1950

Marital Property Problems from and Oil and Gas Lessee's Standpoint

W. D. Masterson Jr.

MARITAL PROPERTY PROBLEMS FROM AN OIL AND GAS LESSEE'S STANDPOINT

*W. D. Masterson, Jr.**

1. General Principles

THE husband as manager of the community property usually has power to dispose of or encumber such property without the wife's consent or joinder.[1] Exceptions to the usual rule exist when (a) the property constitutes homestead; (b) the wife acts alone but with consent of the husband;[2] (c) possibly when the property constitutes special community.[3]

The husband also usually has power to dispose of or encumber his separate property without the wife's consent or joinder. The most important exception to this rule is where the property constitutes homestead.

In considering the wife's separate property, it is necessary to distinguish between personalty and realty. Except as to stocks and bonds, the wife has control over personal property.[4] As to realty, it is usually necessary that both husband and wife sign the instrument affecting it.

An important principle to bear in mind is that whenever it is necessary for a married woman to sign a conveyance involving

*Professor of Law, Southern Methodist University.

[1] This article is without reference to the tests for determining whether a given tract is separate or community. For a good discussion of the effect of non-residence, see Thomas and Thomas, *Community property and the Conflict of Laws: A Recapitulation*, 4 SOUTHWESTERN L. J. 46 (1950). Problems raised when one spouse dies are discussed in a comment, *Problems on the Administration of Community Property*, this issue.

[2] Thomas v. Chance, 11 Tex. 634 (1854); Leyva v. Rodriguez, 195 S. W. (2d) 704 (Tex. Civ. App. 1946), *error refused.*

[3] The rules and problems incident to special community will not be covered herein. They are discussed in comment, *Control and Disposition of Special Community Property*, 4 SOUTHWESTERN L. J. 88 (1950). As to the wife's emergency power to contract, see comment, *The Wife's Emergency Powers*, 4 SOUTHWESTERN L. J. 112 (1950).

[4] See comment, this issue, *The Wife's Contracts*, both as to her right of control, and as to her power to contract relative to her separate property.

realty, it is also usually essential that she acknowledge it in the manner required by the statute governing acknowledgements of married women.[5]

As indicated, the wife's joinder is necessary if the property constitutes homestead, even though said property is the separate property of the husband, or is part of the general community. Such joinder is also necessary if the property, though not homestead, is the separate property of the wife. There is, however, an important difference between the two situations. If her joinder is necessary because the property is her separate property, then the result of her failure to properly join is that the instrument as to her is a nullity.[6] On the other hand, if the only reason for joinder is that the property is homestead, her failure to join does not render the instrument void. It simply gives her a right to avoid the transaction. This right is lost unless asserted while the property is still homestead. It also may be lost by some subsequent act by the wife indicating consent to the transaction.[7]

2. Contracts to Execute Oil and Gas Leases

Frequently when an oil company desires to procure leases in a given area, it follows the procedure of first attempting to secure contracts obligating the persons believed to be the owners to execute leases. These contracts give the lessee a designated time to examine title and obligate the lessor to execute the lease and the lessee to accept and pay therefor within such time if title is marketable, or satisfactory to the lessee.

Sometimes the lessors have an incentive from a business standpoint to avoid compliance with such a contract if possible.[8] Thus,

[5] Humble Oil and Refining Co. v. Downey, 143 Tex. 171, 183 S. W. (2d) 426 (1944).

[6] Humble Oil and Refining Co. v. Downey, *supra*, note 5, *Compare* Burens v. Brown, 290 S. W. 1086 (1927), 118 Tex. 551, 18 S. W. (2d) 1057 (1929).

[7] Grissom v. Anderson, 125 Tex. 26, 79 S. W. (2d) 619 (1935).

[8] Of course sometimes it is the lessee who has the incentive to avoid, as where a nearby well is completed as a dry hole. However, when the problem of voidability is presented by the fact that one party is a married woman, the option to avoid rests with her and does not give a similar option to the lessee.

pending title examination, the mineral value of the tract covered by the contract may become much higher; or farmer Jones may learn that his neighbor made a better deal with the oil company, and feel highly wronged.

Obviously, then, it is important to the lessee to secure binding contracts.

While there is a conflict of authority elsewhere, the Texas rule is well settled that a contract to execute an oil and gas lease on a usual form involves an interest in realty. To be enforceable, such a contract must be evidenced by a written instrument meeting the requirements of the statute of frauds, which include a correct property description and also a specific description of the proposed lease.[9]

If the property therein described is part of the general community estate or of the husband's separate estate and is not homestead, it is not necessary to secure the wife's joinder.[10]

If the property is homestead, or the separate property of the wife, then the prospective lessee should be on guard. This is because it is a general rule that a married woman is not bound by a contract to convey realty, but only by an actual conveyance.[11]

Any time leases are desired in a potentially valuable field, the prospective lessee should give careful consideration to seeking to secure oil and gas leases instead of contracts in those instances in which it appears probable that the wife's signature will be necessary. Of course the objection to this procedure is that it may develop that the parties executing the lease do not have title. There are several possible answers to this objection: the parties can agree to a deferred consideration; even if the consideration is immediately payable, the warranty in the lease may result in recovery

[9] Fagg v. Texas Co., *et al.*, 57 S. W. (2d) 87 (Tex. Comm .App. 1933).

