s): 2008-3434

BEFORE: DONOHUE, J., OTT, J., and PLATT, J.*

OPINION BY OTT, J.: **FILED MAY 09, 2014**

Herder Spring Hunting Club (Herder) appeals from the judgment entered July 12, 2011, in the Court of Common Pleas of Centre County, on the orders of September 29, 2010 and June 20, 2011, denying its motions for summary judgment and granting the heirs of Harry and Anna Keller ("Keller heirs") cross motions for summary judgment and awarding the Keller heirs fee simple ownership of the subsurface rights of the Eleanor Siddons Warrant. [1] Herder claims the trial court erred in: (1) failing to

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* Retired Senior Judge assigned to the Superior Court.

[1] Two sets of cross-motions for summary judgment were filed and decided in this matter. The first addressed the issue of the tax sale of unseated land and the applicability of the Act of 1806. These motions were decided in favor of the Keller heirs on September 29, 2010. The second set of cross-motions, addressing the issue of adverse possession, were decided in favor of the Keller heirs on June 20, 2011. The Keller heirs entered judgment on
(Footnote Continued Next Page)

recognize that a prior sale of the land for non-payment of real estate taxes effectively rejoined the subsurface and surface rights, and (2) failing to recognize that it had obtained subsurface rights through adverse possession. After a thorough review of the submissions by the parties and *amicus curiae* briefs filed on behalf of each party, the certified record, and relevant law, we agree with Herder's first argument. Therefore, we vacate the judgment entered July 12, 2011, on the orders of September 29, 2010 and June 20, 2011, and remand for entry of an order consistent with this decision.

We quote the factual background as stated by the trial court in its opinion and order dated September 29, 2010.

> On August 14, 2008, [Herder] initiated this action by filing a Complaint in the nature of an Action to Quiet Title. [Herder] subsequently filed a First Amended Complaint on October 27, 2008. [Herder] contends a 1935 tax sale extinguished the 1899 reservation of subsurface rights by Harry and Anna Keller and conveyed fee simple title to the tax sale purchaser, Max Herr. [Herder] argues Defendants failed to report their reservation of subsurface rights as required under the Act of March 28, 1806. [Herder] also asserts it has adversely possessed the mineral rights for a period in excess of twenty-one (21) years. The

(Footnote Continued)

July 12, 2012. Herder's appeal from that judgment was premature, as the Keller heirs' counterclaims remained open. ***See Herder Spring Hunting Club v. Keller***, 60 A.3d 556 (Pa. Super. 2012) (memorandum). Therefore, the appeal was quashed due to the unresolved counterclaims. On March 25, 2013, the Keller heirs withdrew their counterclaims, and this appeal was timely filed on April 23, 2013.

adverse possession claim has not been addressed by either party in the Motions for Summary Judgment.[2]

This suit arises out of a dispute over subsurface rights. In 1894, Defendant Harry and Anna Keller[1] acquired a tract of "unseated[2]" real estate containing 460 acres strict measure, known as the Eleanor Siddons Warrant[3] (hereinafter also referred to as the "property") at a tax sale. On June 20, 1899, the Kellers transferred the surface rights of the property to Isaac Beck, Isaiah Beck and James Fisher by deed but reserved unto themselves, their heirs and assigns all subsurface rights therein:

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[1] Harry Keller served as a Court of Common Pleas Judge in Centre County, Pennsylvania. Judge Keller served from 1926 to 1927.

[2] The distinction of seated and unseated land was part of Pennsylvania tax assessment law prior to 1961. Unseated land was unoccupied and unimproved whereas seated land contained permanent improvements as indicate a personal responsibility for taxes. ***See Hutchinson v. Kline***, 199 Pa. 564 (1901).

> [e]xcepting and reserving unto the said parties of the first part, their heirs and assigns forever all the coal, stone, fire clay, iron ore and other minerals of whatever kind, oil and natural gas lying or being, or which may now or hereafter be formed or contained in or upon the said above mentioned or hereafter be formed or contained in or upon the said above mentioned or described tract of land; together with the sole and exclusive right liberty and privilege of ingress and egress unto, upon and from the said land for the purpose of examining, digging and searching for, and of mining and manufacturing any minerals oil, or natural gas found therein or thereon for

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[2] As noted, cross-motions for summary judgment regarding Herder's adverse possession claim were subsequently filed and decided in favor of the Keller heirs.

[3] "Warrant" appears to refer to the warrant the property is as described.

> market, and the transportation and removal of the same without hindrance or molestation from the said parties of the second part, there [sic] heirs executors administrators, lessees or assigns, or any of them; together with the right and privilege onto the said parties of the first part, their heirs or assigns, to take from said land such timber as may be necessary for the purposes aforesaid, and for the said purposes to build, construct or dig common roads, railroads, tramways, or monkey drifts and make all and every other improvement that may be necessary either upon or under the surface of said land, on and over which may be transported or manufactured all mineral, oil and natural gas formed in or on said land, and to erect such buildings structures and other necessary improvement thereon as the parties of the first part hereto their heirs or assigns, may deem necessary for the convenient use of working of said mines mills or works, and the manufacturing and preparing of the out put [sic] of the same for market with the right to deposit the dirt and waste from said mines, mills and works upon the surface of said land as may be necessary for convenient and for all of said foregoing uses and purposes to take and appropriate such land for their exclusive use as the said parties of the first part, their heirs or assigns may deem necessary.

The deed was recorded on August 8, 1899 in Centre County Deed Book 80, Page 878. The property was subsequently transferred on various occasions.

In February 1910, the Becks sold the property to Arthur Baird. In August of 1910, Mr. Baird sold the property to Robert Jackson and Thomas Litz. In 1922, Ralph Smith acquired the property via deed from Jackson and Litz. In November of 1935, the Centre County Commissioners acquired title to the property via Treasurers Sale. The property was offered for sale by the Treasurer for unpaid real estate taxes. No bidder bid the upset price and the Commissioners purchased the property. At the time the land was unseated. By deed dated June 3, 1941, the Centre County Commissioners sold the property to Max Herr. Max Herr died intestate on February 2, 1944.

