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# The Rule of Capture in Pennsylvania Oil and Gas Law

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**Rule of Capture: General Definition**

- The Rule of Capture is one of the fundamental concepts of oil and gas law. A generally recognized definition was provided by Robert E. Hardwicke in *The Rule of Capture and its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 392, 393 (1935).
    - "The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands."
- *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235 (1889), described *infra*, is one of the foundation cases applying the Rule of Capture legal theory to oil and natural gas issues. Despite the prominent role that Pennsylvania case law, including *Westmoreland*, has played in the development of national jurisprudence on this topic, the author was unable to locate a single opinion from a Pennsylvania state court that has used the specific term "Rule of Capture." The phrase, however, has appeared recently in a few opinions from federal district courts within Pennsylvania. It is interesting to note that these opinions have not analyzed or ruled upon the legal theory. Rather, the opinions have included the phrase to describe communications between landmen and landowners in the negotiation of oil and gas leases. These communications may serve to demonstrate a common understanding of the Rule of Capture's application.
    - *Price v. Elexco Land Services, Inc.*, No. 3:09-cv-433, 2009 WL 2045135, at *2 (M.D. Pa. July 9, 2009) – "Count I of the plaintiff's complaint advances a cause of action for fraudulent inducement. This claim is made in regard to a statement made by the defendants' representative that the defendants would place a gas well

on neighboring property and take gas under the plaintiff's land under the 'rule of capture' and pay Plaintiff Price nothing if he did not sign a lease."

- *Frystak v. Cabot Oil & Gas Corp.*, No. 3:08-cv-667, 2008 WL 2357744, at *1 (M.D. Pa. June 5, 2008) – "Defendant also represented to plaintiff that if he failed to sign a lease defendant would negotiate leases with plaintiff's neighbors and capture the gas under plaintiff's land through the 'rule of capture,' leaving plaintiff without a lease or gas on his land."

- *Cronk v. Cabot Oil & Gas Corp*., No. 3:08-cv-634, 2008 WL 2367294, at *1 (M.D. Pa. June 5, 2008); *Escandel v. Cabot Oil & Gas Corp*., No. 3:08-cv-669, 2008 WL 2357749, at *1 (M.D. Pa. June 5, 2008); *Miller v. Cabot Oil & Gas Corp*., No. 3:08-cv-665, 2008 WL 2367293 at *1 (M.D. Pa. June 5, 2008); *Starzec v. Cabot Oil & Gas Corp*., No. 3:08-cv-668, 2008 WL 2357746, at *1 (M.D. Pa. June 5, 2008); *Wells v. Cabot Oil & Gas Corp*., No. 3:08-cv-666, 2008 WL 2357756, at *1 (M.D. Pa. June 5, 2008) – These companion cases to *Frystak* include identical or substantially identical language to that used in the *Frystak* opinion.

**Historical Bases for Rule of Capture**

- *Ferae Naturae*

  - One of the bases for applying the Rule of Capture to oil and natural gas is that these substances have properties similar to animals *ferae naturae*. *Ferae naturae* is defined as "Of a wild nature or disposition." BLACK'S LAW DICTIONARY 619 (6th ed. 1990).

  - *Pierson v. Post*, 3 Cai. 175 (N.Y. 1805) is one of the landmark U.S. cases applying the Rule of Capture to wild animals or *ferae naturae*. In this case, Pierson captured a fox that had been actively pursued by Post and his hounds. Post filed suit, claiming that he was the rightful owner of the fox as he had spent significant time and resources in its pursuit. In its analysis, the court acknowledged that the fox was "an animal *ferae naturae*, and that property in such animals is acquired by occupancy only." The court ruled that occupancy included the deprivation of the animal's natural liberty, either by ensnaring it or subjecting it to the control of the pursuer by other methods. Until a person could demonstrate that he had brought the animal "within his certain control," it could continue to roam without being owned by anyone. In light of Pierson being the person who had acquired occupancy of the fox, the court ruled in his favor.

