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# Widow's Right to Dower in an Oil and Gas Lease-- Van Camp v. Evans

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**WIDOW'S RIGHT TO DOWER IN AN OIL AND GAS LEASE—  
VAN CAMP v. EVANS\***

In the recent case of *Van Camp v. Evans*<sup>1</sup> the Court of Appeals of Kentucky held that a wife was not entitled to an assignment of dower in her husband's interest under an oil and gas lease because the lease did not vest in him a fee simple interest, that being one of the statutory requirements for an assignment of dower in this state. In addition to the words, "do hereby lease, grant and sell for the purpose of entering upon, operating thereon, and removing therefrom oil and gas," the lease contained provisions for drilling to begin within fifteen days, for forfeiture if the drilling conditions were not complied with, and for an assignee to keep the lease "alive" by drilling. There was no specified duration for the lease.

There is considerable conflict in the different states as to the nature of oil and gas in place, and the interest conveyed to the purchaser or lessee by a deed to or a lease of oil and gas rights. Some courts hold oil and gas in place are not subject to ownership until severed from the soil, and reduced to possession, so that the lessee under an oil and gas lease has only a right to enter upon the land, explore to find the oil and gas, and take the oil and gas from under the land.<sup>2</sup> On the other hand, in Kentucky it is held that oil and gas in place are interests in real estate, and the purchaser of oil and gas in place acquires not only a right to go upon the property, explore, and take the oil and gas, but also acquires the ownership of the oil and gas itself as it lies in place on, in, or beneath the property.<sup>3</sup> The Kentucky courts have held also that minerals are subject to ownership in fee, and that the widow of the owner is entitled to dower in the minerals.<sup>4</sup> It is interesting, therefore, to examine the court's reasons for holding that the lease here did not pass the fee simple title to the oil and gas.

The decision in the principal case seems to rest on the following grounds: The lease provided for forfeiture of the lessee's right under the instrument by his failure to drill within the specified time, the instrument was specifically for the purpose of entering, operating,

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\* This note and the succeeding one are companion notes.

<sup>1</sup> 306 Ky. 59, 206 S.W. 2d 38 (1947).

<sup>2</sup> Ky. R. S. (1946) 392.020.

<sup>3</sup> *Alexander, Collector of Internal Revenue v. Continental Petroleum Co.*, 63 F. 2d 927 (C.C.A. 10th 1933), *Phillips v. Springfield Crude Oil Co.*, 79 Kan. 783, 92 Pac. 1119 (1907), *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922); *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732 (1893).

<sup>4</sup> *Pine Oil and Gas Co. v. Allen*, 235 Ky. 767, 32 S.W. 2d 325 (1930), *Trimble v. Ky. River Coal Corp.*, 235 Ky. 301, 31 S.W. 2d 367 (1930).

<sup>5</sup> *Pursifull's Admx. v. Pursifull*, 299 Ky. 245, 184 S.W. 2d 967 (1944), *Trimble v. Ky. River Coal Corp.*, 235 Ky. 301, 31 S.W. 2d 367 (1930).

and removing the oil and gas, and the instrument provided that it might be kept "alive" by an assignee complying with the conditions of drilling specified in the lease. The court recognized that except for these three features such a lease would pass the fee simple title to the oil and gas. Since the theme of this paper is that the three features did not render the estate passed less than a fee simple, it may help to consider each feature separately.

#### THE FORFEITURE PROVISION OF THE LEASE

The lease provided for the forfeiture of the lessee's interest if he failed to drill within fifteen days. It is difficult to see why if the lease would pass the fee to the oil and gas, the forfeiture provision would render the estate passed to the lessee less than a fee. A fee is defined as an estate with a duration potentially infinite.<sup>6</sup> Under this lease, if the lessee complied with the drilling conditions, his estate was potentially infinite. In effect the lease was a sale of a portion of the land<sup>7</sup> since the lessee had the right under the lease to remove all of the oil and gas in place under the premises. In the writer's opinion, the forfeiture provision of the lease was a qualification subjoined to the fee passed by the lease. This made the interest passed a determinable fee which is defined as a fee with a qualification subjoined thereto, and which must be determined when such qualification is at end. Until its determination such a fee has all the incidents of a fee simple.<sup>8</sup> On its determination the property reverts to the grantor without any claim or action on his part. Therefore the forfeiture provision of the lease did not render the estate passed less than a fee simple, but provided that the fee simple would revert unless the lessee complied with the drilling conditions.

#### THE INSTRUMENT WAS SPECIFICALLY FOR THE PURPOSE OF ENTERING, OPERATING, AND REMOVING THE OIL AND GAS

The court stressed the fact that the lease was for the purpose of entering, operating, and removing the oil and gas. But this provision should not necessarily make the estate granted less than a fee. The qualification subjoined to a fee may be one which attaches itself to the use of the land, so that the estate is held to be granted for that use and purpose only.<sup>9</sup> For instance, in the Texas case of *Reynolds v.*

<sup>6</sup> RESTATEMENT, PROPERTY, sec. 14 (1936)

<sup>7</sup> *Trimble v. Ky. River Coal Corp.*, 235 Ky. 301, 31 S.W. 2d 367 (1930), *Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564 (1896), *State ex rel. Attorney General v. Hatcher*, 115 Texas 332, 281 S.W. 192 (1926), *Stephens County v. Mid-Kansas Oil and Gas Co.*, 113 Texas 160, 254 S.W. 290 (1923).

