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IN THE SUPREME COURT OF PENNSYLVANIA

Middle District

No. 5 MAP 2015

HERDER SPRING HUNTING CLUB,
Appellee
vs.
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,
Appellants

BRIEF OF APPELLEE

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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SUMMARY OF THE ARGUMENT

The distinction in real estate tax assessment between "seated" and "unseated" land is critical to an understanding of the issues in the matter before the Court. Unseated land is land which is found to be vacant and unoccupied, and without any personal property found on the land to satisfy the taxes, it is the land itself which generates the assessment and is debtor for the real estate tax. The Siddons Warrant, all estates (surface as well as subsurface) in fee, generated the assessment unless and until the owner of a reserved mineral estate reported the severance. This notification to the County is required by the Act of March 8, 1806. *Williston v. Colkett*, 9 Pa. 38 (1848). Only by Keller's reporting of his severed subsurface estate would his subsurface estate be assessed and taxed separately by Centre County from the other estates in the Siddons Warrant. *Rockwell v. Warren County*, 228 Pa. 430 (1910) confirmed that severance of a separate subsurface interest creates an interest or estate in land and may be the subject of taxation, and, if the tax is unpaid, may be sold.

Logan v. Washington County, 29 Pa. 373 (1857) stands for the proposition that the total tax on all estates taxed separately cannot be greater than the real estate taxes assessed against the fee. Consequently,

when a separate interest is created for an interest less than in fee, the resulting tax on the other estates in the Warrant must be reduced.

The County officials did not conduct title examinations to determine who owned what interest in unseated lands, as the land – in this case the Warrant – was the debtor for the taxes. Unless and until this interest was reported, the subsurface would continue to be assessed and taxed along with the other estates of the Siddons Warrant, in fee, by reference to the name of the Warrantee. The Kellers have admitted that they have no evidence to establish that their ancestor ever complied with the law requiring reporting of the creation of a separate estate, and the tax deeds do not reflect that any interest in the Siddons warrant - less than a fee - was assessed. Therefore, the assessment of taxes on the Eleanor Siddons warrant was the whole warrant - all estates and in fee - and that was what was sold by the Treasurer to Centre County in 1935, and, following the five year period of repose, the fee interest in all estates was what was sold by the County Commissioners in 1941 to Max Herr, and subsequently sold to Herder Spring.

The Kellers argue that the Superior Court's opinion and decision deprived "...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." ***Keller Brief, p. 41***. The real loss to the Kellers, of course, occurred in 1935 when the Treasurer sold the Siddons Warrant and fee interests in all estates therein to the Centre County Commissioners for non-payment of real estate taxes. The Act of 1804 contained a five year statute of repose for the bringing of any action for the recovery of real lands, or rights, or estates sold at tax sales. The time for making a claim for violation of due process under the laws of the Commonwealth regarding sale of unseated land for non-payment of real estate taxes would have been in the 1930's, when the Siddons Warrant was sold to the County. Further, nothing prevented one who had a defective title from purchasing a better title in the same lands at the tax sale. *Powell v. Lantzy*, 173 Pa. 543 (1895). In other words, Kellers could have purchased the Siddons Warrant at the 1935 Treasurers' sale upon payment of the real estate taxes which they allege to have been around $75.00.

Kellers assert that the Superior Court acted as a fact finder that Keller never reported his reserved subsurface interest for taxation, or, stated

another way, that the Superior Court determined as a fact something which the trial court did not. Nothing could be further from the truth. On page 7 of the Opinion and Order dated September 29, 2010, the trial court specifically ruled that "[t]here is no evidence one way or another whether Kellers ever reported their ownership interest for assessment purposes." **R. 363a**. The trial court seemingly placed the burden of proving the non-reporting of this interest on Herder Spring, while the Superior Court properly placed the burden of proof of proper reporting on the party which asserted that it had done so. The trial court concluded that the Kellers did not prove Harry Keller had reported his interest. There was no reference in the assessment or the tax deeds that only a surface interest was sold.

Kellers also assert that a generic clause contained in the Herr to Herder Spring deed of "This conveyance is subject to all exceptions and reservations as are contained in the chain of title." (**R. 73a**.) undoes the effects of the 1935 Treasurer's deed and the 1941 Commissioners' deed, and resurrects the lost severed subsurface estate. This clause is not an exception or a reservation, and inasmuch as the Kellers were not a party to that deed, it creates no estate in Kellers. In *Satterthwait v. Gibbs*, 288 Pa.428, 135 A. 862 (1927), the Court held that a limitation on a grant,

coming after a prior grant of an unlimited right, will not reduce the unlimited right, unless the intent to do so is clearly expressed. The deeds of the Treasurer, and of the County Commissioners, contained no such limitation or restriction, and conveyed a fee simple interest in all estates. Additionally, the Herr to Herder Spring Deed contained a very broad Habendum, and is subject to the Short Form Deed language contained in title 21 P. S. §3, Act of April 1, 1909-53, P.L. 91, § 2, whereby, all of a Grantor's interest is conveyed unless expressly excepted or reserved.