> In 1959, [Herder was] interested in purchasing the property from Mr. Herr's widow. A title search was performed and [Herder] became aware of the reservation. [Herder's] attorney, Richard Sharp, Esquire,[3] suggested to grantor's attorney, Roy Wilkinson, Jr., Esquire,[4] that Mr. Wilkinson "cover the exception by a specific clause making the conveyance subject to all exceptions and reservations as are contained in the chain of title." (Defendant's Motion for Summary Judgment 3/11/2010 Exhibit E) [Herder's] deed dated November 30, 1959 reflected "this conveyance is subject to all exceptions and reservations as are contained in the chain of title." [Herder's] deed was recorded on April 12, 1960 at Deed Book 253, page 107.
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> [3] Richard Sharpe served as a Court of Common Pleas Judge in Centre County, Pennsylvania from 1978 to 1980.
>
> [4] Roy Wilkinson, Jr. was one of the seven original judges nominated by Governor Raymond Shafer to the Commonwealth Court and confirmed by the Senate in 1971. Wilkinson served on the Court until 1981 when he was appointed a Justice of the Pennsylvania Supreme Court by Governor Richard Thornburgh.
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> Recently it was discovered that the property contains "a deep stratum of shale which contains natural gas." Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment, 4/8/2010, at 2.

Trial Court Opinion, 9/29/2010, at 2-4.

After relevant motions for summary judgment were filed and briefed, the trial court determined that Harry and Anna Keller's reservation of subsurface rights was recorded, Herder was aware of the reservation of rights, and therefore, the Keller heirs were entitled to those rights. The trial court also rejected Herder's adverse possession claim. Accordingly, the Keller heirs were awarded fee simple subsurface rights to the property originally known as the Eleanor Siddons Warrant.

Our scope and standard of review for summary judgment are well known:

> Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.
>
> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

Shamis v. Moon, 81 A.3d 962, 968-69 (Pa. Super. 2013) (citation omitted).

The relevant transactions herein are: (1) the 1899 horizontal severance of rights and transfer of surface rights to Beck and Fisher, (2) the acquisition of the property by the county commissioners for failure to pay taxes in 1935, (3) the sale from the commissioners to Herr in 1941, and (4) the purchase of the land in 1959 by Herder. Because of the age of these transfers, the resolution of this matter turns upon an arcane point of law, involving the interpretation of § 1 of Act of 1806, March 28, P.L. 644, 4 Sm.L. 346, retitled as 72 P.S. § 5020-409 (the Act).

72 P.S. § 5020-409 states:

> It shall be the duty of every person hereafter becoming a holder of unseated lands, by gift, grant or other conveyance, to furnish to the county commissioners, or board for the assessment and revision of taxes, as the case may be, a statement signed by

> such holder, or his, her, or their agent, containing a description of each tract so acquired, the name of the person or persons to whom the original title from the Commonwealth passed, and the nature, number and date of such original title, together with the date of the conveyance to such holder, and the name of the grantor, within one year from and after such conveyance, and on failure of any holder of unseated lands to comply with the injunctions of this act, it shall be the duty of the county commissioners to assess on every tract of land, respecting which such default shall be made when discovered, four times the amount of the tax to which such tract or tracts of land would have been otherwise liable, and to enforce the collection thereof, in the same manner that taxes due on unseated lands are or may be assessed and collected: Provided, That nothing in this section shall be construed as giving greater validity to unexecuted land warrants than they are now entitled to, nor to the detriment of persons under legal disabilities, provided such person or persons comply with the foregoing requisitions within the time or times limited, respectively, after such disability shall be removed.

1933, May 22, P.L. 853, art. IV, § 409.[4]

The Act required persons who acquired unseated land to furnish a statement describing that land to the county commissioners, or the board for the assessment and revision of taxes, so that a proper tax assessment could be levied.

However, the Section did not specifically address the situation presented in this case, where the subsurface rights to a specific parcel of

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[4] In 2010, effective January 1, 2011, this title was repealed as it relates to counties of the second class A, third, fourth, fifth, sixth, seventh and eighth class counties. ***See*** 53 Pa.C.S. § 8801, *Historical and Statutory Notes.* (Centre County is a county of the fourth class. ***See*** 16 P.S. § 210(4)).

land were horizontally severed[5] from the surface rights, thereby creating two estates in the same parcel of land. To understand how this severance affected the subsequent transfers of title, we must examine the state of the law, as it existed at the relevant periods.

We begin by reviewing ***Morton v. Harris***, 9 Watts 319 (Pa. 1840). It appears that prior to 1815, tax sales of unseated land were, originally, a suspect proposition, requiring specific proof that each and every step taken in the foreclosure and sale of the property were in "exact and literal compliance with every direction of the law or laws," ***id***. at *4, including proof that all relevant tax assessors had been properly elected. These strict requirements allowed original owners to reclaim land from tax purchasers even after the purchaser had improved the land. The Act of 1815 disposed of this strict requirement of proof, substituting the "presumption that everything was rightly done, for the proof that it was rightly done." ***Id***. The original owner was prevented from offering specific proof of irregularity of process, after a "lapse of two years from the time of sale." ***Id***.

Seated lands, that is land which has been improved by permanent structures, were treated differently from unseated lands, land which was unimproved, because "seated lands are assessed in the name of the owners

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[5] Horizontally severed land separates surface from subsurface rights; vertically severed land subdivides an estate into lots.

while unseated lands are assessed by survey or warrant numbers, regardless of the owners whose names if used at all are only for the purpose of description."[6] ***F.H. Rockwell & Co. v. Warren County, et al.***, 77 A. 665-66 (Pa. 1910) (superseded by statute as stated in ***Coolspring Stone Supply, Inc. v. County of Fayette***, 929 A.2d 1150 (Pa. 2007)). This statement of the law, which was applicable to the severance of rights and initial transaction in 1899,[7] highlights the necessity for informing the county commissioners of any changes to the real estate, because the commissioners, in assessing tax values to a particular warrant, are not concerned with names of the owners, only the property itself. Therefore, if the county commissioners have not been informed of the severance of surface and subsurface rights, the tax assessment is levied against the property as a whole.

The annotations to the Act (current Section 5020-409) reveal only three cases that address the issue of a tax sale of severed, unseated lands: ***Hutchinson v. Kline***, 49 A. 312 (Pa. 1901); ***Williston v. Colkett***, 9 Pa. 38

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[6] For example, the property at issue instantly is the Eleanor Siddons Warrant, although Eleanor Siddons is a stranger to these proceedings.

[7] ***Rockwell*** affirmed the Superior Court decision in ***Rockwell v. Keefer***, 39 Pa. Super. 468 (Pa. Super. 1909). The case addressed unseated tax assessments from 1904 through 1907 but relied upon case law such as ***Lillibridge v. Lackawanna Coal Co., Limited***, 22 A. 1035 (Pa. 1891) and ***Neill v. Lacy***, 1 A. 325 (Pa. 1885), which predate the 1899 transaction involved herein.

(1848); and ***Roaring Creek Water Co., v. Northumberland County Commissioners***, 1 Northumb. 181 (1889).