- Percolating Groundwater

    - Another basis for applying the Rule of Capture to oil and natural gas is due to the similarities that these substances share with percolating groundwater.

    - *Acton v. Blundell*, 152 Eng. Rep. 1223 (1840), is an English case that has provided a foundation for the application of the Rule of Capture to percolating groundwater. In *Acton*, the court ruled that the rights of ownership and use of subsurface water should be treated differently than the rights to the use of streams flowing on the surface of the land. In so doing, the court established new law with regard to ownership rights in subsurface water.

        - The court stated, "[T]he person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of damnum absque injuria, which cannot become the ground of an action." *Id.* at 1236.

        - *Damnum absque injuria* is defined as "Loss, hurt, or harm without injury in the legal sense." BLACK'S LAW DICTIONARY 393 (6th ed. 1990).

**Application of Rule of Capture to Pennsylvania Oil and Natural Gas Law – *Westmoreland & Cambria Natural Gas Co. v. De Witt,* 130 Pa. 235 (1889)**

- Facts of *Westmoreland* case

    - Landowner John Brown executed an oil and gas lease for approximately 140 acres of land. The lease was eventually assigned to Westmoreland Natural Gas Company, which drilled a well into the gas-bearing strata.

    - Westmoreland shut the well in by closing the valves at the surface. Instead of marketing the gas, the gas from the well was held in reserve in the event one of the company's other wells experienced failure or low production.

    - Brown was unhappy with the arrangement and sought to top lease the land to a second company which intended to drill a well and extract gas. Brown allegedly ordered Westmoreland off of his land and claimed a forfeiture of the lease due to Westmoreland's failure to make certain payments.

    - Westmoreland filed suit to prevent the second company from drilling a well.

- Lower court opinion
    - The lower court adopted the report of the master which ruled that Westmoreland had forfeited the lease.
    - The master found that Brown had acted to take "full and absolute possession of the premises and rights mentioned and granted in the lease." *Id.* at 248.
- Issues Presented
    - Whether the well proposed by the second company was on leased land?
    - Whether Westmoreland had forfeited its lease?
- Ruling
    - The court found without "the slightest doubt" that the well proposed by the second company was on land leased by Westmoreland. *Id.* at 251.
    - The court denied the request for forfeiture of the lease because "not a single payment under this lease was made strictly according to its terms; the departure was begun by lessor's request, and was always in his favor." *Id.* at 254.
- Analysis
    - The Supreme Court ruled that the lower court had misconstrued the property interest that was at issue, stating that "[t]he subject of possession was not the land, certainly not the surface." *Id.* at 249.
    - The court continued its analysis by stating, "The real subject of possession to which complainant was entitled under the lease was the gas or oil contained in, or obtainable through, the land." *Id.*
    - The court found that Brown did not exercise possession of the gas. Any actions that he took with regard to the surface estate did not give him possession of the gas.
- Application of Rule of Capture
    - In its discussion of whether Brown had possessed the interest at issue, the court outlined the principles of the Rule of Capture that would provide the foundation for its application to oil and gas law within Pennsylvania and nationally.
    - The court's expression of the Rule of Capture was based largely upon the *ferae naturae* concept while also referencing percolating waters.

- The oft-quoted language of the court is as follows:

    - "Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals feroe naturoe [sic]. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract was uncertain' as said by Chief Justice AGNEW in Brown v. Vandergrift, 80 Pa. St. 147, 148. They belong to the owner of the land, and are part of it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his. And equally so as between lessor and lessee in the present case, the one who controls the gas-has it in his grasp, so to speak-is the one who has possession in the legal as well as in the ordinary sense of the word." *Id.* at 249-50.