<sup>8</sup> *Connecticut Junior Republic Assn. v. Town of Litchfield*, 119 Conn. 106, 174 Atl. 304 (1934) *McIntyre v. Dietrich*, 294 Ill. 126, 128 N.E. 321 (1920), see *Rumble v. Strange*, 154 Ga. 512, — 114 S.E. 881, 884 (1922).

<sup>9</sup> *Union Missionary Baptist Church v. Fyke*, 179 Okla. 102, 64 P. 2d 1203 (1937) *Stephens County v. Mid-Kansas Oil and Gas Co.*, 113 Texas 160, 254 S.W. 290 (1923).

*McMan Oil and Gas Co.*,<sup>10</sup> the lease stated " grant, convey, demise, lease, and let for the sole and only purpose of mining and operating for oil and gas."<sup>11</sup> (Italics writer's.) The court held that the lease granted a determinable fee in the oil and gas. The Kentucky court in the case of *Pursifull's Adm.x. v. Pursifull*<sup>12</sup> held that the widow, of a lessee under a lease which read " for the purpose of entering upon, operating and handling and removing therefrom said oil and gas " was entitled to dower in the lease. Although in the *Pursifull* case, the court did not discuss determinable fees, it appears that they gave the lease the effect of granting a determinable fee as the lease contained a forfeiture clause and was for the purpose of entering, operating, and removing the oil and gas. Several Texas cases have held that an oil and gas lease invests the lessee with a determinable fee in the oil and gas.<sup>13</sup> It seems clear that where an estate is conveyed in fee for a specified purpose, and no other, the fee is a determinable fee determinable on cessation of the use of the property for that purpose.<sup>14</sup>

THE INSTRUMENT MIGHT BE KEPT "ALIVE" BY AN ASSIGNEE COMPLYING WITH THE CONDITIONS OF DRILLING

In the principal case, the court stated that the provision that the lease could be kept "alive" by an assignee complying with the conditions of drilling was contrary to the concept of a fee simple estate. But, is this provision contrary to the concept of a determinable fee? The writer thinks that it is not. The owner of a determinable fee cannot alone convey a perfect title to the property and if he conveys in fee the determinable quality of the estate follows the transfer.<sup>15</sup> Therefore, the assignee of this lease would have to comply with the conditions of drilling or forfeit his estate. The assignee stands in his assignor's shoes. The determinable quality of the fee of the first

<sup>10</sup> 11 S.W. 2d 778 (Tex. 1928).

<sup>11</sup> *Id.* at 780.

<sup>12</sup> 299 Ky. 245, 184 S.W. 2d 967 (1944) It is interesting to note the extent to which the court went in rationalizing this case with the instant case. In the *Pursifull* case, 299 Ky. 245, 248, 184 S.W. 2d 967, 969, the court stated: "In this state a widow is entitled to dower in mineral leases owned by her husband." In the instant case, *Van Camp v. Evans*, 306 Ky. 59, 64-65, 206 S.W. 2d 38, 41, they stated: "We have reexamined the original record in that case and find that the question involved here was not in issue.

<sup>13</sup> *Sheffield v. Hogg*, 124 Texas 290, 77 S.W. 2d 1021 (1934), *Leonard v. Prater*, 36 S.W. 2d 216 (Tex. 1931), *Morrissey v. Amburgey*, 292 S.W. 255 (Tex. 1927), see *Brown v. Humble Oil and Refining Co.*, 126 Texas 296, — 83 S.W. 2d 935, 940 (1935).

<sup>14</sup> *Slegel v. Herbene*, 148 Pa. 236, 23 Atl. 996 (1892), see *Regular Predestinarian Baptist Church of Pleasant Grove v. Parker*, 373 Ill. 607, —, 27 N.E. 2d 522, 524 (1940).

<sup>15</sup> *Riner v. Fallis*, 176 Ky. 575, 195 S.W. 1102 (1917) *Lee v. Roberson*, 297 Ill. 321, 130 N.E. 774 (1921) *Blackstone v. Althouse*, 278 Ill. 481, 116 N.E. 154 (1917), *Staack v. Detterding*, 182 Iowa 582, 161 N.W. 44 (1917)

owner follows any transfer by him. It follows, therefore, that the provision is not contrary to the concept of a determinable fee.

The court did not discuss the fact that there was no term specified for the duration of the lease. As it has been held in at least one other jurisdiction that an oil and gas lease for a term of years and as long as oil and gas are produced in paying quantities invests the lessee with a determinable fee,<sup>16</sup> it seems logical that the fact that no term was specified would be an even stronger case for holding that the lease granted a determinable fee. If this logic is correct, the widow of the lessee would be entitled to dower in the lease as the courts of Kentucky have held that a widow of a person owning a determinable fee is entitled to dower in that determinable fee.<sup>17</sup>

In conclusion, it is suggested that the lease in the principal case granted the fee to the oil and gas subject to forfeiture by the lessee's failure to comply with the conditions of drilling. This seems to be the most reasonable and logical construction of such an instrument. Under an oil and gas lease, the lessee has the right to remove all of the oil and gas from the land. As minerals are subject to ownership in fee, it seems illogical to hold that one who has the right to all the minerals does not own them in fee. In the writer's opinion, the lease created a determinable fee in the oil and gas, and the widow should have received an assignment of dower in the lease.

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<sup>16</sup> Leonard v. Prater, 36 S.W. 2d 216 (Tex. 1931).

<sup>17</sup> Murphy v. Murphy, 182 Ky. 731, 207 S.W. 491 (1919), Landers v. Landers, 151 Ky. 206, 151 S.W. 386 (1912) - see Bodkin v. Wright, 266 Ky. 798, 799-800, 100 S.W. 2d 824,825 (1937).