In ***Williston***, the property had been vertically, not horizontally, severed. The original warrant was for 999 acres, parts had been sold, leaving the property at 600 acres. However, the property was assessed at 200 acres and taxes were paid at the improper, lower value. When a treasurer's sale took place, ostensibly for the 200 acres, it was realized that the warrant correctly listed the properly at 600 acres, and the entire tract was deemed sold. The Supreme Court noted,

> It is of some consequence in this case that Asa Mann, the owner of the 600 acres unseated, had for two years previously paid the tax assessed in the same way, and for the same number of acres, on the same tract, without informing the officers that the true number of acres unseated was 600. By the act of Assembly of 8th March, 1806, it was the duty of the holder to give the commissioners a description of the unseated land held by him; but Asa Mann did not choose to comply with the law, but rather elected to profit by a mistake in the number of acres which was to his own advantage; and he now complains with an awkward grace of injustice done. He was silent for his own advantage, when truth and the interest of the public required him to speak.
>
> No man who reads the assessment, can doubt the intent of the officer to assess all the land which was unseated on the warrant 4483, in the name of Wilson. Such is the obvious meaning and import of the assessment – the 200 acres were mentioned as description. But the land was identified by the number of the warrant, the name of the warrantee, and the name of the owner from who, Mann had purchased.

Williston, at 9 Pa. at *2. The warrant listed the property at 600 acres,[8] and Mann was on notice of that fact, and had the responsibility to notify the assessors, yet he failed to do so. Because he failed to fulfill his duty under the Act, he could not take refuge in the faulty listing of the assessment. As such, he lost the entire 600 acres at the treasurer's sale, rather than the 200 acres listed on the tax assessment.[9] Even though ***Williston*** involves vertically severed lands, the result emphasizes the requirement that it is the owner's responsibility to provide an accurate report to the commissioners, and the failure to do so can have dire consequences.

In ***Roaring Creek***, the Roaring Creek Water Company, which owned the surface rights to certain tracts of lands near its dam, sought to enjoin the treasurer's sale of that property. As a public utility, Roaring Creek contended that its land, whether used for the public benefit or not, was exempt from taxation. The trial court determined that excess lands were subject to taxation, and so four of six tracts of lands at issue were both subject to taxation and treasurer's sale. In relevant part, the trial court noted:

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[8] It is unclear if this refers to 600 additional acres (800 total acres) or 600 total acres.

[9] The ***Williston*** decision also noted the import of the Act of 1815, regarding the presumption, absent proof to the contrary, that the commissioners had acted in conformance with the law.

> All these tracts of land have been valued and assessed in the usual way as unseated lands, and, doubtless, a treasurer's sale will pass the whole title, both as to the surface and all that is beneath. I refer to this matter only to suggest, both to the county and the owners, that hereafter it might be well to value and assess the respective interests of the several owners separately. One man may have a distinct title to the surface, and another to that which is beneath: Brooms Legal maxims, 297, 298. I do not, however, decide that it is incumbent on the taxing officers to notice the titles of parties, but doubtless it would be convenient and just to them.

Roaring Creek Water, Co. v. Northumberland Co. Commissioners, 1 Northumb.L.J. at *3.

Finally, in ***Hutchinson v. Kline***, 49 A. 312 (Pa. 1901), our Supreme Court affirmed the trial court's decision that had awarded both surface and subsurface rights to a tax purchaser even though those rights had been previously severed. The commissioners had never been informed of the severance and the property had been taxed as a whole, therefore, the property was sold as a whole. The trial court stated:

> By the act of the 28th of March, 1806, it is made the duty of the holder of lands to give the commissioners a description of the unseated lands held by him. ***Williston v. Colkett***, 9 Pa. 38. And when the mineral rights were severed from the surface rights the plaintiffs should have given notice of this fact to the commissioners or to the assessor. It was also their duty to give the county commissioners a description of their lands as conveyed by courses and distances, if they desired to have them assessed as a whole. The tax laws as to unseated lands treat them entirely in reference to the original warrants, when not otherwise directed by the owners. Parts of distinct warrants, united in fact by purchase, may be returned and assessed by whatever designation the owner may choose, and be held and taxed as a unit. But in order to accomplish this, it would be the duty of the owner to furnish the taxing officers with a proper description, in order that they may be assessed and taxed as a unit. ***Heft v. Gephart***, 65 Pa. 510 [1870].

Hutchinson, 49 A. 312. The decision goes on to state, "The record of the deed creating a separate estate in the minerals would not be notice to the assessor or the commissioners, as they were not bound to search or examine the records." ***Id.***[10]

In addition to those three cases annotated to the Act, in ***Heft v. Gephart***, 65 Pa. 510 (1870), our Supreme Court confirmed that under the tax system, in place then and also relevant to the instant matter, treated unseated land "in reference to the original warrants when not otherwise directed by the owners." ***Id.*** at *6.

The relevant case law established that the acts taken by the commissioners regarding the tax sale were presumed to comport with applicable statutes and regulations, subject to contrary proof produced within two years of the foreclosure. The person who severed rights to unseated land was under an affirmative duty imposed by statute to inform

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[10] An *amicus curiae* filed in support of the Keller heirs has claimed that the Act provides a remedy for the failure to inform the commissioners of the severance of rights, that being a four-fold increase in the tax assessment. This penalty appears to be applied in those instances where the land was not sold at a Treasurer's sale. The four-fold penalty was in place when ***Hutchinson*** and ***Roaring Creek*** were decided. We have no reason to believe that either our Supreme Court or the Northumberland County Court were unaware of the four-fold statutory provision. Although not explained in either of those decisions, that penalty was not applied. We will not retroactively apply that provision where the courts of that era did not see fit to utilize the penalty in this circumstance. It appears that the four-fold penalty was to be imposed in those situations where no tax sale had taken place.

the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independently valued.[11] If information regarding the severance of rights to unseated property is not

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[11] Appellees have argued that because there is no showing that the subsurface rights were ever independently valued, they cannot have been subject to taxation and therefore cannot be part of tax sale. This argument is unavailing. First, the import of the Act is that it allows the tax assessors the opportunity to independently assess a value to severed rights. That opportunity was never given to Centre County. One cannot say the mineral rights were never valued when the commissioners were not given the opportunity to independently value them. Next, that argument has been rejected by our Supreme Court, which stated:

> Appellant further argues that even though a taxing body purports to assess an entire mineral estate, only minerals known to exist at the time and place are actually valued by the assessors, taxed and later sold if taxes become delinquent. Acceptance of this proposition would undoubtedly lead to confusion and speculation, for no one would know what had actually been sold. Attempts to prove that accessors [sic] did or did not know of the presence of oil or gas when they assessed 'minerals' at some point in the past would lead to protracted collateral investigation and litigation. It is true, of course, that an assessor can tax only that which had value. ***Rockwell v. Warren County***, 228 Pa. 430, 77 A. 665 (1910); if no gas or oil exists, the mineral rights should not be taxed as if they did. Nevertheless, an assessment or sale believed to be improper because of overvaluation cannot be collaterally attacked fifty years later. The owner must petition immediately for exoneration. ***Wilson v. A. Cook Sons Co.***, ***Supra***, 298 Pa. 85, at 92, 148 A. 63 [(1929)].