- Impact of *Westmoreland* case

    - *Westmoreland* is often cited as being one of the first cases in the nation to apply the Rule of Capture theory to oil and natural gas law. *See* Bruce M. Kramer and Owen L. Anderson, *The Rule of Capture – An Oil and Gas Perspective*, 35 ENV. L. 899, 906 (2005).

    - *Westmoreland* was relied upon by courts outside of Pennsylvania including the U.S. Supreme Court in *Brown v. Spilman*, 155 U.S. 665, 670 (1895).

    - *Westmoreland* continues to express the general law applicable in Pennsylvania.

**Clarification of the *Ferae Naturae* Analogy – Ownership in Place**

- Unlike wild animals, which are not owned when until they have been captured, oil and natural gas, when in place, are capable of ownership.

- *Kier v. Peterson*, 41 Pa. 357 (1862)

    - Peterson leased land to Kier for the purpose of manufacturing salt. As Kier was recovering salt water, oil was recovered along with the salt water as an "unexpected product." Peterson filed suit, claiming that the oil recovered was his property.

    - The court ruled that since the oil was extracted "with the brine of a well which was opened in pursuance of, and must be regularly worked by, the express stipulations of the lease, it must belong to [Kier]."

    - Justice Woodward authored a concurring opinion that more clearly expressed the foundation for the theory of ownership in place. He stated, "Petroleum . . . is included in the very comprehensive idea which the law attaches to the word *land*. It is part of the land. It is land. As such it belonged to Peterson, in the place where the present dispute arose. He held it by the same title by which he held the surface, or the salt which underlay the surface." *Id.* at 362. Justice Woodward, however, opined that the raising of petroleum and salt were linked inextricably. He stated, "The severance of the petroleum was an inevitable incident of their exercise of clearly granted rights. The grant of the right to take salt was the grant of all incidental rights which were indispensable to the exercise of the main one. Hence, their severance of the petroleum from the freehold, and their possession of it, were lawful." *Id.* at 363.

- *Hamilton v. Foster*, 272 Pa. 95 (1922)

    - In this case, Plaintiff Hamilton had executed an oil and gas lease to defendant, in an agreement which prohibited drilling within a certain portion of the land subject to the lease. Defendant ultimately drilled a well within this restricted land. Whether defendant had received permission to drill said well on the restricted land was in dispute.

    - The court determined that the gas recovered from the well in question belonged to defendant whether or not he had permission to drill the well at the precise location where it had been drilled. In so ruling, the court stated that "we do not have to decide whether or not title can be acquired by trespass, but at most what recovery can be had against one who, by a trespass, obtains possession of his own property; and certainly this cannot be measured by its value." *Id.* at 103.

    - In addressing the arguments made by plaintiffs, the court approved the *ferae naturae* analogy expressed in the *Westmoreland* case, but cautioned that the analogy should not be extended beyond the specific language contained in *Westmoreland*. The court reviewed the *Westmoreland* language and added its interpretation as follows:

- "Much of the difficulty under which [plaintiffs] labor would be removed if they did not attempt to extend the comparison made in [the *Westmoreland* case] far beyond the purpose for which it was intended. It was there said:

  'Water and oil, and more strongly gas, may be classed by themselves, if the analogy be not too fanciful as minerals ferae naturae.'

  The analogy is not too fanciful, when understood in the sense in which the words were used, as appears in the next sentence:

  'In common with [wild] animals, and unlike other minerals, they have the power and the tendency to escape without volition of the court.'

  But the first statement, whether or not qualified by the second, does not determine that oil and gas are not capable of ownership, even when in place, or may not be the subject of a grant. On the contrary, in this state these matters are firmly established otherwise."

  *Id.* at 102.

- The court reiterated the application of the "ownership in place" doctrine by stating, "It has been many times decided that oil and gas are minerals, though not commonly spoken of as such, and while in place are 'part of the land.'" *Id.*

  - For this proposition, the court relied upon *Kier v. Peterson*, 41 Pa. 357, 362 (1861); *Funk v. Haldeman*, 53 Pa. 229, 249; *Stoughton's Appeal*, 88 Pa. 198, 201 (1879); and *Marshall v. Mellon*, 179 Pa. 371, 374.