ARGUMENT

Herder Spring Hunting Club (hereafter "Herder Spring") is a non-profit corporation which owns a 460 acre tract of mountain land which they occupy, primarily, for hunting and other recreational purposes. This tract of land is the full "Warrant", or grant from the Commonwealth of Pennsylvania which was surveyed in 1793 under the name of the warrantee, "Eleanor Siddons". Although by strict measure the tract is 460 acres, it is assessed

as 433 acres, 153 perches.[1] Herder Spring bought this tract of land from the heirs of Max Herr by virtue of a 1959 deed. **R. 25a-27a.** Max Herr had purchased the tract of land in 1941 at a County Commissioner's sale for non-payment of real estate taxes returned as unseated land in the name of the warrantee, Eleanor Siddons, and further described as land of the reputed owner, Ralph Smith. **R. 64a–65a.** The Treasurer of Centre County sold the Siddons warrant to the Commissioners in 1935. R. 65a – 66a.

Appellants Keller Heirs (sometimes referred to as "the Kellers") are descendants of Harry and Anna Orvis Keller, husband and wife. Harry Keller bought the Siddons Warrant as unseated land at a Centre County Treasurer's Sale in 1894. Keller then sold the lands to Isaac Beck and others in 1899 (**R. 62a-63a**.) excepting and reserving the subsurface rights by the following language:

"Excepting and reserving unto the 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 found on or contained in or upon the aid 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

[1] Recognizing that within a tract of land of this size, some areas will be unusable, the assessment of a full warrant is 460 acres, less the usual allowances for roads and streams, and is very often assessed as 433 acres, 153 perches. A perch as a linear measure is equal to one rod or 16.5 feet, and as a unit measuring area, is a square rod (16.5 feet by 16.5 feet). 160 square perches equals one acre.

said lands 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 market, and the transportation and removal of the same without hindrance or molestation from the said parties of the second part, their heirs, executors, administrators, lessees or assigns, or any of them . . ."
R. 62a.

DISCUSSION:

Issue I:

Prior to 1961, Pennsylvania real estate tax assessment law made a distinction between "seated" and "unseated" lands. Unseated land was land on which permanent structures were built and which evidenced a personal responsibility for payment of the real estate tax assessed. Unoccupied and unimproved land was characterized as "unseated". The decision to tax land as seated or unseated was in the first instance for the local tax assessor. *Hutchinson v. Kline*, 199 Pa. 564, 49 A. 312 (1901). Seated lands were assessed annually, along with any personal property found thereon. Unseated lands were taxed yearly, but assessed every three (3) years. Tax sale law authorized and directed the sale of seated lands for non-payment of real estate taxes only when there was insufficient personal property on or about the seated land to satisfy the tax obligations. Unseated lands, on the other hand, were themselves responsible for the

tax and the payment thereof, and taxes were assessed and returned in the name of the Warrantee. "The land, and not the owner, is debtor to the unseated tax". *Neill v. Lacy*, 110 Pa. 294, 1 A. 325 (1885).

Throughout all of the relevant time periods the Siddons Warrant continued to be assessed as unseated land. It was unseated when Keller bought it at the tax sale in 1894 (**R. 95a**) and was returned as unseated at the time of the tax sale in 1935 from the Treasurer to the County Commissioners. In 1941 it was sold to Max Herr as unseated land. **R. 100a**. Following Max Herr's death his widow, Kate Herr, and his heirs sold the lands to Herder Spring. **R. 129a**.

Beginning in 1973 and continuing for some thirty-odd years, Herder Spring leased the oil & gas interests six times to four different gas companies. **R. 40a; R. 231a – 247a**. During that same period of time, and, in fact, since the reservation of 1899, Kellers admittedly did not ever again identify and claim this interest, lease it, transfer it, devise it, or report it on any decedent's estate inventories, divorce inventories, or other legal documents. See Herder Spring's Motion for Summary Judgment, (**R. 117a**.) and Answers by Kellers to Interrogatories and Requests for Production of Documents (**R. 121a – 142a**).

Pennsylvania has long recognized that land may be severed horizontally, and when so severed, different estates exist in the land. The owners of the surface and the owners of any of the other strata of land are not co-tenants; they are not fiduciaries for the other; they are not partners. *Powell v. Lantzy*, 173 Pa. 543, 34 A. 450 (1896). *Neill v. Lacy*, 110 Pa. 294, 1 A. 325 (1885). Each of the owners of the various strata may own a title in fee simple absolute. This refers to the quantum of title, or a title without limitation on the right of alienation. Fee simple absolute does not mean that an owner necessarily owns all estates in land. *Estate of Rider*, 711 A.2d 1019 (Pa. Super. 1998).

The distinction between "seated" and "unseated" land is critical to an understanding of the issues in the matter before the Court. With "unseated" lands it is the land itself which generates the assessment. The Siddons Warrant, in fee, generated the assessment unless and until the owner of a reserved mineral estate reported the severance. Only by Keller's reporting of his severed subsurface estate would the subsurface estate be assessed and taxed separately by Centre County from the other estates in the Siddons Warrant. Unless and until this interest was reported, the subsurface would continue to be assessed and taxed along with the

other estates of the Siddons Warrant, in fee to the Warrantee. The Kellers have admitted that they have no evidence to suggest that their ancestor ever complied with the law requiring reporting of his severed interest so it could be taxed, and the tax deeds do not reflect that any interest in the Siddons warrant less than a fee was assessed, returned and sold. Therefore, the assessment and return of taxes on the Eleanor Siddons warrant was the whole warrant - all estates and in fee - and that was what was sold by the Treasurer to Centre County in 1935, and that was what was sold by the County Commissioners in 1941 to Max Herr.[2]