Bannard v. New York State Natural Gas Corporation, 293 A.2d 41 (Pa. 1972). We note that ***Bannard*** also recognizes the requirement to promptly challenge a tax sale. ***See Morton***, ***supra***.

given to the commissioners, then any tax assessment for that unseated property must logically be based upon the property as a whole.

If a parcel of unseated land was valued as a whole, and the taxes on that land were not paid, thereby subjecting that property to seizure and tax sale, then all that was valued, surface and subsurface rights, were sold pursuant to any tax sale, absent proof within two years, of the severance of rights.

We apply the law to the instant facts. Because the Kellers originally obtained the property through an 1894 tax sale, they obtained the rights to the property as a whole, and the tax assessors would continue to value the property as a whole unless otherwise informed. ***See Hutchinson**, **supra***; ***Heft**, **supra***. When the property was horizontally severed in 1899, the Kellers never informed the county commissioners of their retention of the subsurface rights to the land after selling the surface rights. Pursuant to the Act, it was their affirmative duty to do so. In 1935, the treasurer obtained the rights to the property pursuant to a treasurer's sale. Because the horizontal severance had never been reported to the commissioners, the property continued to be taxed as a whole, just as it had been when the Kellers obtained the property at tax sale. Therefore, the treasurer obtained the property as a whole and transferred it to the commissioners as a whole.

The trial court credited the Keller heirs' averment in their pleadings that the records of the severed subsurface rights were not kept by the Recorder of Deeds or were lost or destroyed. ***See*** Trial Court Opinion,

9/29/2010, at 7. Notwithstanding the lack of proof of notice of severance, it remains that the tax deeds do not reflect that any interest in the land less than a fee simple was ever assessed. There is nothing in the certified record to suggest that the records of Centre County were ever subject to flood, fire, or some other calamity or negligence such that it might be presumed that relevant records were lost or destroyed. Absent such proof, we cannot presume such extraordinary events and the loss or destruction of records. The Act of 1806 placed the affirmative duty on the party who severed the rights to unseated land to report that action to the tax authorities. The law further requires we presume that all actions, such as recording and assessing severed rights, that were required to be taken were taken. Therefore, the proper assumption on the record before us is that failing any affirmative proof to the contrary, the severance of surface and subsurface rights in 1899 was never reported to the Centre County Commissioners. Therefore, when the commissioners finally sold the property in 1941 to Max Herr, they sold what had been taken, the entire property. ***See Hutchinson***, ***supra***. We note that neither the 1936 deed[12] transferring title from the County Treasurer to the County Commissioners, nor the 1941 deed

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[12] While the Treasurer obtained the rights to the land in November 1935, the Treasurer's Office did not formally transfer the property to the County until June, 1936.

transferring title from the Commissioners to Herr make reference to any reservation of subsurface rights.

Pursuant to ***Morton v. Harris***, ***supra***, the Keller heirs who ostensibly took possession of the subsurface rights, had two years from the delivery of the title to Herr, the purchaser at tax sale, to make known their claim. They did not. After the two years had passed, without any challenge or amendment to the deed, any subsequent transfer of the title of the property was allowed to rely on the deed containing no reservation of subsurface rights.

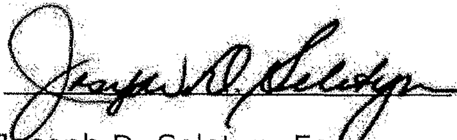
Although the 1959 deed (from the Herr estate to Herder) made mention of the "conveyance being subject to all exceptions and reservations as are contained in the chain of title," there were no active exceptions or reservations in the chain of title, the horizontal severance having been extinguished more than one decade earlier. Neither the Act of 1806 nor any case law interpreting the Act allow for the preservation of a reservation of land rights through the deed only after a tax sale. We do not believe, and the Keller heirs have provided no authority for, the proposition that such general language acknowledging the possibility of exceptions or reservation serves to re-sever that which had been united.

Finally, we are aware that our resolution of this matter is at odds with modern legal concepts. This resolution may be seen as being unduly harsh. However, at the time of the relevant transactions – the seizure of the property for failure to pay tax and the subsequent Treasurer's sale – this

was the appropriate answer. We do not believe it proper to reach back, more than three score years, to apply a modern sensibility and thereby undo that which was legally done.[13]

Judgment orders granting summary judgment and awarding subsurface rights in favor of appellees is vacated. This matter is remanded to the trial court to enter summary judgment and award subsurface rights in favor of appellant, Herder. Jurisdiction relinquished.

Judgment Entered.



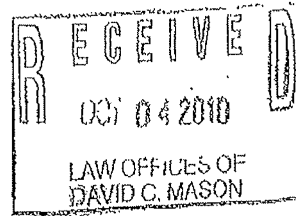
Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/9/2014

[13] Because of our resolution of this matter, we need not address Herder's claim of adverse possession. However, we note from our review of the certified record, it appears that this claim would fail, as there was a two-month gap from November 16, 1983 to January 11, 1984 in the leases.

APPENDIX C – SEPTEMBER 29, 2010, TRIAL COURT OPINION

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION - LAW



HERDER SPRING HUNTING CLUB,

Plaintiff,

v. : No. 2008-3434

HARRY KELLER and ANNA KELLER, his wife; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF; JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARY LYNN COX; ROBERT EGOLF; NATHAN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDE SUE HUTCHISON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE; DAVID KELLER; STEPHEN RICHARD KELLER; MICHAEL EGOLF, their heirs, successors, executors, administrators, and assigns, as well, as ANY OTHER PERSON, PARTY OF ENTITY,

Defendants.

COPY

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DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

Attorney for Plaintiff: *David Mason, Esq.*
Attorney for Defendants: *Brian Marshall, Esq.*
Timothy Schoonover, Esq.
Rebecca Warren, Esq.

Lunsford, J.

