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Labyrinth of Royalty and Mineral Intersts - A Survey - Part II

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THE LABYRINTH OF ROYALTY AND MINERAL INTERESTS — A SURVEY

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This is the second installment of an article which began in the last issue, 34 DICTA 195 (1957).

OKLAHOMA

Unlike Texas, Oklahoma has fairly consistently adhered to the "non-ownership" concept, having rejected the doctrine of absolute ownership of minerals in place.[1] Notwithstanding, severed mineral and royalty rights are considered to be interests in real property or in land.[2] As early as 1923 the severance of a pure royalty interest (as opposed to an expense-bearing mineral fee interest) was recognized.[3] Since the opening of this Pandora's box, the Oklahoma court has almost constantly wrestled with the mineral-royalty distinction and the attendant correlative problems.[4] A synthesis of the numerous decisions is almost impossible to achieve, but a few general principles can be adduced.

The Oklahoma courts seem to be committed to the doctrine that the word "royalty" may mean either one of two things. In the "broad" sense the word connotes an interest in the mineral fee, the holder having the right of ingress and egress to remove his propor-

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[1] McKernan v. Josey Oil Co., 106 Okla. 100, 233 Pac. 451 (1925); Wright v. Carter Oil Co., 97 Okla. 46, 223 P.2d 835 (1923); Barker v. Campbell-Ratcliff Land Co., 64 Okla., 249, 167 Pac. 468 (1917). But cf. Hudson v. Smith, 171 Okla. 79, 41 P.2d 861 (1935) and Wilson v. Cox, 100 Okla. 300, 229 Pac. 267 (1924), where the court described a reserved mineral estate as a "fee interest in the grantor." Bowen, *Pitfalls in Mineral Conveyancing in Oklahoma*, 9 Okla. L. Rev. 133 (1956) is a valuable treatise tracing the development of the severed mineral interest in Oklahoma and delineating many of the problems which have arisen.

[2] Magnolia Petroleum Co. v. Ball, 203 Okla. 514, 223 P.2d 136 (1950); Ross v. District Court, 199 Okla. 573, 188 P.2d 861 (1948); Sunray Oil Co. v. Cortez Oil Co., 188 Okla. 690, 112 P.2d 792 (1941); Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940); Meyers v. Central Bank, 183 Okla. 231, 80 P.2d 584 (1938).

[3] Dunlap v. Jackson, 92 Okla. 246, 219 Pac. 314 (1923), holding valid a reservation of ¾ "of the royalties of all oil or gas or the proceeds therefrom which may be produced." And see Meyers v. Hines, 149 Okla. 232, 300 Pac. 309 (1931), construing a reservation of an undivided ⅛ interest in and to all oil and gas produced (the deed reciting an existing lease) as creating a perpetual non-participating royalty.

[4] Davis v. Mann, 234 F.2d 553 (10th Cir. 1956); Plymell v. Lee, 139 F. Supp. 739 (W.D. Okla. 1956); Mabee Oil & Gas Co. v. Hudson, 156 F.2d 450 (10th Cir. 1946); Shinn v. Buxton, 154 F.2d 629 (10th Cir. 1946); Crews v. Burke, Case #37331 p.324, Okla. B.A.J. for Mar. 9, 1957; Cook v. McClellan, 311 P.2d 244 (Okla. 1957); Coker v. Hudspeth, 308 P.2d 291 (Okla. 1957); Lawson v. Earp, 309 P.2d 721 (Okla. 1956); Keener v. Neustadt, 304 P.2d 303 (Okla. 1956); Doss Oil Royalty Co. v. Lahman, 302 P.2d 157, (Okla. 1956); McNeil v. Shaw, 295 P.2d 276 (Okla. 1956); Hartness v. Young, 299 P.2d 699 (Okla. 1956); Maloy v. Smith, 5 Oil and Gas Rep. 564 (Okla. 1956); Colonial Royalties Co. v. Keener, 266 P.2d 467 (Okla. 1954); Surety Royalty Co. v. Sullivan, 275 P.2d 259 (Okla. 1954); Casteel v. Crigler, 266 P.2d 643 (Okla. 1953); Ewing v. Trawick, 208 Okla. 311, 256 P.2d 182 (1953); Iskian v. Consolidated Gas Utilities Corp., 251 P.2d 1073 (Okla. 1952); Federal Land Bank v. Nicholson, 207 Okla. 512, 251 P.2d 490 (1952); Meeks v. Harmon, 207 Okla. 459, 250 P.2d 203 (1952); Pease v. Dolezal, 206 Okla. 696, 246 P.2d 757 (1952); Elliott v. Berry, 206 Okla. 594, 245 P.2d 726 (1952); Fry v. Smith, 205 Okla. 222, 236 P.2d 699 (1951); Conner v. Frickenschmidt, 205 Okla. 230, 236 P.2d 674 (1951); Armstrong v. McCracken, 204 Okla. 319, 229 P.2d 590 (1951); Purcell v. Thaxton, 202 Okla. 612, 216 P.2d 574 (1950); Hinkle v. Gauntt, 201 Okla. 432, 206 P.2d 1001 (1949); Gardner v. Jones, 198 Okla. 691, 181 P.2d 838 (1947); Swearingen v. Oldham, 195 Okla. 532, 159 P.2d 247 (1945); McCullough v. Almach, 188 Okla. 434, 110 P.2d 295 (1941); Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940); McCullough v. Burks, 185 Okla. 1502, 94 P.2d 541 (1939); Manley v. Boling, 186 Okla. 59, 96 P.2d 30 (1939); Sykes v. Austin, 182 Okla. 299, 77 P.2d 719 (1938); Meyers v. Central Nat'l Bank, 183 Okla. 231, 80 P.2d 584 (1937); Carroll v. Bowen, 180 Okla. 215, 68 P.2d 773 (1937); Douglas v. Douglas, 176 Okla. 378, 56 P.2d 362 (1936); Burns v. Bastien, 174 Okla. 40, 50 P.2d 377 (1935); Wilson v. Olsen, 167 Okla. 527, 30 P.2d 710 (1934); Sullivan v. Sykes, 114 Okla. 87, 243 Pac. 723 (1926); Humphrey v. Taylor, 106 Okla. 38, 233 Pac. 180 (1925). For interesting discussions of some of these cases see Bowen, *Pitfalls in Mineral Conveyancing in Oklahoma*, 9 Okla. L. Rev. 133 (1956); Dunlop, *The Impact of Burns v. Bastien*, 21 Okla. B.A.J. 115 (1950); Mason, *Mineral Rights or Royalties*, 18 Okla. B.A.J. 1739 (1947); Morris, *Some Legal Consequences Resulting from a Separation of the Incidents of Ownership of a Mineral Interest*, 7 Okla. L. Rev. 285 (1954).

