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Redemption of an Interest in Real Estate

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COMMENTS

REDEMPTION OF AN INTEREST IN REAL ESTATE

Every one understands that under the Statutes of Indiana when real estate is sold by the sheriff on execution or decretal order, there is a right of redemption. Our redemption statute, however, reads "real estate *or interest therein.*" (Burns' Indiana Statutes 1926, sec. 832.) While the right of redemption is founded on equitable principles, the right itself is dependent upon the statutes of each state. Some states have broader statutes than Indiana, while others do not allow redemption.

The investigation resulting in the material of this article arose out of the following circumstances. The Lawrence Petroleum Company, a Delaware corporation, owned and operated some oil leases in Daviess County, Indiana. Its creditors filed an attachment suit in the Daviess Circuit Court, and its properties, including pumps, pipes, wells and leases, were sold by the sheriff of Daviess County to Harts. Within one year from the date of that sale, receivers were appointed by the District Court of the United States at Indianapolis. The receivers tendered to the Harts the full amount required for redemption, but redemption was refused, primarily on the ground that the sale by the sheriff of Daviess County was not one within our redemption statutes.

Thereupon, the receivers filed, in the District Court of the United States at Evansville, Indiana, a suit in the nature of a bill to enforce redemption, being *Lawrence Petroleum Company, by its receivers, v. Hart et al.*, No. 39 In Equity. There were other theories mentioned in the bill, but all parties and the court treated the case as involving the single question of redemption. The right of redemption was sustained, but the learned Judge did not render a written opinion. As the case is novel, though apparently well supported in principle, I feel the legal profession might be interested in the authorities and reasoning sustaining this decision, as no pat case could be found in any American report.

Section 832, Burns' Indiana Statutes 1926, provides, "The real estate or any interest therein, sold as aforesaid, or any part thereof separately sold may be redeemed . . ." The first problem is to find to what "sold as aforesaid" refers. This

is made difficult for reasons set forth in footnote[1] but, undoubtedly, means sold by the sheriff on execution or decretal order.

The main contention of the defendants was that all the property sold was personal property and, therefore, not within the redemption statutes. Probably all the property sold was personal property, but that is not reaching the question of whether it was an interest in real estate. At common law, interests in real estate less than life estates were chattel interests. There are numerous instances of chattels real. An ordinary lease of real estate for a term of years is personal property, but is it not also an interest in real estate? A number of our states in their redemption statutes specifically provide there shall be no redemption from a lease for a term of less than two years.

Our Supreme Court has said:[2]

"A 'Chattel real' at common law was an interest annexed to, or growing out of, real estate, as a term for years, having the character of immobility, which denominated them real, whilst other chattels proper are movable, but they are regarded as personal property, and went to the personal representative upon death, and not to the heir. Schouler on *Personal Property*, Sec. 20. Prior to 1843 a 'term of years' was held to be personal property, and the subject of sale upon execution issued by a justice of the peace. *Barr v. Doe* (1842) 6 Blackf. 335, 38 Am. Dec. 146. But under Rev. St. 1843, page 454 Sec. 3, and under the present statute (Burns' Ann. St. 1908 Sec. 635) judgments are liens upon chattels real, and they are sold as real estate."

Section 816, Burns' Indiana Statutes 1926, provides for the sale of real estate, including chattels real, requiring sale at the door of the court house of the county in which they are situated.

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[1] Sections 831 and 832, Burns Statutes 1926, purport to be from Acts 1881 Special Session, page 240, in force September 19, 1881, and appear to be Sections 2 and 3 of that Act respectively. The reference, however, is to the beginning of our Code of Civil Procedure, Section 256, Burns 1926, et. seq. Undoubtedly, Sections 831 and 832 are Sections 2 and 3 respectively of the Acts 1881 Special Session, page 593 et. seq., and Section 1 is Section 821, Burns 1926. The present redemption statute was approved April 11, 1881, and is carried in Burns Indiana Statutes 1926 as Sections 821, 831-841 and 843. Section 13 carried an emergency clause which is omitted in the Burns revision. The reference to the original Acts at Sections 831 and 832 should be as at Sections 821 and 843.

