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Peppertree Farms, L.L.C. v. Thonen: Ohio's High Court Classifies Unaccrued Royalties as Real Property

In its February 15, 2022, Memorandum Opinion,^[1] the Supreme Court of Ohio revisited pre-1925 deed interpretation to make a formal distinction between accrued and **un**accrued royalties: the former is a personal property interest while the **latter is a real property interest**.

Peppertree Farms, L.L.C. v. Thonen involved a title dispute over two deeds, one from 1916^[2] and the other from 1921.^[3] Importantly, (1) both deeds expressly reserved the oil and gas **royalties**, as opposed to the oil and gas fee interest; and (2) both deeds were recorded **before** the Ohio legislature abrogated the common law rule that property grants had to contain words of inheritance (e.g. "her heirs and assigns...").^[4] In Ohio's pre-1925 era of deed construction (and in most states before the enactment of similar laws), the labels "exception" and "reservation" carried very real and distinct consequences. An "exception" meant the grantor was keeping something that already existed. If the grantor owned the property in fee, her exception out of a deed was also a fee interest, meaning words of inheritance were not required. If the language created a **new interest** in favor of the grantor (and binding on the grantee), it was a "reservation" requiring words of inheritance for such carveout to be heritable (i.e., not a life estate in the grantor).^[5]

And as with all matters of deed construction, whether a carveout was an exception or reservation depended on the intentions of the parties as evidenced by the deed as a whole in light of the circumstances.^[6]

Ohio's March 25, 1925, law changed all of this, rendering the distinction between exceptions and reservations far less important. It provided:

The use of terms of inheritance or succession are not necessary to create a fee simple estate, and every grant, conveyance, or mortgage of lands, tenements, or

hereditaments shall convey or mortgage the entire interest which the grantor could lawfully grant, convey, or mortgage, unless it clearly appears by the deed, mortgage, or instrument that the grantor intended to convey or mortgage a less estate.
[\[7\]](#)

Because the deeds at issue in *Peppertree Farms* were recorded before the law's effective date, the Court applied the law that was applicable at the time.[\[8\]](#)

The plaintiff/surface owner, Peppertree Farms, argued that each of these deeds reserved a royalty interest, which is personal property, thus creating a new interest in the grantors.[\[9\]](#) A "reservation" lacking words of inheritance, the new interest expired when the grantors died.[\[10\]](#) Additionally, Peppertree argued, in the alternative, that the Marketable Title Act would have extinguished this interest anyway.[\[11\]](#) The trial court agreed and granted Peppertree's motion for summary judgment.[\[12\]](#) The Fifth District Court of Appeals affirmed.[\[13\]](#)

The Ohio Supreme Court disagreed with both of lower courts' findings that the interest reserved was a personal property interest. After tracing the historical roots of the "exceptions" versus "reservations" distinction, the Court discussed examples of these differences, noting that, in the realm of exceptions, "[c]oal, oil, timber, gas, and minerals are all corporeal things already in existence; thus, they squarely meet the requirements to be an exception, rather than a reservation."[\[14\]](#) The Court noted that whether language is an exception or reservation is determined from the words of the instrument as a whole—not simply whether the words "reservation" or "exception" was used.[\[15\]](#) From here, the Court examined the opinion of a well-known treatise author, who considered the right to royalties to be, loosely, *part of the mineral estate*.[\[16\]](#) Significantly, the Court discussed *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 156, N.E. 119 (1927) and held that its statement that royalties were personal property was *dicta* because that issue was never properly before the Court.[\[17\]](#)

Citing multiple authorities outside of Ohio, as well as treatise authors, the Court pointed out that "there is a recognized difference between royalties that have accrued, which are personal property,

and the right to unaccrued royalties, which is real property.”^[18] Critically, the right to unaccrued royalties is, in essence, part of the fee: “[t]he right to receive royalty in the future is one of the separately alienable incidents of ownership of the full mineral interest.”^[19] Thus, the Court said, language carving out the right to unaccrued royalties is the retention of something that already exists, not the creation of a new interest.

Applying these principles, the Court determined that the grantors of the Deeds retained an exception, not a reservation:

[A]t the times that W.T. Fleahman and Mary Fleahman each conveyed the property, they owned an existing real-property interest in unaccrued royalties from the production of oil and gas, regardless of whether the property was then subject to an oil and gas lease. They could sever their present right to future royalties from both the surface and the mineral estate, which they did. And because they did so by excepting the royalty interest from the conveyance, their property rights in the partial interest to the oil and gas were absolute.^[20]

Immediately after so holding, the Court agreed with the lower courts that even if the royalty exceptions are real property, they were extinguished by the Marketable Title Act (except for the T.J. Kremer interest).^[21] The Court noted that the only challenge to this argument was that the DMA superseded the MTA, which was resolved by the Court’s decision in *West v. Bode* holding that both statutes could apply to severed mineral interests.^[22]