With regard to "unseated" land the severance from the surface of a mineral interest is no different than the subdivision, or parceling off, of a tract of surface land. When Harry Keller bought the Siddons Warrant in 1894 at a sale of unseated lands for non-payment of real estate taxes, the Warrant was assessed as a whole in fee, and would continue to be so assessed unless and until the supposed owner of a portion of the warrant (surface or sub-surface, or even fractional, undivided interest) notified the tax assessor of his separate and distinct interest. This notification to the

[2] This application of the laws and procedures regarding the unseated lands tax sale's effect of reunification of previously severed subsurface estates with the surface was so widespread, common and well known that it is commonly referred to among title attorneys as "title washing". Pa. Bar Assn Qtrly, Volume LXXXIV, No. 1 (January, 2013).

County is required by the Act of March 8, 1806. *Williston v. Colkett*, 9 Pa. 38 (1848). The tax on the whole of the Warrant of unseated land is still assessed in the name of the Warrantee, and returned (if not paid) in the name of the Warrantee. If the owner or supposed owner of an interest in that land wishes to protect himself from the risk of loss as a result of the tax sale, he must either pay the tax or redeem it during the two year period of redemption following the sale, or the five year period of repose. The Keller family did none of that. There has been no evidence that Harry Keller, or anyone acting for him, reported the severance, or paid the taxes, or redeemed the warrant or attempted to do so.

In *Powell v. Lantzy*, *supra*, this Court placed its imprimatur on the concept of "title wash" and has never removed it and should not do so now. Following a rapid-fire transfer of titles to the surface and subsurface estates, Lantzy owned the surface and Powell one-half the mineral estate under a tract of unseated land returned for non-payment of real estate taxes assessed in 1882 and 1883. The assessments predated the severance, so the tax was on all of the interest in the unseated lands. In 1884, the lands were sold at a tax sale, and purchased by Lantzy. By 1894, Powell had acquired the other one-half of the mineral estate and

challenged Lantzy's claim to own the title to the coal. Citing *Coxe v. Gibson*, 27 Pa. 160, this Court recognized that since taxes on unseated land were not a debt or charge against the owner, and consequently, there was no personal responsibility for the same, "...there was nothing in reason or law to prevent the holder of a defective title from purchasing a better one at a tax sale." *Powell v. Lantzy*, 173 Pa. 543, at 548. Lantzy owned the surface, and acquired the subsurface at a tax sale of unseated lands, though title was vested in Powell, as to a one-half interest, and Flynn as to the other.

Once severed from the surface ownership oil, gas and/or coal and other minerals are vested in a separate owner, and an estate in land is created which, if it is of any value, may be assessed and taxed. *Rockwell v. Warren County*, 228 Pa. 430, 77 A. 665 (1910). *Rockwell v. Warren County*, supra, is the Pennsylvania Supreme Court opinion of the Pennsylvania Superior Court opinion captioned *Rockwell v. Keefer*, 39 Pa. Super. 468 (1909).[3]

[3] *Independent Oil & Gas Association (IOGA) of Pa. v. Board of Assessment Appeals*, 572 Pa. 240, 814 A.2d 180 (2002), determined that the General County Assessment Law, title 77 P.S. 5050-201(a), does not permit the taxation of oil & gas interests as real estate. In *Coolspring Stone Supply, Inc. v. County of Fayette*, 593 Pa. 338, 929 A.2d 1150 (2007), the Supreme Court reaffirmed the decision of *Rockwell*, supra, and noted that the General County Assessment Law followed the Rockwell decision. *Coolspring*, supra, 593 Pa. 338, 350, fn 9.

The question before the court in *Rockwell v. Warren County* was the ability and legality of the county treasurer to assess and tax and, when the tax went unpaid, sell for non-payment of real estate taxes a reserved mineral, oil & gas estate in unseated land. Rockwell owned almost 10,000 acres of subsurface coal, oil & gas interests in Warren County which it had acquired from various sources, with the surface of these lands owned by others. For tax years 1904, 1905, 1906, and 1907, the surface lands were taxed, and, generally, were paid by the surface owners. For the same period of time, the mineral and oil & gas estates underlying these unseated lands were taxed to Rockwell as an interest in land, but Rockwell refused to pay the taxes and these taxes were unpaid. When threatened with the sale of these interests in unseated land, Rockwell sought an injunction against the Treasurer of Warren County, C. S. Keefer, to restrain their sale. The *Rockwell* opinions in both the Superior Court and Supreme Court held that the severed mineral, oil & gas interests could be separately taxed, and if the tax went unpaid, could be sold by the treasurer as with any other interest in land. These decisions also pointed out that:

"A mere license to mine coal or drill for oil or gas, unaccompanied by the right of ownership in the minerals underlying the surface, does not constitute an estate in land. On the other hand, oil, gas, and coal are minerals, and when the title to the same is severed from the owner of the

surface and vested in a separate owner, an estate in land is thus created, which, if it be of any value, may be taxed....It is just as well settled that each separate estate is subject to valuation and assessment as land." *Rockwell*, 228 Pa. 430, 43.