**Specific Applications of Rule of Capture in Pennsylvania Oil and Gas Law**

- Use of Mechanical Devices to Increase Production – *Jones v. Forest Oil Co*., 194 Pa. 379 (1900)

  - Jones and Forest Oil operated numerous oil wells on adjacent tracts of land. Forest Oil began to use a gas pump to increase the production from its wells. Forest Oil's use of the gas pump caused the production in Jones' wells to decrease.

  - The issue decided by the court was "to what extent an owner of oil wells may use mechanical devices for bringing the oil to the surface. In operating his wells, may he use appliances which diminish the production of his neighbor's wells?"

  - In its analysis, the court relied heavily upon the percolating water analogy, stating, "To some extent, the law governing the use of subterranean waters by the

owner of the surface is applicable to the production of oil." The court continued to expand upon the percolating water analogy by stating:

- "In regard to wells and springs, the law is well settled that the owner of land is not entitled to recover for injuries to his wells and springs caused by acts of an adjoining owner, if the injury results from a lawful exercise of the rights of the adjoining owner, on his own property, and without malice and negligence. An owner of land may dig a well upon his property, and if, in so doing, he taps the hidden flow of water which supplies his neighbor's spring, it is a loss to the neighbor for which the law provides no remedy."

- The court relied upon *Westmoreland* to rebut Jones' assumption that "there is a certain fixed amount of oil and gas under his farm, in which he has an absolute property." The court continued its analysis by stating that the oil and gas underlying Jones' property "belong to him while they are part of his land; but when they migrate to the lands of his neighbor, or become under this control, they belong to the neighbor."

- The court found that since Forest Oil had a lawful right to extract oil from the property, it was permitted to use all lawful means to do so. Accordingly, the court concluded that "to that end it may resort to the use of all known lawful modern machinery and appliances."

  - The court determined that the use of these lawful procedures did not depend upon the harm that they caused to neighboring wells. It stated that "as long as the plaintiff uses only lawful means as against his neighbor, however injurious or however artificial those means may be, his right to appropriate the common source is not diminished because he uses the most artificial or most injurious methods."

  - The court also noted that gas pumps were widely used and that "[t]heir cost is within the reach of all operators, and, when used by all, none are injured."

- At the citation listed above, the Pennsylvania Supreme Court affirmed the lower court decision in a *Per Curiam* opinion.

- Drilling Close to Property Lines – *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362 (1907)

  - Facts

    - The Monongahela Natural Gas Company held leases on adjacent parcels of real estate with one – a 66 acre tract – belonging to Plaintiffs Daniel

and Elizabeth Barnard and the second – a 156 tract – belonging to James Barnard.

- The gas company drilled a well on the property of James Barnard 35 feet from the property line of Daniel and Elizabeth Barnard. The ten-acre drainage area from said well was estimated to be 75% from underneath the property of Daniel and Elizabeth Barnard and 25% from underneath the property of James Barnard.

- The opinion cited above is a *Per Curiam* decree that "affirmed on the opinion of the court below." *Id.* at 367.

- Although the fact pattern presented involved a lessee drilling a well that would impact the rights of two neighboring lessors, the lower court also addressed the issue of one landowner drilling a well that would affect the rights of a neighboring landowner. The specific issues addressed by the lower court were as follows:

  - "Can a landowner in gas territory drill a well on his farm close to the line of his adjoining landowner and draw from the land of the latter three-fourths of the gas that his well may produce without so invading the property rights of the adjoining landowner as to be legally accountable therefore?"

  - "Will a lessee who has a lease on each of two adjoining farms be enjoined at the instance of one of the landowners from drilling a well on the farm of the other at such a point as will drain most of the gas that it produces from the land of the first?"