[10] TEX. REV. CIV. STATUTES (Vernon's 1948) art. 4619. It is advisable when possible to secure the wife's signature to avoid fact questions as to homestead and as to whether the property is actually general community.

[11] The same rule applies even though the lease is executed and placed in escrow. Maynard v. Gilliam, 225 S. W. 818 (Tex. Civ. App. 1920). For a good discussion and collection of cases, see WALKER, CASES ON OIL AND GAS, Vol. 1, p. 426 (1948).

from the husband of the purchase price; frequently the bonus is relatively small, and the risk of losing it may be more than offset by the risk of losing the lease.

Sometimes the lawyer is not called in until after a contract has been procured, and the wife has refused to perform. While the position of the lessee is not of the best, it is not necessarily hopeless. Several possibilities should be explored. Possibly the contract could be sustained as having the requisites or effect of conveyance; as reasonably necessary to the preservation of the wife's separate property; as reasonably necessary to provide her with the necessities of life; or, if the husband is mentally incompetent, as a valid exercise of power as the community manager.[12]

3. Oil and Gas Leases

In Texas an oil and gas lease on a usual form conveys to the lessee a determinable fee title in realty.[13] Remembering that a married woman usually can be bound only by a conveyance as distinguished from a contract to convey, it is important that the lease include words of conveyance. All, or practically all, oil and gas leases include sufficient words of grant in the granting clause. Some forms, however, do not include such words in the mother hubbard, or all-inclusive clause.[14] However, it seems that even here, the requirement in this respect is met by the wording of the granting clause.[15]

Briefly, if the property constitutes general community or the husband's separate property, and is not homestead, the wife's joinder, while advisable to avoid potentially dangerous fact questions, is not necessary. If the property is homestead or the separate property of the wife, her joinder is necessary.

---

[12] See *supra* not 3. While a money judgment would often be a poor substitute for a lease, the lessee should also consider the possibility of proceeding against the husband for breach of warranty.

[13] Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A.L.R., 566 (1923).

[14] This is the clause which follows the specific property description and in effect provides that the lease also covers adjacent land owned or claimed by the lessor.

[15] Sun Oil Co. v. Burns, 125 Tex. 549, 84 S. W. (2d) 442 (1935).

4. Lease Amendments

When it is desired to change the terms of an existing lease, the same rules are applicable to the transaction purportedly effectuating the change as to the original lease transaction. For example, suppose the original lease described the wrong tract, and it is desired to correct this mistake. The correction instrument must meet the requirements of the statute of frauds. Further, if words of conveyance were necessary in the original instrument, they are also necessary in the correction instrument. As a married man can be bound by contract as well as by conveyance, logically as to him the absence of such words should not be fatal. This is especially true in the light of Article 1301, which provides in effect that a defective conveyance having the requisites of a contract shall be enforceable as a contract. However, several court of civil appeals decisions have held a correction or ratification instrument to be a nullity even as to the husband where words of conveyance are lacking.[16] It is submitted that these decisions are wrong and that when the opportunity presents itself they should be overruled. Of course, as to a married woman, it is and should be essential that words of conveyance be included in a correction instrument.[17]

There is an important distinction between changing the terms of the lease, and accepting as performance of existing terms, something other than that required by such terms. Thus, if the property is community and homestead, and it is desired to change the lease, a written instrument with words of conveyance executed by both husband and wife is necessary. On the other hand, if it is desired to substitute performance, the husband alone, as community manager, can accept substituted performance.

Nowhere are the results and importance of this distinction bet-

[16] Humble Oil and Refining Co. v. Johnston, 76 S. W. (2d) 818 (Tex. Civ. App. 1934, *error dismissed;* Redden v. Pure Oil Co., 86 S. W. (2d) 874 (Tex. Civ. App. 1935). Compare the reasoning in these opinions, and the Crabb Case, cited therein, with that in Sun Oil Co. v. Burns, *supra* note 15; Baker v. Westcott, 73 Tex. 129, 11 S. W. 157 (1889), and Magee v. Young, 143 Tex. 485, 198 S. W. (2d) 883 (1947).