tionate share of the minerals, the right to join in any oil and gas lease, and the right to demand and receive his proportionate share of the bonus, rents and royalties under such lease. In the "strict" sense, the term "royalty" denotes only the right in the oil and gas produced, nonparticipating in rentals and bonuses, and not including the executive right to lease or the privilege of ingress and egress.[5] The latter connotation has been referred to by the Oklahoma courts as the "popular" meaning of the word "royalty."[6] In addition to this theory, or possibly as its rational correlative, the Oklahoma courts have also adopted the principle that the word "royalty" standing alone is ambiguous, at least when used in a conveyance or reservation which does not specify the percentage or fraction of total production which is the royalty share and where no reference is made to an existing lease establishing this amount.[7] For example, conveyances or reservations of "3/4 of the oil and gas royalty" have been held sufficiently ambiguous to permit the introduction of parol testimony and extrinsic evidence for clarification.[8] Generally speaking, in the words of the Oklahoma Supreme Court, "the term 'royalty' is construed in the broad sense of denoting mineral rights when there is no oil or gas lease upon the property, but is construed in the restricted sense of denoting an interest in the production when the property is under lease for oil and gas."[9] Where a deed specifies the royalty share and then conveys or reserves a fractional part thereof, the Oklahoma courts have ordinarily construed such an instrument as unambiguously creating a nonparticipating royalty interest. Illustrative of this principle is *Carroll v. Bowen*,[10] where a reservation of the undivided ½ interest "in and to the Royalty (the ordinary 1/8 ordinarily left the grantor in oil and gas leases being the royalty above referred to)" was construed as vesting a 1/16 perpetual nonparticipating royalty interest.

At least two Oklahoma cases establish the generally recognized principle that the reservation of 1/16 (or any other fraction) of all oil, gas or other minerals in or under the land involved creates only a mineral fee interest not to be enlarged to permit the holder to

[5] Mabee Oil & Gas Co. v. Hudson, 156 F.2d 450 (10th Cir. 1946); Elliott v. Berry, 206 Okla. 594, 245 P.2d 726 (1952); Purcell v. Thaxton, 202 Okla. 612, 216 P.2d 574 (1950); Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940); Carroll v. Bowen, 180 Okla. 215, 68 P.2d 773 (1937). But cf. Federal Land Bank v. Nicholson, 207 Okla. 512, 251 P.2d 490 (1952), where the court made the amazing statement that "In this state, the term 'royalty' has never been construed to mean an interest in oil, gas, or other minerals 'in place,' but accrues only after production has been obtained," and construed a reservation of an undivided ½ interest in all oil and gas royalties reserved under any existing or future lease with the grantee having the right to all lease rentals as creating only a nonperpetual royalty, even though no lease was in existence at the time the deed was executed.

[6] Carroll v. Bowen, *supra* note 5.

[7] *Ibid.*; Pauly v. Pauly, 198 Okla. 156, 176 P.2d 491 (1946); Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940); Burns v. Bastien, 174 Okla. 40, 50 P.2d 377 (1935); Wilson v. Olsen, 167 Okla. 527, 30 P.2d 710 (1934).

[8] Burns v. Bastien, and Wilson v. Olsen, *supra note 7*. Decisions in Federal Land Bank v. Nicholson, 207 Okla. 512, 251 P.2d 490 (1952) and Meeks v. Harmon, 207 Okla. 459, 250 P.2d 403 (1952) may indicate a trend away from this principle.