OPINION and ORDER

Plaintiff and Defendant filed Motions for Summary Judgment which are presently before the Court. For the following reasons, the Motion for Summary Judgment filed by Plaintiff is

denied and the Motion for Summary Judgment filed by Defendant is granted.

Background

On August 14, 2008, Plaintiff initiated this action by filing a Complaint in the nature of an Action to Quiet Title. Plaintiff subsequently filed a First Amended Complaint on October 27, 2008. Plaintiff contends a 1935 tax sale extinguished the 1899 reservation of subsurface rights by Harry and Anna Keller and conveyed fee simple title to the tax sale purchaser, Max Herr. Plaintiff argues Defendants failed to report their reservation of subsurface rights as required under the Act of March 28, 1806. Plaintiff also asserts it has adversely possessed the mineral rights for a period in excess of twenty-one (21) years. The adverse possession claim has not been addressed by either party in the Motions for Summary Judgment.

This suit arises out of a dispute over subsurface rights. In 1894, Defendants Harry and Anna Keller[1] acquired a tract of "unseated[2]" real estate containing 460 acres strict measure, known as the Eleanor Siddons Warrant (hereinafter also referred to as the "property") at a tax sale. On June 20, 1899, the Kellers transferred the surface rights of the property to Isaac Beck, Isaiah Beck and James Fisher by deed but reserved unto themselves, their heirs and assigns all subsurface rights therein:

> [e]xcepting and reserving unto the said parties of the first part, their heirs and assigns forever all the coal, stone, fire clay, iron ore and other minerals of whatever kind, oil and natural gas lying or being, or which may now or hereafter be formed or contained in or upon the said above mentioned or hereafter be formed or contained in or upon the said above mentioned or described tract of land; together with the sole and exclusive right liberty and privilege of ingress and egress unto, upon and from the said land for the

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[1] Harry Keller served as a Court of Common Pleas Judge in Centre County, Pennsylvania. Judge Keller served from 1926 to 1927.

[2] The distinction of seated and unseated land was part of Pennsylvania tax assessment law prior to 1961. Unseated land was unoccupied and unimproved whereas seated land contained permanent improvements as indicate a personal responsibility for taxes. *See Hutchinson v. Kline*, 199 Pa. 564, (1901).

> purpose of examining, digging and searching for, and of mining and manufacturing any minerals oil, or natural gas found therein or thereon for market, and the transportation and removal of the same without hindrance or molestation from the said parties of the second part, there heirs executors administrators, lessees or assigns, or any of them; together with the right and privilege onto the said parties of the first part, their heirs or assigns, to take from said land such timber as may be necessary for the purposes aforesaid, and for the said purposes to build, construct or dig common roads, railroads, tramways, or monkey drifts and make all and every other improvement that may be necessary either upon or under the surface of said land, on and over which may be transported or manufactured all mineral, oil and natural gas formed in or on said land, and to erect such buildings structures and other necessary improvement thereon as the parties of the first part hereto their heirs or assigns, may deem necessary for the convenient use of working of said mines mills or works, and the manufacturing and preparing of the out put of the same for market with the right to deposit the dirt and waste from said mines, mills and works upon the surface of said land as may be necessary for convenient and for all of said foregoing uses and purposes to take and appropriate such land for their exclusive use as the said parties of the first part, their heirs or assigns may deem necessary.

The deed was recorded on August 8, 1899 in Centre County Deed Book 80, Page 878. The property was subsequently transferred on various occasions.

In February of 1910, the Becks sold the property to Arthur Baird. In August of 1910, Mr. Baird sold the property to Robert Jackson and Thomas Litz. In 1922, Ralph Smith acquired the property via deed from Jackson and Litz. In November of 1935, the Centre County Commissioners acquired title to the property via Treasurers Sale. The property was offered for sale by the Treasurer for unpaid real estate taxes. No bidder bid the upset price and the Commissioners purchased the property. At the time the land was unseated. By deed dated June 3, 1941, the Centre County Commissioners sold the property to Max Herr. Max Herr died intestate on February 2, 1944.

In 1959, Plaintiffs were interested in purchasing the property from Mr. Herr's widow. A title search was performed and Plaintiff became aware of the reservation. Plaintiff's attorney, Richard Sharp, Esquire[3], suggested to grantor's attorney, Roy Wilkinson, Jr., Esquire,[4] that Mr. Wilkinson "cover the exception by a specific clause making the conveyance subject to all exceptions and reservations as are contained in the chain of title." (Defendant's Motion for Summary Judgment 3/11/2010 Exhibit E) Plaintiff's deed dated November 30, 1959 reflected "this conveyance is subject to all exceptions and reservations as are contained in the chain of title." Plaintiff's deed was recorded on April 12, 1960 at Deed Book 253, page 107.

Recently it was discovered that the property contains "a deep stratum of shale which contains natural gas." Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment, 4/8/2010, at 2.

Discussion

Under the Pennsylvania Rules of Civil Procedure, Rule 1035.2, "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:

> 1. whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> 2. if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence

[3] Richard Sharpe served as a Court of Common Pleas Judge in Centre County, Pennsylvania from 1978 to 1980.

[4] Roy Wilkinson, Jr. was one of the seven original judges nominated by Governor Raymond Shafer to the Commonwealth Court and confirmed by the Senate in 1971. Wilkinson served on the Court until 1981 when he was appointed a Justice of the Pennsylvania Supreme Court by Governor Richard Thornburgh.

> of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa. R.C.P. 1035.2. Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Blackman v. Federal Realty Inv. Trust*, 444 Pa. Super. 411, 415, 664 A.2d 139, 141 (1995). The court may grant summary judgment only where, examining the record in the light most favorable to the non-moving party, the moving party's right to it is clear and free from doubt. *Id.* at 141-142.

I. Plaintiff's Motion for Summary Judgment

Plaintiff argues that Defendants neglected to take any action in order to protect their respective subsurface interests in the premises. Plaintiff argues if Harry Keller was to retain the reserved subsurface rights, he was required to notify the County Commissioners of his severance of the subsurface interest from the ownership of the surface so that it could be taxed pursuant to Act of March 8, 1806. Plaintiff points out that the Act of March 8, 1806, placed an obligation on owners of unseated lands to give the county commissioners a description of the unseated lands held. Plaintiff argues because there is no evidence the subsurface interest was reported to the county for taxation and no separate assessment issued, the fee simple interest was assessed, levied and sold to Max Herr.

Additionally, Plaintiff argues it has adversely possessed the mineral rights for a period in excess of twenty-one (21) years although this issue was not addressed in the Motion for Summary Judgment.