[17] Thompson v. Crim, 132 Tex. 586, 126 S. W. (2d) 18 (1939).

ter illustrated than in the two opinions of the Supreme Court and in the dissenting opinion in *Gulf Production Co. v. Continental Oil Co.*[18] In that case, the husband accepted property other than money in satisfaction of three years delay rentals. The court held that this substituted performance kept the lease in effect.

The cases have not as yet evolved a formula for discerning the border line between lease amendments and substituted performance, and no attempt to do so will be made herein. Suffice it to say that the safe procedure is always to secure a lease amendment meeting the requirements applicable to an original oil and gas lease; further, if the problem is presented after the transaction relied upon has occurred, the possibility of upholding the lease upon the basis of substituted performance should be explored.

5. Ratification

Here the problem is not changing the original lease, but rather in seeking to breathe life into it by virtue of some transaction subsequent to its execution.

Here again the Texas authorities do not justify formulation of specific principles. Several general rules, with more specific possibilities, may prove helpful.

Somewhere in the transaction, there must be an instrument satisfying the statute of frauds, and, where applicable, the statutes of conveyancing. Suppose that the original lease is oral, and that the ratification is also oral. Clearly, absent a binding estoppel, the lease would not be enforceable. Suppose, however, that while the original lease is oral, the ratification is written. If this ratification meets the requirements applicable to an original oil and gas lease, it will be valid.[19] Thus, if the property is not homestead

[18] Gulf Production Co. v. Continental Oil Co., 132 S. W. (2d) 553 (1939). *Superseded by* 139 Tex. 183, 164 S. W. (2d) 488 (1942). *See also* Baker v. Hamilton, 147 Tex. 240, 214 S. W. (2d) 460 (1948).

[19] Humble Oil Co., *et al.* v. Clark, *et al.*, 126 Tex. 262, 87 S. W. (2d) 471 (1935). *See also*, Humble Oil & Refining Co. v. Mullican, 144 Tex. 609, 192 S. W. (2d) 770 (1946); 36 Tex. Jur., p. 723.

and is community or the husband's separate property, and the instrument complies with the statute of frauds (possibly, also, words of conveyance are necessary) it is valid. If the property is the separate property of the wife, or homestead, or both, then to be enforceable such ratification instrument would have to be executed by both husband and wife, and would have to include words of conveyance and meet the requirements of the statute of frauds.

Suppose that the original lease has all the necessary requisites, but has terminated by its own terms. If the primary term has ended and there is no production, ratification would usually be futile, because the moment after ratification the lease would again terminate. A different situation exists, however, where the primary term period has not expired or where there is production in sufficient quantities to hold a lease.

Here, where the husband's signature is all that is necessary (non-homestead and general community or the husband's separate property) it seems clear that if the ratification act meets the requirement of the statute of frauds, it is sufficient. The fact that the instrument ratified includes words of conveyance, apparently removes any question in this respect.[20] Even where the statute of frauds is not complied with, the original instrument may become effective under the doctrine of adoption, or, possibly, ratification.[21]

When the wife's signature is also necessary, a more difficult problem is presented. First, it is here important to distinguish between a lease which is void and one which is simply inoperative at the wife's option, as, for example, where the property is general community but also homestead. It seems settled that in the latter instance, any written instrument properly executed by both husband and wife sufficiently evidencing an intent to ratify will have that effect.[22]

---

[20] Leopard, *et ux. v.* Stanolind Oil and Gas Co., *et al.*, 220 S. W. (2d) 259 Tex. Civ. App. (1949) *error ref. n. r. e.*

[21] Mondragon v. Mondragon, 113 Tex. 404, 257 S. W. 215 (1923); McDonald v. Carlisle, 146 Tex. 206, 206 S. W. (2d) 224 (1947).

[22] Grissom v. Anderson, 125 Tex. 26, 79 S. W. (2d) 617 (1935); Reserve Pet. Co. v. Hodge, 147 Tex. 115, 213 S. W. (2d) 456 (1948).

When the original lease has completely terminated, then it could be at least reasonably argued that the asserted ratification agreement must within itself have all of the requisites of a conveyance. However, some cases originally citing cases in the other class, have held the married woman bound even in the absence of words of conveyance in favor of the lessee.[23]

Conceivably, but not necssarily, the courts will hold that a married woman can be bound by a ratifying act not meeting the statute of frauds and not joined in by the husband where the lease ratified was simply inoperative or subject to cancellation, but not void. Where the lease is void, a minimum requisite would seem to be an instrument meeting the statute of frauds and executed by both husband and wife.[24]

A minimum requisite should always be sufficient evidence of an actual intent to ratify. Suppose that a lease on a married woman's separate property has actually terminated, or for some reason is unenforceable as to her. Suppose that thereafter she and her husband execute a mineral deed expressly subject to the lease. The lessee of course is not even a party to the mineral deed. It is submittd that a fair and logical rule would be to permit evidence as to an intention to ratify; however, at least one recent Supreme Court opinion seems to indicate that such a reference when accompanied by language indicating an intent to ratify constitutes ratification as a matter of law.[25]

---

[23] *See, for example,* Leopard, *et ux.* v. Stanolind Oil & Gas Co., *supra* note 19. *Compare* Pickens v. Bacle, 129 Tex. 610, 104 S. W. (2d) 482 (1937).