- Offset drilling rule

  - The lower court opined that, according to its understanding of Pennsylvania law, a landowner is free to drill as close to the property line as he wishes and that the remedy for the neighbor is to drill an offset well. The court elaborated on this understanding as follows:

    - "[E]very landowner or his lessee may locate his wells wherever he pleases, regardless of the interests of others. He may distribute them over the whole farm or locate them only on one part of it. He may crowd the adjoining farms so as to enable him to draw the oil and gas from them. What then can the neighbor do? Nothing; only go and do likewise. He must protect his own oil and gas. He knows it is wild and will run away if it finds an opening and it is his business to keep it at home."

        - The lower court took issue with this offset drilling rule and appeared to lend support to the rationale of the conservation laws that would follow many years later in stating:

            - "This may not be the best rule; but neither the Legislature nor our highest court has given us any better. No doubt many thousands of dollars have been expended 'in protecting lines' in oil and gas territory that would not have been expended if some rule existed by which it could have been avoided."

    - Common lessee's drilling near property lines of adjoining lessors

        - The court opined that a common lessee is not restrained from drilling near the property lines of adjoining lessors so long as he does not act with a fraudulent intent.

            - "We think it is well settled that the lessee has the same rights in regard to locating of his wells as the landowner would have if doing the operating, but he cannot take advantage of the fact that he has leases on adjoining farms so as to fraudulently deprive either of his lessors of his royalty or annual gas rental."

        - In this case, the court found that the gas company had not acted with a fraudulent intent, and thus, that its conduct was not actionable. The court provided some examples of conduct that would demonstrate fraud such as refusing to develop the lease on a property after draining gas from underneath it through a well on an adjacent property.

- Gas Storage Fields – *White v. New York State Natural Gas Corp*., 190 F. Supp. 342 (W.D. Pa. 1960)

    - The drainage area of a well had been exhausted, and New York State Natural Gas was using the area as a gas storage field. White owned an interest in nearby wells. A dispute arose as to the ownership of gas that may have migrated from the gas storage field.

    - White alleged that the gas in question did not originate from the storage field. As an alternative, White argued that "title to such gas is lost by its injection into natural underground reservoirs for storage purposes." *Id.* at 343. White relied upon the *ferae naturae* analogy to characterize the escaped gas as a captured wild animal that had "escaped to its natural habitat." *Id.* at 347.

    - The court addressed the issue of "whether title to natural gas, once having been reduced to possession, is lost by the injection of such gas into a natural underground reservoir for storage purposes." *Id.* at 345.

- The court cited *Hamilton v. Foster*, 272 Pa. 95 (1922), discussed *supra*, for the proposition that the *ferae naturae* analogy has limitations.
    - The court found that the gas in question had not actually escaped as it continued to be in the possession of the storage company.
    - The court found that the gas in question had not returned to its 'natural habitat' because it was gas that had been transported from the Southwestern United States. As such, it differed substantially from the native Oriskany gas that would have originally been present in the storage fields. Use of the *ferae naturae* analogy "would no more divest a storage company of title to stored gas than a zookeeper in Pittsburgh of title to an escaped elephant." *White* at 348.
  - The federal district court ultimately opined "that the Supreme Court of Pennsylvania would hold title to natural gas once having been reduced to possession is not lost by the injection of such gas into a natural underground reservoir for storage purposes." *Id.* at 349.

