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Mines and Minerals - Nature of Estate Granted or Reserved - Reservation Clause Held to Reserve Minerals in Place

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terpretation of this rule necessarily considers benefits and hardships.[4] Only by the production and sale, basic consideration for execution of the lease, does the lessor realize value.[5] It appears that the better rule is for lease termination when there are no reasonable grounds for ceasing production,[6] and this was followed in Oklahoma recently.[7]

It may be inferred from a decision that North Dakota courts would render the same judgment as given in the principal case.[8] Such a holding would be repugnant to the view of lease termination under common law or special limitation upon which interest terminates immediately,[9] and also derogatory to statutory interpretation,[10] unless delay rental is provided for under the terms of the lease.[11]

The instant case is subject to criticism because no logical reason appears why the shut-down period could not extend to a year or longer, if lessee suggests it is "temporary." Suggested for consideration, was the possibility of continued production with impoundment of the runs, thereby protecting interests of lessors as well as disputing lessees.[12]

LAWRENCE M. NAGATOMO.

MINES AND MINERALS — NATURE OF ESTATE GRANTED OR RESERVED — RESERVATION CLAUSE HELD TO RESERVE MINERALS IN PLACE. — Plaintiff brought an action to determine his rights under the following mineral reservations in a deed of land not under any oil and gas lease: "We do hereby

lessee, in closing down the wells had done so with the intention of abandoning the same." Tyson v. Surf Oil Co., 195 La. 248, 196 So. 336 (1940). Also *compare with* Texas rule, which is much more favorable for the lessor than the Louisiana rule, because it has been modified to allow a temporary cessation of production due to sudden stoppage of the well or some mechanical breakdown of the equipment used in connection therewith, or the like." Watson v Rochmill, 137 Tex. 565, 155 S.W.2d 783 (1911). *Cf.* Waggoner v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929). (In place of forfeiture it was suggested a lease is a determinable fee which is lost on cessation of production). See also, 2 SUMMERS, OIL & GAS § 305 n. 19.

4. See, *e. g.*, Lamb v. Vansyckle, 205 Ky. 597, 266 S.W. 253 (1924) (No termination where royalties were paid during period of 56 days cessation); Zeller v. Book, 7 Ohio Cir. Ct. (N.S.) 429, 28 Ohio C.C. 119 (1905) (Where cessation was due to derricks being blown down in storm).

5. In the instant case the dissenting opinion stated that the holding amounted to amending the lease by the court. "Its effect is to change the 'as long thereafter' clause to read 'It is agreed that this lease shall remain in force for a term of one year from date, and as long thereafter as oil or gas, or either of them, can be produced from said land by the lessee, as distinguished from 'is produced.' "

6. Anthis v. Sullivan Oil & Gas Co., 83 Okla. 86, 203 Pac. 187 (1921); Western States Oil and Land Co. v. Helms, 140 Okla. 206, 288 Pac. 964 (1930); Woodruff v. Brady, 181 Okla. 105, 72 P.2d 709 (1937). For a further discussion, see 2 SUMMERS, OIL & GAS § 305 n. 19.

7. Brown v. Shafer, 325 P.2d 743 (Okla. 1958).

8. Herman Hanson Oil Syndicate v. Bentz, 77 N.D. 20, 40 N.W.2d 304 (1949) (court will not declare an oil and gas lease terminated by lessee unless it appears by direct evidence or preponderent circumstances that lessee intended to abandon the lease, and there must be a demand by lessor upon lessee to comply with implied covenants and allowances of a reasonable time for compliances).

9. Woodside v. Lee, 81 N.W.2d 745 (N.D. 1957) (Under an "unless" oil and gas lease, failure of lessee to commence drilling operations within stated time terminates lease without any notice or demand upon part of lessor, unless delay rentals are paid).

10. N. D. Rev. Code § 47-1616 (1943).

11. N. D. Rev. Code § 38-1003 (1957 Supp.) (Provides for payment of royalties and delay rentals. A lease may provide for delay rentals which will operate as a rental to cover privilege of deferring commencement of a well for a period or successive periods as provided in a lease).