In response, Defendants argue: 1.) only subsurface rights under operation and production have value which is assessable and taxable, and 2.) only assessed property can be acquired by a tax sale purchaser and, as Plaintiff admits, the subsurface rights were never assessed

prior to the tax sale in this matter. Furthermore, Defendants contend Plaintiff has failed to meet its burden to prove that the Keller subsurface rights were taxable prior to the 1935 tax sale. Because the property's subsurface rights were not assessed, Plaintiff's predecessor-in-interest received only the assessed surface rights at the tax sale. Defendants also argue that Plaintiff is estopped from claiming ownership of the subsurface rights, where it expressly acknowledged all reservations in the chain of title in its own deed.

In *F. H. Rockwell & Co. v. Warren County*, 228 Pa. 430, 433, 77 A.655, 666 (1910), the Court noted "[a] mere naked reservation of oil and gas in a deed without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes.[5]" *Id.* at 433. In *Day v. Johnson*, 31 Pa. D.&C.3d 556, 1983 WL 968 (Pa.Com.Pl., 2003), the court found in favor of a plaintiff who claimed subsurface rights through a deed reservation over defendants who claimed ownership through a tax sale. The *Day* court found the subsurface interest was never assessed for taxation purposes and therefore could not be sold for delinquent taxes. *Id.* at 558. The court further found the creation of an exception and reservation without the operation for the removal of the minerals does not create a taxable estate *per se* and would not until production is commenced and the property is assessed. *Id.* The court provided the assessment for tax purposes of the subsurface rights is on the production of the oil and gas from the subsurface not on an estate where valuation

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[5] In a 2007 Pennsylvania Supreme Court case, the Court clarified that in *F.H. Rockwell* it stated that "oil and gas beneath the surface are also separately taxable as land, but *F.H. Rockwell* did not contemplate whether any particular statutory provision permitted the taxation of oil and gas interests, as we have since repeatedly instructed that an enactment of the General Assembly is necessary for a tax to be valid. *See Northwood Constr. Co.*, 856 A.2d at 796; *IOGA*, 814 A.2d at 182; *Appeal of H.K. Porter Co.*, 219 A.2d at 654. Moreover, the enactment of the General County Assessment Law followed *F.H. Rockwell* and, as determined in *IOGA*, there is no statutory authority that presently supports the real estate taxation of oil and gas interests." *Coolspring Stone Supply, Inc. v. County of Fayette*, 593 Pa. 338, 929 A.2d 1150 (2007).

cannot be determined. *Id.* The present case is analogous to *Day*. As Defendants note, Plaintiff admits the subsurface rights were not assessed prior to the 1935 tax sale. Furthermore, Plaintiff does not have any evidence that there has ever been production of subsurface resources on the property since the recordation of the Keller reservation in 1899. Because the subsurface interest was never assessed for taxation purposes it could not have been sold for delinquent taxes.

Regarding Plaintiff's claim that the Kellers failed to report their reservation of subsurface rights to the county commissioners, all inferences must be drawn in favor of the non-moving party, Defendants. There is no evidence one way or another whether the Kellers ever reported their ownership interest for assessment purposes. Defendants were unable to locate evidence of *any* reserved mineral interest having been reported to the county for taxation purposes consistent with the Act of March 28, 1806. Defendants aver the records were not kept by the Recorder of Deeds or were lost or destroyed. Therefore Plaintiff's claim of ownership based on the purported failure of Harry Keller to report his reservation of subsurface rights to the Centre County Commissioners which resulted in Keller escaping assessment and taxation and his rights being sold at tax sale along with the surface rights to the County, Max Herr and Plaintiff fails and Plaintiff's Motion for Summary Judgment is denied.

II. <u>Defendants' Motion for Summary Judgment</u>

Defendants argue that the Keller heirs have clear record title to the subsurface rights and Plaintiff is bound by its explicit acknowledgement thereof in its own recorded deed and; therefore, this Court should grant Defendants' Motion for Summary Judgment as a matter of law. Defendants argue the Kellers detailed an explicit reservation of subsurface rights which was recorded in the Centre County land records. Plaintiff had actual knowledge of the reservation when it acknowledged the reservation at the time of purchase in 1959.

Defendants also argue Plaintiff is estopped from claiming ownership of the subsurface rights, where the chain of title in its deed expressly acknowledged the reservations concerning subsurface rights. When Plaintiff purchased the property from Max Herr's widow, the language "[t]his conveyance is subject to all exceptions and reservations as are contained in the chain of title." Defendants contend that because Plaintiff drafted the acknowledgement in its deed recognizing the Keller reservation, Plaintiff must be estopped from now claiming the Keller reservation was "extinguished" by the Tax Sale in 1935. In response, Plaintiff argues the language contained in the 1959 deed from Kate Herr to Plaintiff, "[t]his conveyance is subject to all exceptions and reservations contained in the chain of title," does not support Defendant's arguments. Plaintiff argues the language is not part of the description but part of the "Habendum." However, clearly Plaintiff was aware of the reservation of subsurface rights no matter where it was included in the deed. When Plaintiff purchased the property in 1959, Plaintiff's attorney, Richard Sharp, sent correspondence to Ms. Herr's attorney, Roy Wilkinson, Jr., suggesting that Attorney Wilkinson "cover the exception by a specific clause making the conveyance subject to all exceptions and reservations as are contained in the chain of title." The deed contains the suggested language, "this conveyance is subject to all exceptions and reservations as are contained in the chain of title." Therefore, Plaintiffs cannot claim they were unaware of the reservation as Plaintiff's attorney proposed the language to cover the exception that was added to the deed.

Essentially Plaintiff relies on the arguments made in its Motion for Summary Judgment that that the Kellers failed to report the reservation under the Act of March 8, 1806 and; therefore, the 1935 tax sale extinguished the 1899 reservation of subsurface rights. However, as addressed above, Defendants make a valid point that there are no records of any reports of such

reservations. Plaintiff also argues "tax sale does not convey weak title" citing *Ziff v. Taylor* from Centre County. However, rights to minerals are separate estates and may be assessed and taxed separately from the surface rights. *Armstrong v. Black* Fox *Mining and Development Corp.*, 15 Pa. D & C.3d 757, 762, 1980 WL 741 (Pa.Com.Pl., 1980) *citing Sanderson v. Scranton*, 105 Pa. 469 (1884).