- Waste – *Hague v. Wheeler*, 157 Pa. 324 (1893)
  - Facts and procedural history
    - In *Hague*, two plaintiffs each drilled and maintained productive gas wells on their respective tracts of land. Defendant drilled a well within the same pool of gas as that into which plaintiffs had drilled their wells.
    - Defendant was unable to market the gas from his well, but left the well open allowing the gas to escape into the air.
    - Plaintiffs entered upon defendant's land and shut the well. Plaintiffs then obtained an injunction to prevent defendant from re-opening the well. Defendant appealed the grant of the injunction.
  - The court found that defendant had not acted with malice or negligence in drilling the well as it had been drilled at the request of a gas company. The court characterized defendant's inability to market the gas from the well as being unfortunate. The court characterized the situation as thus:
    - "Three landowners owning considerable holdings in the same basin, or overlying the same gas-bearing sand rock, each having an open gas well or wells or his land, drilled without malice or negligence, in a lawful manner, and for a lawful purpose." *Id.* at 338-39.

- The court recognized that there was a public interest in preventing waste, but that should be addressed by the legislature and was largely irrelevant in a dispute between private parties.

- The court opined that a person's dominion over natural gas lawfully extracted is absolute stating, "so long as he can reach it and bring it to the surface it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property." *Id.* at 341.

    - The court compared the waste of natural gas to the waste of timber by use of the following example: "The owner of timber may pile it in heaps, and burn it, as was done in the early settlement of the country, notwithstanding the fact that his neighbor has a sawmill and all the facilities for preparing the sawed lumber for market and converting it into money. The power of the owner of the timber over it is neither greater nor less because of his neighbor's readiness and ability to market it." *Id.* at 340.

    - The court provided two limitations upon this general rule: "[H]e must not disregard his obligations to the public, he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy or any positive provision of the written law, he brings himself within the reach of the courts." *Id*. at 341.

- The opinion acknowledged that the right of a well operator to release gas as was done in the instant case could be restricted by statute should the legislature act in the general interest.

- Ownership of Coal Bed Methane – *United States Steel Corp. v. Hoge*, 503 Pa. 140 (1983)

    - Facts and procedural history

        - In 1920, coal rights were severed from the surface estates in the properties that were the subject of this dispute. The coal severance deeds conveyed the following property interests:

            - *"All the coal* of the Pittsburgh or River Vein underlying all that certain tract of land . . .

              *Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including* the right of mining without leaving any support . . ., *the right of ventilation* and drainage and of access to the mines for men and materials . . .

> The parties of the first part [surface owners] hereby *reserve the right to drill and operate through said coal for oil and gas* without being held liable for any damages."
>
> *Id.* at 144.

- In 1976 and 1977, the surface owners executed gas leases, and the drilling of wells to recover coal bed methane began in 1978.

- The owner of the coal brought suit to halt the drilling of wells and to determine ownership of the coal bed methane.

- The Superior Court ruled that ownership of the coal bed methane belonged to the owners of the surface estates.

- Issue presented – Who owns coal bed methane where the ownership of coal and the ownership of the surface estate have been severed.

- Analysis

  - The court reviewed the prior opinions of the Pennsylvania Supreme Court in *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235 (1889) and *Hamilton v. Foster*, 272 Pa. 95 (1922) to conclude that title to the gas rests with whoever has title to the substance in which the gas rests.

    - The court elaborated on this statement as follows: "When a landowner conveys a portion of his property, in this instance coal, to another, it cannot thereafter be said that the property conveyed remains as part of the former's land, since title to the severed property rests solely in the grantee. In accordance with the foregoing principles governing gas ownership, therefore, *such gas as is present in coal must necessarily belong to the owner of the coal*, so long as it remains within his property and subject to his exclusive dominion and control." *U.S. Steel* at 147.

  - The court accepted that any coal bed methane that migrates out of the coal and into the surrounding mineral estate would belong to the owner of that surrounding mineral estate.

  - The court considered the reservation to drill through the coal for oil and gas, but concluded that the term "gas" was not referring to coal bed methane.

- The rationale for this conclusion was that at the time of the execution of the coal severance deed, coal bed methane was known to be a dangerous waste product.