In *Logan v. Washington County*, 29 Pa. 373 (1857), Logan owned a coal seam under lands of another. He was mining and accessing the coal, and an assessment issued out of the county for just the value of the coal - with the surface owner still paying the tax just on the surface. The question before the court was whether the real estate tax on the coal should be assessed to Logan or the owner of the surface: "The only question is, shall it be paid by the owner of the coal, or by one who does not own it?" *Logan, supra.* Obviously, the court recognized that when there is a divided ownership of the land there ought to be divided taxation. The significance of *Logan* for the matter before the court is that the decision recognized that the total tax on both interests should not be higher than if one party owned the entire interest. The separate assessment "...requires an apportionment of the valuation among the different owners, so that each may bear his portion of the public taxes, and that one should not have to pay for the other." *Logan*, supra, p. 375.

As in *Logan, supra*, the coal, minerals, oil & natural gas interest which

Keller reserved should have been reported by Keller for assessment and taxation. This assessment of the subsurface interest would necessarily reduce the taxes on the surface owner. The trial court found no evidence that Keller had reported his interest for assessment. That no assessment was issued to Keller is conclusive evidence that the single assessment of the total interest in the Siddons Warrant to Keller, then to Beck, and later to Ralph Smith included the assessment of all estates in the Siddons Warrant. Further, a careful examination of the Treasurer's deed (R. 65a – 66a) and the Commissioners' deed (R. 64a-65a.) would reveal that there is nothing in either deed which would lead one to believe the deeds were for a surface interest only. To the contrary, each deed referenced the sale of the tract based on a return of unpaid taxes on unseated land assessed in the name of the Warrantee, Eleanor Siddons.

In the instant matter, the Keller reservation of the coal, minerals, oil & natural gas, together with extremely broad and expansive rights to enter upon the surface of the lands to exploit, extract and carry away the minerals is a separate estate in land which should have been reported by Harry Keller to the County Commissioners and taxed. *Hutchinson v. Kline*, supra. Citing *Williston v. Colkett*, 9 Pa. 38. Act of March 8, 1806. There is

no evidence that the Keller-reserved coal, minerals, oil & natural gas estate was ever reported to the Commissioners of Centre County for taxation, and, understandably, no separate assessment under the Siddons Warrant was issued for these reserved interests. Therefore, the assessment of the entire fee simple estate in the Siddons warrant continued after the 1899 sale of the surface by Keller to Isaac Beck, and it was the entire fee simple estate that was assessed, levied, and sold as the Siddons Warrant in 1935 to Centre County, and later by the County Commissioners in 1941 to Max Herr.

This matter is squarely on point with the 1901 decision of this Court in *Hutchinson v. Kline*, *supra*, where there was no evidence that the putative owner of a reserved subsurface estate reported the same to the Commissioners for taxation. A sale for non-payment of real estate taxes returned in the name of the warrantee sold the entire fee simple estate, disregarding the previous severance. "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." *Hutchinson v. Kline*, 199 Pa. 564, at 573, 49 A. 312 (1901). Also, *Heft v. Gephart*, 65 Pa. 510 (1870).

In tax sales, as in judicial sales, the sale is the method of enforcing a lien. What passes under the sale depends upon what was bound by the lien. The extent of the lien in tax sale cases must depend upon the assessment. *Brundred v. Egbert*, 164 Pa. 615, 30 A. 503 (1894). The assessment of the Siddons Warrant without a separate assessment of the severed coal, minerals, oil & natural gas estates meant that the one assessment of the unseated land in the Eleanor Siddons Warrant was for the fee simple interest in all estates. Therefore, the sale of the warrant to Centre County included all of the estates, both surface and subsurface, and in 1941, Centre County sold all of the same to Max Herr.

It was never the duty of the County Commissioners or the local tax assessor to scour the recorded deeds to determine what acreage or interests had been transferred or reserved. *Hutchinson v. Kline*, supra. "It is said, however, that every owner knows his land is taxed, and it is his duty to seek the officer, and offer to pay the tax, and this offer will stand as his excuse, and save his title." *City of Philadelphia v. Miller*, 49 Pa. 440 (1865).

In *Williston v. Colkett*, supra, the land involved was the James Wilson Warrant, which was originally assessed as containing 999 acres.

Thereafter, sales of land occurred, and the assessment of this warrant was reduced to 200 acres. Williston purchased the remaining tract of the James Wilson Warrant from an individual named Asa Mann, which tract was assessed as 200 acres. The taxes on this unseated tract were returned, and it was sold for non-payment of real estate taxes to Colkett. The Treasurer's deed was for the remaining 200 acres of the warrant. After the two year period of redemption passed, Williston (the supposed owner of the tract at the time of the assessment) revealed that there was really 800 acres, and brought action against Colkett in ejectment to remove him from the other 600 acres still remaining in the warrant. Williston's view was that it was assessed as 200 acres, and sold as 200 acres, and the Treasurer sold only the 200 acres, not the entire 800 acres. He asserted that he still owned the other 600 acres.

In reversing the trial court, the Pennsylvania Supreme Court reviewed and cited the Act of March 8, 1806, which requires the holders of unseated lands to inform the Commissioners of the description of the unseated lands so held, so that a proper assessment might be made. "...[B]ut Asa Mann chose not 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." *Williston v. Colkett*, 9 Pa. 38, at page 38. "There could be no mistake on the part of Mann. The assessment and the advertisement gave him full notice; and I must again repeat, that he had himself, for two years, paid the taxes so assessed, and wronged the public in a small way." *Williston v. Colkett*, supra.