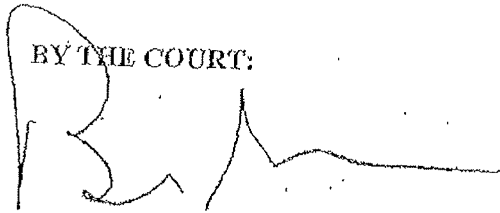
In *Armstrong*, a 1903 deed severed title to the surface from the coal and conveyed "[a]ll coal of whatever king lying and being in and under" a 54 acre tract of land. *Id.* at 758. The surface rights were sold for delinquent taxes by the Armstrong County Tax Claim Bureau to the Duppstadts. *Id.* at 759. In *Armstrong*, the defendant argued the coal ownership to a 54 acre tract was not separately assessed for taxation purposes from the surface and thus was sold with the surface by the Tax Claim Bureau. *Id.* at 761. Plaintiffs denied the coal was not separately assessed and further argued the tax sale could not have conveyed the coal since it was not owned by the prior owners in whose name the sale for delinquent taxes was made. *Id.* The court noted, "[a] purchaser at a tax sale of the surface of the estate would not be able to rely on this to claim he purchased the coal estate as well." *Id.* at 762. A tax sale for delinquent taxes conveys only that estate owned by the titleholder and covered by the assessment. *Id. citing Miller v. McCollough*, 104 Pa. 624 (1884), *Brundred v. Egbert*, 164 Pa. 615 (1894). Therefore, in the present case, because the property was undisputedly unseated and was not under production at any time prior to the tax sale to Max Herr, the subsurface rights were not conveyed to Max Herr as the prior owner did not possess the subsurface rights. Defendants' Motion for Summary Judgment is granted as to the above issues raised in the Motion for Summary Judgment.

Neither party has addressed the issue of adverse possession in the Motions for Summary Judgment consequently this issue is still pending before this Court.

ORDER OF COURT

AND NOW, this 29th day of September, 2010, upon consideration of the Motion for Summary Judgment filed by Plaintiff, Herder Spring Hunting Club; said motion is hereby denied. Upon consideration of Defendants' Motion for Summary Judgment, said motion is hereby Granted; however, Plaintiff's claim that it has adversely possessed the property known as the Eleanor Siddons Warrant for a period in excess of twenty-one (21) years is still at issue before this Court.

BY THE COURT:



Bradley P. Lunsford, Judge

APPENDIX D - JUNE 20, 2011 TRIAL COURT OPINION

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

HERDER SPRING HUNTING CLUB,	:	No 2008-3434
Plaintiff	:	
vs.	:	
HARRY KELLER and ANNA KELLER, ET AL.,	:	
Defendants	:	

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Attorney for Plaintiff: *David C. Mason, Esq.*
Attorneys for Defendants: *Brian K. Marshall, Esq.*
Timothy A. Schoonover, Esq.
Rebecca L. Warren, Esq.

Lunsford, J.

OPINION AND ORDER

Presently before the Court are Motions for Summary Judgment filed by Plaintiff and Defendants based on Plaintiff's claim of adverse possession. For the following reasons, Plaintiff's Motion for Summary Judgment is denied and Defendants' Motion for Summary Judgment is granted.

Background

The background of the present case was set forth in this Court's Opinion and Order dated September 29, 2010 in which this Court denied Plaintiff's Motion for Summary Judgment and granted Defendant's Motion for Summary Judgment thereby confirming the Kellers' reservation and ownership of the property's subsurface rights to themselves, their heirs and assigns.

Plaintiff purchased the surface rights of the Eleanor Siddons Warrant consisting

of 460 acres (hereinafter "the property") in 1959. The parties disputed the ownership of the subsurface rights. Harry Keller and Anna Keller severed the surface and subsurface rights of the property by specifically reserving onto themselves, heirs and assigns forever, the subsurface rights to coal, stone, fire, clay, iron ore, mineral of whatever kind, oil and natural gas by a Deed dated June 20, 1899. The Plaintiff's Deed for the property contains a clause providing, "[t]his conveyance is subject to all exceptions and reservations as are contained in the chain of title." Plaintiff and its attorney were aware of the reservation of the subsurface rights to the Kellers, their heirs and assigns in 1959 when Plaintiff purchased the property. Plaintiff alleged in the Complaint in the form of an Action to Quiet Title that it had fee simple ownership to the surface and subsurface rights through chain of title or through Adverse Possession. This Court confirmed the Kellers' reservation and ownership of the subsurface rights to themselves, their heirs and assigns in the September 29, 2010 Opinion and Order. However, the issue of Adverse Possession was not addressed in the previous Motions for Summary Judgment and is now before this Court.

Discussion

Under the Pennsylvania Rules of Civil Procedure, Rule 1035.2, "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:

> 1. whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
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> 2. if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to

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> produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa. R.C.P. 1035.2. Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Blackman v. Federal Realty Inv. Trust*, 444 Pa. Super. 411, 415, 664 A.2d 139, 141 (1995). The court may grant summary judgment only where, examining the record in the light most favorable to the non-moving party, the moving party's right to it is clear and free from doubt. *Id.* at 141-142.

In order to succeed in a claim of adverse possession it must be proven that the party had "actual, continuous, exclusive, visible, notorious, distinct and hostile possession of the land for 21 years." *Conneaut Lake Park v. Klinginsmith,* 363 Pa. 562, 66 A.2d 828 (1949). Each of the elements must exist or the possession will not confer title. *Id.*

Plaintiff argues it exercised dominion and control over the oil and gas interests underlying the property for a period in excess of 21 years through the execution, delivery and recording of exclusive oil and gas leases six different times to five different companies, commencing November 15, 1973. The most recent lease was a five year lease executed June 12, 1993. Upon review of Plaintiff's motion, the claim of Adverse Possession fails.

Plaintiff bases its claim for Adverse Possession on the fact that Plaintiff owns the surface and has leased rights to the oil and natural gas on the property on six separate occasions. The most obvious insufficiency in Plaintiff's Adverse Possession claim is the leases were not continuous for a period of 21 years. The first lease was executed on November 15, 1973 for a five year term which expired on November 16, 1978. On March

17, 1978, Plaintiff executed a lease effective from November 16, 1978 to November 16, 1983. On January 11, 1984, Plaintiff executed a lease for a ten year term to expire on January 11, 1994. Between November 16, 1978 and January 11, 1984, the leases lapsed thereby defeating Plaintiff's claim for Adverse Possession.

The next lease overlapped the January 11, 1984 lease. It was executed on March 31, 1987 for a period of five years to expire on March 31, 1992. Next, a lease was executed on April 13, 1990 for a period of five years which expired April 13, 1995--which also overlapped the previous lease. On June 12, 1993, the final lease was executed for a period of five years to expire on June 12, 1998. Therefore, the period after the lapse in November 1978, is also insufficient to meet the 21 year requirement. No leases were in place for the fifteen year period of time preceding the filing of the present action.