- According to the court, "It strains credulity to think that the grantor intended to reserve the right to extract a valueless waste product with the attendant potential responsibility for damages resulting from its dangerous nature. . . We find more logical and reasonable the interpretation offered by the Appellant that the reservation intended only a right to drill through the seam to reach the unconveyed oil and natural gas generally found in strata deeper than the coal" *Id.* at 150.

- Holding – The court held that title to the coal bed methane was held by the owners of the coal in which the coal bed methane was held.

- Dissent

  - The language and reasoning of the dissenting opinion resembled that of the majority opinion in large part, but differed on the interpretation of the reservation of the right to drill through the coal for oil and gas.

  - The primary difference in the opinions is summed up in the following passage:

    - "In plain terms, the deed reserves to the grantor the right to drill for 'gas', without any express qualification limiting the types of gas that may be extracted. It is argued by appellant that the term 'gas', as was used in the deed, should be construed narrowly as a reference to what has traditionally been called 'natural gas', the characteristics of which have heretofore been described, rather than as a reference to all gases. The chancellor found, however, that in the year 1920 it was well known that coal mines always contained coalbed gas; thus, it cannot be asserted that the parties were unaware of the existence of the particular gas now in dispute, though they may or may not have been aware of the few wells in Greene County and elsewhere that produced coalbed gas in paying quantities. Given their awareness of the presence of coalbed gas in the stratum, the earlier described similarities between coalbed gas and what has been commonly referred to as 'natural gas', and the fact that the unrestricted term 'gas' was employed in the reservation clause, we believe the plain meaning of the term 'gas' would be too far subverted were we to exclude coalbed gas as a recoverable gas." *Id.* at 157-58.

- The dissenting opinion asserted that both the owner of the surface estate and the owner of the coal should be permitted to extract the coalbed methane.

**Modifications to Rule of Capture – Conservation Laws**

- Pennsylvania Oil and Gas Conservation Law, 58 PA. STAT. §§ 401 - 419
    - This legislation was enacted by the Pennsylvania legislature in 1961.
    - The Conservation Law prohibits the waste of oil or gas. Waste includes physical waste as well as drilling more wells than are necessary.
    - The Conservation Law authorizes DEP to issue spacing orders which determine where wells can be drilled. When multiple landowners own interests in a drilling unit, the landowners will share in the royalties from the oil or gas well in proportion to their ownership of the land contained within the drilling unit regardless of whose land the well is drilled upon.
    - A Summary of the Statutory Provisions of the Conservation Law is located on the Agricultural Law Center Web site at http://www.dsl.psu.edu/centers/agpubs/Natural_Gas/SummaryOfOilAndGasConservationLaw.pdf.
- Interstate Oil and Gas Compact Commission (IOGCC) – www.iogcc.org
    - IOGCC is an interstate compact that was formed in 1935 with the original purpose of assisting member states to enact and enforce Conservation Laws.
    - The mission of IOGCC has broadened today such that the commission works to impact national policy in all aspects of oil and gas development. Despite this expanded mission, IOGCC continues to address the issue of state Conservation Laws. In 2004, IOGCC promulgated a model Conservation Law.
    - A fact sheet on the Pennsylvania statute, 58 PA. STAT. §§ 191-196, addressing the state's membership in IOGCC is located on the Agricultural Law Center Web site at http://www.dsl.psu.edu/centers/agpubs/Natural_Gas/Oil_And_Gas_Interstate_Conservation_Compact_Fact_Sheet.pdf.

**Rule of Capture – Issues on the Horizon**

- To what extent does hydrofracing constitute a subterranean trespass?
    - In *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (2008), the Texas Supreme Court held that the contents of frac fluid that travelled under adjoining land did not constitute a trespass.
- To what extent can a property be explored through seismic testing without having permission for physical entry on the property?
- Will the Pennsylvania Oil and Gas Conservation Law be amended to encompass the Marcellus Shale formation?
    - House Bill 977 proposes to so amend the Conservation Law.
    - This legislation is pending before the House Environmental Resources and Energy Committee.