The Act of March 8, 1806 placed upon the owners of unseated lands the duty and obligation to give the County Commissioners a description of the unseated lands held by him. *Hutchinson v. Kline*, 199 Pa. 564, 49 A. 312 (1901); *Williston v. Colkett*, 9 Pa. 38 (1848). The obvious purpose was for the county to be able to value or assess the real estate, to levy taxes, and, in the event of non-payment to collect the same through the sale of the lands. It was, therefore, incumbent upon the owners of unseated lands to identify and report to the county what they owned in order to generate an assessment separate and apart from other lands in the same Warrant. Otherwise, since the land itself is responsible for the payment of the real estate taxes on unseated lands, and the land generates the assessment, unless and until the Commissioners are notified that the Warrant has been

divided either vertically, horizontally, or in varying, undivided interests, the tax levied on the warrant is on the entire warrant and all interests therein, including previously severed or reserved mineral interests.

This Court should keep in mind that the object of assessment is collection of taxes, and the sale for non-payment of real estate taxes or the threat thereof is the best weapon in the collection effort. The title one acquires at a tax sale is defined by what was assessed, and this is true to both seated and unseated tracts. Only the estate assessed is passed at a tax sale. *Proctor v. Sagamore Big Game Club*, 265 F.2d 196 (3rd Cir., 1959); *Brundred v. Egbert*, 164 Pa. 615, 30 A. 503 (1894).

A partial history of the adoption of some of the laws related to the sale of unseated lands for non-payment of real estate taxes, as well as the rationale for these laws is contained in *Morton v. Harris*, 9 Watts 319 (1840). While the case is not on point for the instant dispute in many respects, it is helpful reading if one wishes to gain an understanding of 19th century Pennsylvania, and real estate tax assessment law and the law regarding the sale for non-payment of such taxes assessed on unseated lands. Justice Huston delivered the opinion of the Supreme Court, explaining the historical underpinnings of the Act of 1815, and stated that

although the remedy may seem harsh to the original owners of the lands, the opposite result was an injustice. *Morton v. Harris,* 9 Watts 319, at 322-323.

Likewise, some of the Kellers have argued that the coal, minerals, oil & natural gas, would not be taxed unless they were known to exist at the time and place of assessment. *Bannard v. New York State Natural Gas Corporation*, 448 Pa. 239, 293 A.2d 41 (1972), specifically rejected this contention, saying: "Appellant further claims 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 assessors 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." *Bannard*, supra, 448 Pa. 239, at 252. As in *Bannard*, the Kellers have presented an incongruous argument...no minerals existed, so no assessment issued, but there are minerals here and now - 80 years later - we want them. But the Kellers arguments in this regard miss the point.

The law required *reporting* of this reserved interest to the Commissioners for assessment, and taxation if it be of any value. Kellers offer no evidence to support the contention that Harry Keller reported his subsurface interest, yet maintain an argument that he did and for some reason, or no reason, the county assessor chose not to separately assess the Keller reserved subsurface interest of minerals, oil & gas. In order for Kellers to prevail, these two points of speculative history must be proven and accepted.

The recording of the Keller 1899 deed, excepting and reserving a separate estate in coal, minerals, and oil & natural gas would not be notice to the assessor or the commissioners of his interest as they were not bound to search or examine the records. *Hutchinson v. Kline*, 199 Pa. 564, 49 A. 312 (1901). If the owner of the minerals underlying unseated lands has had his interest severed from the surface, has notified the commissioners of the reserved interest, and had his mineral interest assessed, and he has paid his taxes before a tax sale, no title has passed to his mineral estate from that tax sale. However, where an owner of lands conveys the surface and reserves the minerals it is his duty to notify the County Commissioners of this fact, and if he fails to do so, and thereafter the lands are assessed as to the entire fee simple estate as unseated lands

and are sold as such at tax sale, the entire interest of the Warrant passes to the tax sale buyer. The owner of the surface may purchase at such sale and acquire good title to the minerals. An assessment of an unseated tract of land sufficiently identifying the same will support a Tax Sale of all of the interests of all of the owners of such tract of land. Rockwell v. Keefer, 39 Pa. Super. 468 (1909).

Notice of the sale of the unseated lands returned in the name of the Warrantee is by the publication in newspapers of the names of the Warrants subject to tax sale, the township, county, number of acres and the amount due. The Act of 1815 required that the publication be made four times in a newspaper in Philadelphia, and as close as possible to the county where the land was located.[4] Title 72 P. S. §6001. Anyone who has an interest in the warrant would require not more than a few minutes to review the list of unseated lands subject to sale, to determine if his or their interest is at risk. City of Philadelphia v. Miller, 49 Pa. 440 (1865).

