



Book Review – Finders Keepers?: How the Law of Capture Shaped the World's Oil Industry

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Finders Keepers? is “compulsory” reading for those who wish to understand the origins of New York’s Spacing Laws. In his fascinating volume Terence Daintith has compiled the definitive History of the Law of Capture.

Under both Roman and English Common Law, minerals under the land belonged to the landowner. Yet, as minerals took on greater importance, every country, except the US, migrated to sovereign ownership, and that the author sees as the root of all evil in the US.

In 1923, the Teapot Dome Scandal, involving operators’ draining the Navy’s Elk Hill Petroleum Reserve, opened the eyes of the public to “Offensive Drilling” tactics. Hence the coinage at that time of the phrase: “Law of Capture.” Competitive drilling strategies were used by drillers to blackmail each other, by either sinking wells next to wherever the competition hit oil, capturing the oil’s source or threatening to flood the competitor’s well by pulling their tubing. Daintith lays out example after example of the waste and surface havoc. By the late 1920s, operators, drilling in Town Lot neighborhoods in Texas, were drilling so close to residences that homeowners could not open their front doors. And abroad, the contemporary plays in Galicia, Romania, Baku and Burma, all ended with the same “forest of derricks” that sprung up at Oil Creek.

Tracing the development of “Correlative Rights” – the rights of the community of landowners in a fugacious substance – Daintith analogizes the 19th century development in French law, establishing a “zone of protection” to shield owners of existing Mineral Springs from others capturing their precious water supply, to the spacing rules later developed in this country.

In the US, for a court to subordinate the Capturer’s right to the gas emanating from “their” property, it would have to find an exception to the landowners constitutionally protected private property rights. In 1900, in a case, involving an Indiana Statute, designed to address “conspicuous-waste” by requiring that a well be shut in after two days of flaring, the US Supreme Court sustained the statute, enunciating a principle of “co-equal” rights amongst the pool’s effected landowners, not just the private right of the landowner with the “Flambeaux” on their property.

As early as the 1880s, *Scientific American* had published articles regarding the wasting of gas, occasioned by wells puncturing a field, causing a detrimental lowering of pressure. At the same time, the Conservation and Progressive movements campaigned against the waste of natural resources, not only with respect to the slaughter

of wildlife by aggressive hunting, but also the exhaustion of hydrocarbons by “offensive drilling.” The Conservation movement thus discarded its populist antitrust concerns in favor of preventing waste. It took 30 years for Industry to join the Conservationists, finally abandoning the stubbornly held belief that more wells meant more oil.

In 1924, President Coolidge in response to the Teapot Dome Scandal, appointed the FOCB Commission to investigate the “Finders Keepers” impact on exploration. Two years later, while the Commission deliberated, the bottom, not surprisingly, fell out of the market. Operators on the brink of financial collapse embraced the concept of prorationing through administrative or consensual fiat, an OPEC approach. Though there were some successes, the tactic failed for the most part, as it was too hard to administer. In Texas martial law was declared and troops were sent in to suppress a revolt by drillers.

Then in 1927, the small town of Oxford, Kansas, took matters into its own hands, enacting an Ordinance that became the precursor for all future Unitization statutes. Oxford’s Ordinance provided that each Town block constituted a Unit. The operator who had the most acreage had an exclusive right to drill. Landowners received a 1/8th royalty or could invest. Sustained by the Courts, the Oxford strategy was adopted by Oklahoma and Louisiana. Others soon followed.

With the principle of maintaining field pressure firmly in place, the recognition that prorationing was not the solution, the impetus of the environmental movement, and the success of Oklahoma’s statute, the Unitization approach gained significant momentum. By 1950, it had taken root across the US, with a few notable exceptions, such as Pennsylvania.

Daintith has no sympathy for landowners, particularly small landowners, who allied themselves with opportunistic local independents. In his view, these operators relied on their political clout, the populist anti-monopoly sentiment and the implied duty to drill for their leverage. In the same breath, Daintith recognizes, however, that the Rule, which generates such ferocious competition, may have had its virtues in stimulating the development of the early plays. Ultimately he concludes its opportunistic use by small landowner/operators negated any such benefits.