[24] Pickens v. Bacle, *supra* note 23.

[25] Reserve Pet. Co. v. Hodge, *supra* note 22. This case presented the converse in that a reference in a lease to a prior deed was held to constitute ratification. Possibly this result could be avoided by first prosecuting to judgment a suit to reform the instrument including the reference. However, should such action be necessary when no relief is desired as to the other party to the instrument assertedly constituting ratification? *See also* Humble Oil Co. v. Clark, *supra* note 19; Turner v. Hunt, 131 Tex. 492, 116 S. W. (2d) 688, 117 A. L. R. 1066 (1938); Humble Oil & Refining Co. v. Jeffrey, 38 S. W. (2d) 374 (Tex. Civ. App. 1931), *aff'd.*, 55 S. W. (2d) 521 (Tex. Comm. App. 1932); Blankenship v. Mott, 104 S. W. (2d) 607 (Tex. Civ. App. 1937) *error dismissed.*

In closing this section, it is again pointed out that it was with reference to a situation where there is actually an instrument meeting the formal requisites of a conveyance, but which is void or otherwise unenforceable.

6. Estoppel

The basic element of ratification is an intent to become bound by some prior instrument or transaction. Estoppel on the other hand had these basic elements: (1) Action by the lessor inconsistent with an intent to avoid the transaction; (2) Reasonable reliance thereon by the lessee; (3) Injury to the lessee which cannot be reasonably remedied unless estoppel is applied. These three elements are intended simply as general guides, and not as all-inclusive or hard and fast rules. For example, if a lease terminates through failure to accept a delay rental, but the lessor accepts the payment later, this may give rise to an estoppel.[26] On the other hand, the lessor may possibly avoid estoppel by proving mistake, or that for some other reason it would be inequitable to apply estoppel.

It is important to distinguish between acts of the husband and those of the wife in determining whether estoppel should apply. This is for the reason that a married woman can usually be bound only by affirmative misrepresentations.[27] It is equally important when relying upon the husband's acts to determine whether he has power to act without his wife's joinder. For example, suppose he accepts a late rental on land constituting general community but also homestead. It seems clear that this action could not render the lease enforceable against the wife.[28] Distinguish this situation from the one heretofore discussed where the husband accepts substituted performance at a time when the lease is in effect.

---

[26] Mitchell v. Simms, 63 S. W. (2d) 371 (Tex. Comm. App. 1933).

[27] Humble Oil Refining Co. v. Downey, *supra* note 5; Thompson v. Crim, *supra* note 17.

[28] *See, for example,* Pickens v. Bacle, *supra* note 23.

7. Right to Payments Made Under the Lease

If both the husband and wife execute the lease, payments may be by joint deposit to their credit, unless the lease negatives an agreement that may be so made.[29]

Aside from the joint deposit rule above referred to, if the leased premises are general community or the husband's separate property, all payments (absent express provisions to the contrary) are payable to the husband. This is true regardless of whether or not the property is homestead. If the property is the wife's separate property, the advisable procedure is to secure an agreement from both husband and wife as to how payments shall be made. It seems clear that as bonus and royalties are considered corpus, they could be properly paid to the wife. This is because of her right of control over her separate property. While delay rentals are usually considered income,[30] and thus community, there is a possible question whether they are correctly so treated. Even considered as income, it probably would be safe to pay the wife only.[31] In measuring risk, however, it should be remembered that an incorrect bonus or royalty payment might require another payment, but an incorrect rental payment might end the lease. Thus, if the wife is entitled to payment, a deposit not to her but rather to her and her husband would be insufficient.[32] As stated, the best procedure is to secure an agreement from both as to how payments shall be made.

---

[29] Gulf Production Co. v. Perry, 51 S. W. (2d) 1107 (Tex. Civ. App., 1932) *error refused.*

[30] Commissioner of Internal Revenue v. Wilson, 76 F. (2d) 776 (5 Circ. 1935). This case cites Carruthers v. Leonard, which was later overruled in Harris v. Currie, 142 Tex. 93, 176 S. W. (2d) 302 (1943).

[31] See comment, 4 SOUTHWESTERN L. J. 88 (1950).

[32] Clingman v. Devonian Oil Co., 177 So. 59 (La. 1937); Compare Perkins v. Magnolia Pet. Co., 148 S. W. (2d) 266 (Tex. Civ. App. 1941) *error dismissed, correct judgment.*