The maxim *omnia praesumuntur rite esse acta* is stated many ways

[4] And it shall be the duty of the said county treasurer to give at least sixty days' notice of the time and place of such sales, the township or townships in which the said tracts of land are respectively situated, the number of acres contained in each tract, and the names of the warrantees or owners thereof, and the sums due upon each tract for taxes, at least four times in one daily newspaper in the city of Philadelphia, and in one other newspaper in or nearest to the county where such lands lie, under the penalty of fifty dollars, in each and every case, to be recovered by the owner or owners of the land sold as aforesaid, as debts of like amount are by law recoverable, but the neglect of such treasurer to cause

but generally means that there is a presumption of the regularity of the acts of public officers until the contrary appears. Beacom v. Robison, 157 Pa. Super. 515, 43 A.2d 640 (1945). Morton v. Harris, 9 Watts 319 (1840), applied this rule to tax sales, and tax deeds. The prima facie proof of the regularity of the acts of the assessors and other officials appeared in the recitals of the tax deeds, and stood until contrary evidence overcame the presumption. Also, Peters v. Hawley, 10 Watts 208 (1840). In the 1854 case of Cuttle v. Brockway, 24 Pa. 145, 147 (1854), the Pennsylvania Supreme Court stated that "there is nothing to which the maxim *omnia praesumuntur rite esse acta* applies with so much force as to a tax title." See also, Glass v. Seger, *supra*. Further, in Meyers v. Manufacturers and Traders National Bank of Buffalo, 332 Pa. 180, 2 A.2d 768 (1938), it is stated that presentation of evidence of a Treasurer's deed with the recitals showing that the Grantor was the Treasurer and he did sell to the Commissioners is sufficient until better proof of deficiency in any of the procedures is proven.

A tax deed from the Commissioners is intended to convey all of the county's interest in the lands, and that interest depends upon the

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the said publications to be made shall not, in any case, invalidate any sale made in pursuance of the provisions of this act.

assessment. It is the assessment and non-payment of the taxes that gives rise to the sale, and the interest that is assessed is what is sold by the Treasurer, and thereafter by the Commissioners to a third party such as, Plaintiff's predecessor, Max Herr.

Kellers also assert that the penalty of four-fold taxation as a penalty for the owner of an interest in unseated land who neglects, fails or refuses to report it for assessment and taxation is exclusive. Act of March 21, 1806, 4 Sm, 326, P.L. 558, §13. The Keller argument is that sale of the land for non-reporting is not an available remedy because four-fold taxation is the sole and exclusive penalty. If the court were to accept this as true, then one who refuses to report his interest would simply refuse to pay the tax, be penalized four-fold, and continue to ignore and refuse the tax payment. Obviously, such a result should not obtain. Keller did not lose his interest in the warrant simply for failing to report his severed interest. Rather, he lost it because his failure to report did not initiate a separate assessment (with or without a four-fold penalty) for his reserved subsurface interest and therefore it was sold with the balance of the estates in the Siddons Warrant.

Kellers also rely on the opinion in *Tide Water Pipe Co. v. Bell*, 280

Pa. 104, 124 A. 351 (1924), a decision which is easily and clearly distinguishable. *Tide Water* maintained an existing oil transmission pipeline, along with telegraph and telephone lines over, across and through lands which *Bell* purchased at a tax sale as unseated lands. The lines were visible for all to see before and at the time of the sale. Nonetheless, *Bell* attempted to extort money – and lots of it - from *Tide Water* under threat of digging up and destroying the transmission line. The salient fact of *Tide Water* is that the easement which *Tide Water* enjoyed, which this Court ruled was not extinguished by the tax sale, was that it was visible on the ground, "...open, notorious, permanent and continuous, is not affected by either a private or public sale of the property over which it passes."

Issue II:

The Kellers offer an argument that the Superior Court's opinion and decision deprived "...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." ***Keller Brief, p. 41***. This claim is being made despite the service of the Complaint in Quiet Title upon all of the heirs of Harry Keller in accordance with the Pennsylvania Rules of Civil

Procedure and participation by the Kellers in this litigation since its inception in 2008. With the exception of the opening paragraph in Kellers' brief, any pretext of the due process claim being arising from the Superior Court's opinion is abandoned, and the focus of the Kellers' due process argument is made regarding the 1935 tax sale by the Treasurer to the Commissioners.

It was not the 2013 decision of the Pennsylvania Superior Court which divested the Kellers of the "coal, stone, fire clay, iron ore and other minerals, and oil and natural gas" under the Siddons Warrant which their ancestor had excepted in his 1899 conveyance. Rather, Judge Keller lost this subsurface estate almost 80 years ago, in 1935, when, pursuant to the Act of April 3, 1804, entitled "An Act Directing the Mode of Selling Unseated Land for Taxes" (hereafter "Act of 1804") the Treasurer of Centre County sold the Siddons Warrant, and all of its estates, to the County Commissioners for non-payment of real estate taxes.[5] The statute of limitations for making a due process claim has long since passed since that sale, and the Act of 1804 contained a 5 year statute of repose (See title 72 P. S. §6132, Act of 1815, P.L. 177, 6 Sm.L. 299, § 6) for the bringing of an

[5] Section 5 of the Act of 1815, P.L. 177, 6 Sm. L. 299 (Title 72 P.S. §6131) requires the County Commissioners to purchase any Unseated lands not sold at the tax sale, and to retain title to the same for

action to recover lands, or rights, or estates sold at the tax sales conducted under the Act of 1804. Despite the fact that Harry Keller was a lawyer and judge of the Court of Common Pleas of Centre County, no redemption of his interest was made or offered, and no claim of a due process violation was presented by Judge Keller within the statutory period. In fact, there is no evidence one way or another if any of the Kellers had actual notice and knowledge of the 1935 tax sale.