[2] *Comer v. Light*, 175 Ind. 367; 93 N. E. 660 at page 663; see also *Stackberger v. Masteller*, 4 Ind. 461; *Kohring v. Bowman*, 137 N. E. 767 at page 768.

The right of an attaching creditor to redeem was sustained by the Supreme Court of Massachusetts, in which case the court said:[3]

"But it is not necessary to decide whether the word 'owner' is broad enough in its significance to include an attaching creditor, because we are of the opinion that he comes within the descriptive phrase of the statute, 'any person having an interest in any such land.' Interest, in common speech in connection with land, includes all varieties of titles and rights. When given its plain and natural meaning it comprehends estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right."

An oil or gas lease has peculiarities of its own. The courts speak in various ways concerning its incidents, but ordinarily an oil lease is a contract between the operator engaged in removing crude oil from the ground and marketing the same, and the owner of the fee simple of the real estate. The lease generally provides that drilling shall be begun in a year or several years, and that the lease shall last as long as oil shall be found in paying quantities. A small cash rental is provided until oil is found and thereafter the oil is divided between the operator and the fee owner, the latter getting one-eighth to one-sixth, and, of course, more valuable leases carry a greater price to the owner or lease-holder. The leases oftentimes purport to be grants of the oil and gas under a certain described tract, and also grant to the operator the right to build on certain areas power plants for pumping, and allow him also to put casings in the well and remove them, and to lay carrying pipes. Owing to the fact that oil is in the nature of wild animals, the cases are not uniform on the question as to whether the execution of the lease grants any right in the oil underground in its wild or unpossessed state.

The leases in the instant case had the above incidents, and though the production was not large, it was sufficient to constitute a paying basis.

The case of *Heller v. Dailey*, 28 Ind. Appeals, 555, was one I hesitated to use in my main brief because of some loose language, but when the defendants sought to use it, I replied first by quoting the headnote:

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[3] *Union Trust Company v. Reed* et. al., 213 Mass. 199; 99 N. E. 1093 at page 1094.

"A contract of a landowner, by the terms of which he grants to another 'all the oil and gas in and under' a certain tract of land, and providing penalties for delay in the drilling of the wells, is an assignable interest in the land and must be in writing."

Then at page 561 of the opinion:

"The oil and gas in their free and natural state within the land constitute a part of it, though they be fluent and liable to depart to other land, there to be taken into possession through wells made for such purpose. The right to take such minerals from the land constitutes an interest in the land. The instrument under consideration does not create a mere personal privilege to take the minerals from the land. It is an exclusive and assignable interest in land. If with propriety it can be called a license, it must be a license coupled with an interest in land."

Then at page 562, second paragraph:

"The contract before us cannot be regarded as a lease of land for three years or less, or as a lease of land ineffectual because of uncertainty or indefiniteness of duration of term; and occupancy thereunder can not be regarded as a tenancy from year to year; but the interest granted is properly to be considered as an interest in land within the meaning of our statutes."

And finally at page 564 as follows:

"While, for reasons which we have sought to state, we do not regard the contract in suit, as a grant of land, or as a lease properly so called, but do regard it as a grant of a right in the nature of an incorporeal hereditament, operative from the time of its execution and during the accomplishment of its purpose as a transfer of an exclusive right to search for, take and appropriate the minerals mentioned in the instrument, under whatever technical common law term it may most properly be classed, it must be held to be a conveyance of an interest in land within the meaning of our statutes."

Other cases, considering for their purposes an oil and gas lease as an interest in real estate, are set forth in the footnote.[4]

In the case of *Guffey v. Smith,* 237 U. S. 101, 35 Supreme Ct. 526 at page 530, the Supreme Court of the United States spoke of an oil lease as a "vested freehold right".