12. The dissenting opinion in the instant case stated that there appears no reason under the record which would have prevented continuing production and impounding the runs during the dispute between the lessees.

reserve for ourselves, our heirs and assigns, one-eighth of all the oil and gas which may be produced from said lands to be delivered in tanks and pipelines in the customary manner, and this shall be a covenant running with the land and all sales and other conveyances of said lands shall be subject to this reservation and agreement." The Supreme Court of Mississippi *held*, three justices dissenting, that the words of the deed reserved to the grantors an interest in the oil and gas in place and not a nonparticipating royalty interest. *Mounger v. Pittman*, 108 So.2d 565 (Miss. 1959).

Generally, where the reservation of a royalty is made before the execution of an oil and gas lease, and is not limited as to time, the interest is referred to as a perpetual nonparticipating royalty.[1] The following are usual characteristics of this interest and distinguish it from the ownership of the oil and gas in place: (1) free of cost of discovery and production,[2] (2) no right of ingress and egress,[3] (3) no right to grant leases[4] and (4) no right to receive bonuses and delay rentals.[5] The oil and gas in place, or mineral fee interest, usually possesses the following characteristics: (1) not free of costs of discovery and production,[6] (2) with right of exploration and discovery,[7] and (3) with right to grant leases, to receive bonuses and delay rentals.[8]

Where the instrument of conveyance uses the words: oil and gas, "in and under,"[9] "in and under and that may be produced from,"[10] the land, the courts ordinarily hold that a mineral fee interest is created. However, if the following words are used, "produced,"[11] "produced and saved,"[12] "produced, saved, and made available for market,"[13] the interest usually created is a royalty. The fraction one-eighth has significance since this is the usual royalty reserved.[14]

Precisely what interests are created by given language is a matter of ascer-

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1. Clampitt v. Ponder, 91 F. Supp. 535 (W.D. Ark. 1950); Calcote v. Texas Pacific Coal and Oil Co., 157 F.2d 216 (5th Cir. 1946); Hanson v. Ware, 224 Ark. 430, 274 S.W.2d 359 (1955); Stakes v. Tutvet, 328 P.2d 1096 (Mont. 1958); See 3A SUMMERS, OIL & GAS, §§ 572-599 (2d. ed. 1958).

2. Surety Royalty Co., v. Sullivan, 275 P.2d 259 (Okla. 1954); See Maxwell, *The Mineral-Royalty Distinction and the Expense of Production*, 33 Texas L. Rev. 463 (1955).

3. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351 (1941); Pease v. Dolezal, 206 Okla. 696, 246 P.2d 757 (1952).

4. Calcote v. Texas Pacific Coal and Oil Co., 157 F.2d 216 (5th Cir. 1946); Shlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543 (1937).

5. Colonial Royalties Co. v. Keener, 266 P.2d 467 (Okla. 1953); See 3A SUMMERS, OIL AND GAS, § 599 (2nd ed. 1958).

6. See Surety Royalty Co. v. Sullivan, 275 P.2d 259 (Okla. 1954); See Maxwell, *The Mineral-Royalty Distinction and the Expense of Production*, 33 Texas L. Rev. 463 (1955).

7. Miller v. Ridgley, 2 Ill.2d 223, 117 N.E.2d 759 (1954); See Douglas v. Douglas, 175 Okla. 378, 56 P.2d 362 (1936).

8. Pease v. Dolezal, 206 Okla. 696, 246 P.2d 757 (1952).

9. Robinson v. Southwestern Development Co., 130 Cal. App. 2d 1, 277 P.2d 825 (1954); Miller v. Speed, 248 S.W.2d 250 (Tex. Civ. App. 1952); See Armstrong v. McCraken, 204 Okla. 319, 229 P.2d 590 (1951).

10. Little v. Mountain View Dairies, 35 Cal.2d 232, 217 P.2d 416 (1950); See Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699 (1945).

11. See Hardy v. Greathouse, 406 Ill. 365, 94 N.E.2d 134 (1950); See Elliot v. Berry, 206 Okla. 594, 245 P.2d 726 (1952); See Armstrong v. McCracken, 204 Okla. 319, 229 P.2d 590 (1951).