The time for making a claim for violation of due process under the laws of the Commonwealth regarding sale of unseated land for non-payment of real estate taxes would have been in the 1930's, when the Siddons Warrant was sold to the County. Centre County retained it for 5 years in accordance with the Act of 1815, P. L. 177, 6 Sm.L. 299 § 5 (now title 72 P. S. § 6131), during which time Harry Keller, his wife or his heirs could have redeemed the title, by paying the taxes, along with a 15% premium.[6] Following that 5 year period of repose, Centre County sold the Siddons warrant in 1941, in its entirety, to Max Herr.

The Kellers' assertion of a violation of the right to notice and due

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the 5 years, if not redeemed pursuant to §6 (Title 72 P.S. §6132).

[6] The Act of 1840-145, P.L. 349 §6 allows for redemption "[w]hen any lands have been or shall be sold for taxes, on which any person has a lien or other equitable interest, it shall be lawful for such person or persons, his heirs, assigns or other legal representatives, to redeem the same from the effects of such

process is articulated in the second Issue of their brief to have arisen as the result of the Superior Court opinion, and not the 1935 tax sale. Nonetheless, to the extent such a due process claim could be interpreted to be about the 1935 tax sale, this claim was not raised by Kellers in the trial court in any of the pleadings or arguments, and, accordingly, has been waived. Pa. R. A. P. 302 (a). The Kellers did not plead or argue in the courts below that the sale for nonpayment of real estate taxes of a tract of unseated land and along with it an unreported subsurface estate of coal, minerals, oil and natural gas violated their right to prior notice of the sale, and, consequently, their right to due process of law. They did not challenge in the trial court or Superior Court as unconstitutional the concept of service of notice of a tax sale by publication. They did not challenge in the courts below the constitutionality of assessment of real estate taxes on Unseated land and sale for non-payment of the same as an *in rem* proceeding. Accordingly, such claims cannot be advanced for the first time in the Pennsylvania Supreme Court. Pa. R. A. P. 302 (a).

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sale, as fully as the owner at the time of the sale might or could do." Title 72 P.S. §6095.

There is a presumption of the regularity of tax sales. Beacom v. Beacom, 157 Pa. Super. 515, 43 A.2d 640 (1945). Further, the §1 of the Act of 1815 (title 72 P. S. §6001) provides:

> *"And it shall be the duty of the said county treasurer to give at least sixty days' notice of the time and place of such sales, the township or townships in which the said tracts of land are respectively situated, the number of acres contained in each tract, and the names of the warrantees or owners thereof, and the sums due upon each tract for taxes, at least four times in one daily newspaper in the city of Philadelphia, and in one other newspaper in or nearest to the county where such lands lie, under the penalty of fifty dollars, in each and every case, to be recovered by the owner or owners of the land sold as aforesaid, as debts of like amount are by law recoverable, but the neglect of such treasurer to cause the said publications to be made shall not, in any case, invalidate any sale made in pursuance of the provisions of this act."* Act 1815-4123, P.L. 177, 6 Sm.L. 299.

The tax deed from the Treasurer of Centre County to the Commissioners conveys in fee simple to Centre County the whole of the tract of unseated lands containing 433 acres, 153 perches lying in Rush Township without any reservation whatsoever. **R. 65a.** In Clark v. Weinberg, 38 Pa. Cmwlth. 300, 393 A.2d 507 (1978) the Commonwealth Court recited the oft quoted language from the Pennsylvania Supreme Court that a property owner makes out a prima facie case to sustain his title by producing the County Treasurer's Deed, thereby gaining the benefit of the presumption of the regularity of the acts of public officers in the execution and delivery of the title obtained at a Tax Sale. The burden is

thereby shifted to the Objector to establish some irregularity in the assessment of tax or notice of sale. *Hughes v. Chaplin*, 389 Pa. 93, 95, 132 A.2d 200, 202 (1957). *Bannard v. New York State Natural Gas Corp.*, 293 A.2d 41 (1972).

The Kellers' due process and notice arguments are actually asserting a claim of unconstitutionality of the laws in the 19th and early 20th centuries related to the sale of Unseated land for nonpayment of real estate taxes, without first raising these arguments in the courts below. Stated another way, the Kellers argue that the real estate tax sale laws violate the due process clauses of the Pennsylvania and United States Constitutions. A statute will not be deemed and declared unconstitutional unless it clearly, palpably and plainly violates the Constitution, and the party making such a challenge has a heavy burden. *Commonwealth, Dept. of Transportation vs. McCafferty*, 563 Pa. 146, 758 A.2d 1155 (Pa. 2000). Citing Commonwealth v. *Hendrickson*, 555 Pa. 277, 724 A.2d 315 (1999); *Commonwealth v. Barud, 545 Pa. 297, 681 A.2d 162 (1996)*. This presumption of constitutionality should not be easily disturbed and not unless properly challenged. Failure to challenge the constitutionality of a statute in the trial court is a waiver of the right to challenge it on appeal.