Thoughts and Takeaways:

Peppertree is curiously fact-specific. The standard for jurisdictional appeals to the Ohio Supreme Court is a matter of public or great general interest. Yet, the Court engaged in the interpretation of two pre-1925 deeds. Justice Michael Donnelly points this out in his dissent.^[23]

Nevertheless, *Peppertree Farms* stands as Ohio’s statement on the nature of royalty interests. Despite the seeming futility of the Court’s determination that unaccrued royalties are real property, which were then extinguished by the MTA, its analysis and

conclusion, unlike *Pure Oil Co*, is not *dictum*. The Court's analysis was necessary to determine whether the MTA applied at all. It impacted the outcome, as the T.J. Kremer interest was determined to not have been extinguished by the MTA.

Any conclusions about oil and gas royalty ownership relying upon the presumption that royalties are always personal property is no longer. Because this decision is not merely prospective, it means that a review of title and conclusions based upon pre-1925 law and assumptions must be revisited. Once again, Ohio's growth in jurisprudence comes at the expense of certainty. Nevertheless, a statement by Ohio's highest court is better than nothing at all.

For more information, contact [Chris Rogers](#) or any attorney with Frost Brown Todd's [Oil & Gas](#) industry team.

[1] *Peppertree Farms, L.L.C. v. Thonen*, Slip Opinion No. 2022-Ohio-395. A full copy of the opinion can be found [here](#). In a companion Memorandum Opinion also issued on February 15, 2022 (*Peppertree Farms, L.L.C. v. Thonen*, Slip Opinion No. 2022-Ohio-396 (*"Peppertree II"*)), the Ohio Supreme Court addressed the same two issues in this case. A copy of the full opinion can be found [here](#). In addition to this, the *Peppertree II* opinion addressed a third issue: whether a handwritten, recorded will that neither expressly devised the testator's interest in oil and gas nor contained a residuary clause was a title transaction under the Ohio Marketable Title Act, R.C. 5301.47 *et seq.* The Court held that it was not a title transaction. *Peppertree II* at ¶ 26. This will be the subject of a second article.

[2] The 1916 deed's reservation provided "Grantor W.T. Fleahman excepts and reserves from this deed the one half of the royalty of the oil and gas under the above described real estate." *Id.* at ¶ 7.

[3] The 1921 deed provided: "the 3/4 of oil Royalty and one half of the gas is hereby reserved and is not made a part of this transfer." *Id.* at ¶ 8.

[4] *Id.*, at ¶ 2. Effective March 25, 1925, G.C. 8510-1, 86 Ohio Laws 18 (1925) provided: "The use of terms of inheritance or succession are not necessary to create a fee simple estate, and every grant,

conveyance, or mortgage of lands, tenements, or hereditaments shall convey or mortgage the entire interest which the grantor could lawfully grant, convey, or mortgage, unless it clearly appears by the deed, mortgage, or instrument that the grantor intended to convey or mortgage a less estate.” *Id.* at ¶ 21.

[5] See *id.* at ¶¶ 16–

[6] *Id.* at ¶ 19.

[7] *Id.* at ¶ 21, quoting G.C. 8510–1, 86 Ohio Laws 18 (1925).

[8] *Id.* at ¶ 22.

[9] Peppertree also argued that the Ohio Dormant Mineral Act superseded the Marketable Title Act, meaning that only the Dormant Mineral Act could be utilized to affect a severed mineral or royalty interest. This question was resolved by *West v. Bode*, 162 Ohio St.3d 293, 2020–Ohio–5473, 165 N.E.3d 298. Thus, the Court summarily dealt with this issue in *Peppertree*. *Id.* at ¶ 5. See *infra*.

[10] *Peppertree Farms, L.L.C.* at ¶ 25.

[11] *Id.* at ¶¶ 12–13.

[12] *Id.* at ¶ 13.

[13] *Id.* at ¶ 14.

[14] *Id.* at ¶ 18 (citing Tiffany, *Real Property*, Section 972)(internal quotation marks omitted).

[15] *Peppertree Farms, L.L.C.* at ¶ 19.

[16] *Id.* at ¶ 25.

[17] *Id.*

[18] *Id.* at ¶¶ 26–27.

[19] *Id.* at ¶ 27 (internal quotation marks and citation omitted).

[20] *Peppertree Farms, L.L.C.* at ¶ 28.

[21] *Id.* at ¶ 30.

[22] *Id.* The only error the Court noted was that the Fifth District should not have held that the MTA extinguished the T.J. Kremer

Interest because the trial court never held that. *Id.* at ¶ 31.

[23] His dissent states: “This case should be dismissed as having been improvidently allowed. It does not involve issues of “public or great general interest.” Article IV, Section 2(B)(2)(e), Ohio Constitution. It is highly fact-specific and the issues involved were resolved below. I dissent.” *Peppertree Farms, L.L.C., supra.*

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