12. Hanson v. Ware, 224 Ark. 430, 274 S.W.2d 359 (1955); Mitchell v. Hannah, 123 Mont. 152, 208 P.2d 812 (1949).

13. Miller v. Speed, 248 S.W.2d 250 (Tex. Civ. App. 1952).

14. Shin v. Buxton, 154 F.2d 629 (10th Cir. 1946); Duvall v. Stone, 54 N.M. 27, 213 P.2d 212 (1949); State Nat'l Bank of Corpus Christi v. Morgan, 135 Tex. 509, 143 S.W.2d 757 (1940) (Where the court took judicial notice that one-eighth is the usual royalty reserved); Cheek v. Metzer, 116 Tex. 356, 291 S.W. 860 (1927).

taining the intent of the parties, arrived at from a consideration of the conveying instrument's terms and attending circumstances.[15] However, when, as in the instant case, the parties use clear language such as: ". . . one-eighth of all the oil and gas which may be produced . . . ," it is submitted that such language should be held to result in the creation of a royalty interest. To hold otherwise is to ignore the usual operative effect given such language by the courts.

DAVID C. JOHNSON.

SPECIAL ASSESSMENTS — RAILROADS-RIGHT OF WAY ASSESSMENT LIABILITY DEPENDS ON PRESENT OR FUTURE BENEFITS. — Planitiff railroad's main line right of way ran adjacent and parallel to two portions of defendant's city street that was repaved. Plaintiff was assessed more than 50% of the total amount in the special assessment repaving district. The Michigan Supreme Court *held*, five justices dissenting, that the railroad failed to show that no benefits inured to the right of way at the present time or in the foreseeable future and was therefore liable for the paving assessment. *New York R.R. v. Detroit*, 93 N.W.2d 481 (Mich. 1959).

Most courts hold that property of a railroad may be made liable by assessment for local improvements.[1] The peculiar character of a railroad right of way gives rise to special problems in applying special assessments against it.[2] There is conflict of authority as to whether a special assessment may be enforced against a railroad right of way.[3]

Many courts hold that a railroad right of way is liable for assessment for local improvements only if it can be said to be benefited by the improvements.[4] This does not violate the Fourteenth Amendment.[5] But if the cost of paving is without any compensating advantage and if the statute requires as a basis for its operation the existence of benefits, then the assessment amounts to confiscation.[6] An assessment by proper authority being prima facie valid, the burden is on the railroad to show that it is not benefited.[7] There is a split of authority as to whether the court may say as a matter of law that a right of way does not receive a benefit.[8] Some states hold that a special assessment should be upon the basis of benefits to the property assessed from the improvements and not upon the number of square feet in the property, or

15. Dabney-Johnson Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237 (1935); Hickey v. Dirks, 156 Kan. 326, 133 P.2d 107 (1943); Pure Oil Co. v. Kindall, 116 Ohio St. 188, 156 N.E. 119 (1927).

1. *E. g.*, Carolina & N.W. R.R. v. Clover, 46 F.2d 395 (4th Cir. 1931) (Benefit not necessary); Cowart v. Union Paving Co., 216 Cal. 375, 14 P.2d 764 (1932).

2. *Cf.* Northern Pac. R.R. v. Seattle, 46 Wash. 674, 91 Pac. 244 (1907).

3. See, Town of Clayton v. Colorado & S. Ry., 51 F.2d 977 (10th Cir. 1931) (Solely a question of state policy).

4. See Northern Pac. R.R. v. Grand Forks, 73 N.W.2d 348, (N.D. 1955); Thomas v. Kansas City Southern Ry., 261 U.S. 481 (1923).

5. Northern Pac. R.R. v. Richland County, 28 N.D. 172, 148 N.W. 545 (1914); Louisville & N. Ry. v. Barber Asphalt Paving Co., 197 U.S. 430 (1905).

6. See Georgia R. & Electric Co. v. City of Decatur, 295 U.S. 165 (1934).

7. Chicago, R. I. & P. Ry. v. Wright County Drainage Dist., 175 Iowa 417, 154 N.W. 888 (1916).

8. See, *e. g.*, Long Island Ry. v. Hylan, 240 N.Y. 199, 148 N.E. 189 (1925) (no benefit declared as a matter of law); *Contra*, Grand Rapids v. Grand Trunk Ry. System, 214 Mich. 1, 182 N.W. 424 (1921) (Matter for the jury).