Plaintiffs claim also fails on the other elements required to make a successful claim of Adverse Possession. As Defendants note, this Court already determined that the surface and subsurface rights of the property were severed by the Kellers in the Deed of 1899. Therefore, Plaintiff cannot merely rely on its ownership or occupation of the surface. In the present case, similar to *Thomas v. Oviatt*, 4 Pa.D&C4th 83 (1989), the Court determined the surface owner's Adverse Possession claim based on leases. The Court held it was insufficient to vest title in plaintiffs by reason of their contract in granting a lease which is recorded in absence of drilling on the surface. *Id.* at 84. This Court also concludes that Plaintiff has not demonstrated actual possession of the subsurface rights through the mere execution of leases. Furthermore, Plaintiff's claimed possession was not open, visible or notorious. It is undisputed there was no entry upon the subsurface. As the Pennsylvania Supreme Court provided in *Delaware & H. Canel*

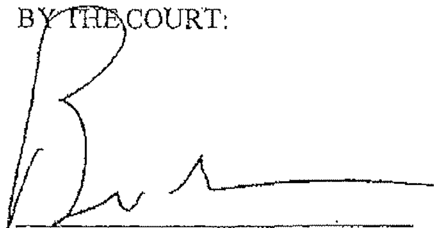
Co., 183 Pa. 66, 38 A. 568 (1897), "a covert or clandestine entry will not do. Such an entry will confer no right on the wrongdoer until his entry is, or by the exercise of due diligence might be, discovered by the owner. Until then the owner cannot know that his possession has been invaded. . ." Because there was no entry on the subsurface that could possibly have been discovered by the owner nor any entry that could have provided open, visible and notorious notice to Defendants, Plaintiff's claim of Adverse Possession also fails to meet this element.

Accordingly, the following Order is entered:

ORDER

AND NOW, this 16th day of June, 2011, Plaintiff's Motion for Summary Judgment Regarding Plaintiff's Claim for Adverse Possession is hereby DENIED. Defendant's Motion for Summary Judgment Regarding Plaintiff's Claim of Adverse Possession is hereby GRANTED. Defendants' fee simple ownership of the subsurface rights of the Eleanor Siddons Warrant is affirmed.

BY THE COURT:



Bradley P. Lunsford, Judge

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APPENDIX E – ACT OF 1806

72 P.S. § 5020-409

Pa.C.S. documents are current through 2014 Regular Session Act 130, Enacted July 18, 2014. P.S. documents are current through 2014 Regular Session Acts 1 to 36 and 38 to 50 Annotations current through July 17, 2014

§ 5020-409. Persons acquiring unseated lands to furnish statement to county commissioners

It shall be the duty of every person hereafter becoming a holder of unseated lands, by gift, grant or other conveyance, to furnish to the county commissioners, or board for the assessment and revision of taxes, as the case may be, a statement signed by such holder, or his, her, or their agent, containing a description of each tract so acquired, the name of the person or persons to whom the original title from the Commonwealth passed, and the nature, number and date of such original title, together with the date of the conveyance to such holder, and the name of the grantor, within one year from and after such conveyance, and on failure of any holder of unseated lands to comply with the injunctions of this act, it shall be the duty of the county commissioners to assess on every tract of land, respecting which such default shall be made when discovered, four times the amount of the tax to which such tract or tracts of land would have been otherwise liable, and to enforce the collection thereof, in the same manner that taxes due on unseated lands are or may be assessed and collected: Provided, That nothing in this section shall be construed as giving greater validity to unexecuted land warrants than they are now entitled to, nor to the detriment of persons under legal disabilities, provided such person or persons comply with the foregoing requisitions within the time or times limited, respectively, after such disability shall be removed.

History

Act 1933-155, P.L. 853, § 409, approved May 22, 1933, eff. Sept. 1, 1933.

Annotations

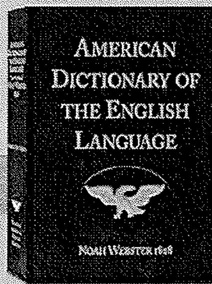
Research References & Practice Aids

LexisNexis (R) Notes

TREATISES AND ANALYTICAL MATERIALS

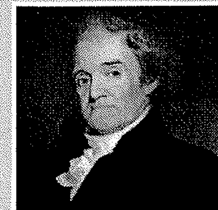
1. *47 P.L.E. TAXATION § 174, Pennsylvania Law Encyclopedia, Description of Property, Copyright 2013, Matthew Bender & Company, Inc., a member of the LexisNexis Group.*

APPENDIX F – WEBSTER'S 1828 DICTIONARY - "LAND"



AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE

Dictionary search: land Go



Noah Webster

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Land

LAND, *noun*

1. Earth, or the solid matter which constitutes the fixed part of the surface of the globe, in distinction from the sea or other waters, which constitute the fluid or movable part. Hence we say, the globe is terraqueous, consisting of *land* and water. The seaman in a long voyage longs to see *land*

2. Any portion of the solid, superficial part of the globe, whether a kingdom or country, or a particular region. The United States is denominated the *land* of freedom.

Go, view the *land* even Jericho. **Joshua 2:1.**

3. Any small portion of the superficial part of the earth or ground. We speak of the quantity of *land* in a manor. Five hundred acres of *land* is a large farm.

4. Ground; soil, or the superficial part of the earth in respect to its nature or quality; as good land; poor land; moist or dry *land*

5. Real Estate. A traitor forfeits all his lands and tenements.

6. The inhabitants of a country or region; a nation or people.

These answers in the silent night received, the king himself divulged, the *land* believed.

7. The ground left unplowed between furrows, is by some of our farmers called a *land*

To make the *land*

To make *land* In seaman's language, is to discover *land* from sea, as the ship approaches it.

To shut in the *land* to lose sight of the *land* left, by the intervention of a point or promontory.

To set the *land* to see by the compass how it bears from the ship.

LAND, *noun* Urine; whence the old expression, *land* dam, to kill. *obsolete*

LAND, *verb transitive* to set on shore; to disembark; to debark; as, to *land* troops from a ship or boat; to *land* goods.

LAND, *verb intransitive* To go on shore from a ship or boat; to disembark.

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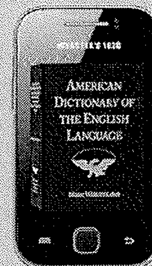

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PROOF OF SERVICE

I hereby certify that on the 6th day of March, 2015, I will have served the foregoing Brief of Appellants upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

Service by first class mail addressed as follows:

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Chariton, Schwager & Malak
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