Issue III:

On page 7 of the Opinion and Order dated September 29, 2010, the trial court specifically ruled that "[t]here is no evidence one way or another whether Kellers ever reported their ownership interest for assessment purposes." **R. 363a**. The trial court determined that the absence of evidence of reporting the interest was fatal to the claim of Herder Spring, while the Superior Court viewed it differently. The Act of 1806 required the owner or claimant to report his interest to the Commissioners, and the Kellers were asserting that their ancestors' interest was not included as part of the Siddons Warrant's assessment when it was sold in 1935. The Superior Court did not find new fact, rather the Opinion of the Superior Court ruled that the burden of proving compliance with the law was on the Kellers, and they did not establish that Harry Keller reported his severed subsurface.

Issue IV:

Finally, Kellers have averred that the following language, which appears in the 1959 deed from Kate Herr to Herder Spring offers them some assistance in re-establishing a claim for the coal, minerals, oil & gas

underlying the Siddons Warrant which the Treasurer of Centre County conveyed to the County Commissioners in 1935:

"This conveyance is subject to all exceptions and reservations as are contained in the chain of title."

R. 73a.

The Kellers are not parties to this instrument, and even the Kellers themselves must concede that such language does not grant to or except to Kellers or their ancestors any interest in the Siddons Warrant. Rather, Kellers argue that based upon a letter from one attorney to another in 1959, Herder Spring should be estopped from disagreeing with Kellers' current analysis of the Acts of 1804, 1806, and 1815, and the resulting effect those laws had on the 1935 Treasurer's Sale. Such an argument must fail for any number of reasons.

First, there is no evidence in the record that Herder Spring knew about this letter, adopted it or understood and accepted it as its position on the concept of "title wash". Second, there is nothing in the record before the Court to establish that Herder Spring's attorney, Richard Sharp, Esquire, knew of but rejected the rationale and holdings of the Pennsylvania Supreme Court on the concept of unseated land and the effect on subsurface rights following its sale for non-payment of real estate

taxes. While in later life Attorney Richard Sharp became a respected real estate title attorney and a Common Pleas Court Judge (1978-79), the 1959 letter offered by the Keller heirs does not reveal that he was aware of, understood, acknowledged and rejected these concepts regarding this transfer to Herder Spring. It is inappropriate for Kellers to assume to know Attorney Sharp's knowledge and thought process under these circumstances, particularly when there is nothing in the record at all to reflect his opinion on the subject of "title wash". Third, the language in the deed did not expressly state that the conveyance reserved or excepted the subsurface rights. Finally, the Herr to Herder Spring deed followed two prior unlimited conveyances, one from the Treasurer to the Commissioners, and the second from the Commissioners to Max Herr.

In *Satterthwait v. Gibbs*, 288 Pa.428, 135 A. 862 (1927), the Court held that a limitation on a grant, coming after a prior grant of an unlimited right, will not reduce the unlimited right, unless the intent to do so is clearly expressed. See also, *Peirce v. Kelner*, 304 Pa. 509, 156 A. 61 (1931). The Herr to Herder Spring deed did not create a reservation of any coal, minerals and oil & gas, nor did it expressly identify an exception. Rather, the language employed was clear and unambiguous, and followed by the

"Habendum". Immediately following the language quoted above there appears the following language:

TOGETHER with all and singular the buildings, improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging to, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title interest, property, claim and demand whatsoever of the said parties of the first part, in law, equity or otherwise, howsoever, of, in and to the same and every part thereof.

R. 73a.

Even without the above language, as of 1909 when Pennsylvania adopted the short form deed all deeds conveyed the entire interest of the Grantor that was not excepted:

§3. Grantor's entire estate and rights conveyed. All deeds or instruments in writing for conveying or releasing land hereafter executed, granting or conveying lands, unless an exception or reservation be made therein, shall be construed to include all the estate, right, title, interest, property, claim, and demand whatsoever, of the grantor or grantors, in law, equity, or otherwise howsoever, of, in, and to the same, and every part thereof, together with all and singular the improvements, ways, waters, watercourses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof.

Title 21 P. S. §3, Act of April 1, 1909-53, P.L. 91, § 2.

CONCLUSION

There was no evidence presented that Harry Keller ever reported to the County Commissioners for separate assessment an interest in the Eleanor Siddons Warrant which he had reserved in 1899. All estates in the Siddons Warrant were then assessed as one, and when the real estate taxes were left unpaid, the taxes on the whole warrant were returned, and the 1935 sale by the Centre County Treasurer for nonpayment of real estate taxes assessed against the Eleanor Siddons Warrant conveyed to the County Commissioners all estates in the warrant, including the previously reserved coal, minerals, oil & natural gas. Any claim presented of a violation of the right to due process as a result of that tax sale, or lack of notice, is stale and should have been presented in the 1930's, and it was not.

The Supreme Court should affirm the holding of the Superior Court and declare the subsurface estate in the Eleanor Siddons Warrant is, and has been owned by Herder Spring.

Respectfully submitted,
MASON LAW OFFICE

By: */s/David C. Mason*
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Attorney for Herder Spring

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

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 8,120 words.

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 5 MAP 2015

HERDER SPRING HUNTING CLUB,
Appellee,

vs.

HARRY KELLER and ANNA KELLER,
his wife; et al., their heirs,
successors, executors, administrators,
and assigns,
Appellants

CERTIFICATE OF SERVICE

I, DAVID C. MASON, Esquire, do hereby certify that I served a true and correct copy of APPELLEE'S BRIEF, filed to the above captioned action, by placing the same in the United States mail, postage prepaid and addressed as follows:

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