The nearest Indiana case we could find was *Johnson v. Sidey,* 59 Ind. App. 678, 109 N. E. 934. In that case the county treas-

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[4] *Ramage v. Wilson,* 37 Ind. App. 532, 537, 538; *Central Fuel Company v. Wallace,* 174 Ind. 721, 93 N. E. 65, 66; *Kahle et. al. v. Crown Oil Co.,* 180 Ind. 131, 100 N. E. 681, 686; *Consumers Gas Trust Co. v. American Tin Plate Co.,* 162 Ind. 393; *Rembarger v. Losch,* 59 App. 678, 118 N. E. 831, 833; *Ohio Oil Co. v. Indiana,* 177 U. S. at page 190.

urer of Wells County, Indiana, sold for delinquent taxes to Sidey, upon the land where situated,

"six oil wells located in the southeast corner of the southwest quarter of the land described in the lease, together with drive pipes, casing, tubing, rods and pumping jacks connected with said six wells."

Johnson brought an action to quiet his title against Sidey. It was the contention of Johnson that the sale of the treasurer was illegal in that it being a sale of chattels real and real estate it should have been made at the court house door instead of on the premises. The Appellate Court, at page 935 of the N. E. Reporter, after discussing the oil lease, stated:

"As to the legal force and effect of this contract there can, we believe, be no doubt when there is coupled with its terms the fact that the wells located thereon became and were at the time of the sale by the county treasurer producing wells. The contract conveyed an interest in land, and the court erred in overruling the separate demurrers heretofore mentioned, for the reason that the paticular wells under the facts of this case, the wells sold with the machinery attached, must be considered real estate, and not personal property, and the pleadings show that they were sold as personal property."

The decision of the court in this case was that, as this property had been sold as personal property was required to be sold, rather than as real estate, the sale was void and the owner of the leases was entitled to have his title quieted as against the purchaser from the treasurer.

It seems, therefore, well established that a producing oil and gas lease is an interest in real estate, and we needed only the decision of the court that an oil and gas lease was an interest in real estate within our redemption statute.

There remained the further question of our right to redeem from the sale of the other property used in operating the leases such as casing, power plants, pumps, etc. The case of *Hyatt et al. v. Vincennes National Bank*, 113 U. S. 408, was relied upon. In that case the sheriff of Knox County sold, as real estate and chattels real, property of the lessee of a coal mine which included

"one engine and boiler and hoisting machine, steam pump, Fairbank's railroad scales, wagon scales, four screens, blacksmith's shop, one office building, one engine-building and dumping house, one stable, one lime-house, two dwelling-houses, track in coal mine, railroad tracks, switches, and all fixtures belonging to the coal mine on said real estate and leasehold."

The sale was on an execution against the lessee of the mine and was sought to be set aside because the property had not been sold as personal property is required to be sold under the laws of the State of Indiana. The Supreme Court held that the sale was properly made as real estate or chattels real at the door of the court house. At page 416 of the opinion the court said:

"The interest of the judgment debtors in this case in the land covered by the Bunting agreement was a chattel real; and as the dispute here relates to machinery, buildings, fixtures and improvements situated on the Bunting premises, and held under the Bunting agreement, it follows that that property had impressed on it, by the statute, for the purpose of a sale on execution, the character of a chattel real, and became, for those purposes, real estate, and, therefore, was not required to be sold as personal property, present and subject to the view of those attending the sale, but was properly sold as real estate, at the door of the county court house.

"The estate for years, or the interest in the land, could not be subject to view. The machinery, buildings, fixtures and improvements were created under the privilege given by the agreement to occupy the land with constructions and buildings for mining coal and other minerals, and, although Helphenstine & Company had the right to remove the buildings and fixtures at the expiration of the agreement, yet, so long as they were held under the agreement, on the premises, and were of the character referred to, they followed the term for years and partook of its character."

And at page 417 the court said:

"The motion made in the Circuit Court to modify the decree was based on the idea, that, while the term for years might be a chattel real, the machinery, buildings, fixtures, and improvements placed on the land should have been sold as personal property. As the statute requires that real estate 'shall' be sold at the door of the court house, the visible property could not be sold there in view of the persons attending the sale of the real estate, unless it was first severed from the land; and to have so treated it would, doubtless, have rendered not only it but the term of years worthless, as vendible articles. No such result could have been contemplated by the law makers, and none such can be allowed, if another reasonable and consistent construction is to be found."

The court enforced the right of the receivers to redeem the whole property. The Harts received the full amount of their purchase price with interest, and accounted to the receivers for all profits realized from operations, they being in possession until the termination of the trial.

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