[9] Elliott v. Berry, 206 Okla. 594, 596, 245 P.2d 726, 729 (1952); Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940) construing a conveyance of "one-third of all royalties, from oil, gas, or other minerals arising from or out of or produced" as creating a mineral fee estate, where no oil and gas lease in existence. But cf. Meyers v. Central Nat'l Bank, 183 Okla. 231, 80 P.2d 584 (1937), holding that a grant of "an undivided one-half interest in and to the oil and gas royalty rights" conveyed a mineral fee estate even though a lease was in existence when the deed was executed. Meeks v. Harmon, 207 Okla. 459, 250 P.2d 403 (1952), where the court construed a reservation of 2/3 of all "royalties, rights and interests" under an existing oil and gas lease, as creating a non-participating royalty interest only would seem to be good law, but contrary to the Meyers decision, which the court attempted to distinguish on the grounds that the Meyers deed did not specifically mention the outstanding lease.

[10] 180 Okla. 215, 68 P.2d 773 (1937). And see Sykes v. Austin, 182 Okla. 299, 77 P.2d 719 (1938) and Douglas v. Douglas, 176 Okla. 378, 56 P.2d 362 (1936).

receive a full 1/16 of the oil and gas produced, even though the executive right to lease and to participate in rentals and bonuses is expressly not retained.[11] On the other hand, several cases assert the proposition that a conveyance of 1/16 of the oil and gas in and under certain land, when followed by language disclosing that the parties intended the grantee to receive a full 1/16 of the oil and gas after production, creates a perpetual 1/16 royalty interest.[12] The common practice of adding the words "and which may be produced" after the phrase "in and under" in a deed which grants or reserves a fractional interest in the oil and gas does not convert a mineral fee estate into a royalty interest.[13] A reservation of 1/16 "of all oil and gas produced" when coupled with a reservation of the right of ingress and egress for the purpose of drilling has been held to

[11] Swearingen v. Oldham, 195 Okla. 532, 159 P.2d 247 (1945); Manley v. Boling, 186 Okla. 59, 96 P.2d 30 (1939); see also Crews v. Burke, Case #37331, 28 Okla. B.A.J. 325 (Okla. 1957) and Coker v. Hudspeth, 308 P.2d 291 (Okla. 1957).

[12] Fry v. Smith, 205 Okla. 222, 236 P.2d 699 (1951); Gardner v. Jones, 198 Okla. 691, 181 P.2d 838 (1947); and see Armstrong v. McCracken, 204 Okla. 319, 229 P.2d 590 (1951), where a reservation of 1/16 of the oil and gas produced was held to create a 1/16 royalty interest under which the holder was entitled to a full 1/16 of the gross production. In Casteel v. Crigler, 266 P.2d 643 (Okla. 1953), the court construed a reservation of 3/32 "in all crude oil that may hereafter be produced" as a nonparticipating royalty. Lawson v. Earp, 309 P.2d 721 (Okla. 1957) holds that a reservation of "an undivided 1/8 interest in and to all the oil, gas, and other minerals that may be produced," with the grantee having the exclusive leasing power and the right to receive all bonus and rentals, created a nonparticipating royalty interest, entitling the holder to a net 1/8 of all production.

[13] Manley v. Boling, 186 Okla. 59, 96 P.2d 30 (1939) holding that a grant of "an undivided one-sixteenth (1/16) of all the oil, gas and other minerals in and under . . . and which may be found therein, or produced therefrom . . ." together with the right of ingress and egress to enter the lands and remove the same, conveyed only a 1/16 mineral fee estate, entitling the holder to 1/16 of the 1/8 royalty. Designation of the instrument as a "royalty contract" was pronounced not controlling. See also, Hinkle v. Gauntt, 201 Okla. 432, 206 P.2d 1001 (1949) reaching the same result under a deed reserving a 1/16 interest "in the oil and gas deposits that may be developed in said land," together with 1/2 of the bonus or rental under an existing lease.

create a 1/16 mineral fee estate, limiting the participation of the holder to 1/16 of any royalty reserved under future oil and gas leases.[14]

A recent decision holds that a conveyance of "the unconditional right and privilege to receive all royalty of oil and gas that is mined, produced and saved" under an existing or any future oil and gas lease, is tantamount to a conveyance of 100% of the fee title to the oil and gas in place.[15] Another late case[16] reconfirms the rule of *Burns v. Bastien*[17] in holding that the reservation of "an equal 1/16 royalty in all oil, gas or mineral rights" where no oil and gas lease was outstanding at the time of conveyance, must be construed in the "broad"sense as creating a 1/16 interest in the oil and gas in fee, limiting the holder's participation in production to 1/16 of any royalty provided for in future leases. An opposite conclusion was reached in *Doss Oil Royalty Company v. Lahman*,[18] where the court construed the words "3/64 royalty interest in and to the oil and gas" as conveying a nonparticipating royalty interest entitling the holder to 3/64 of the net production, apparently because of the existence of an oil and gas lease at the time of the conveyance.

The confusion presently extant in Oklahoma concerning the mineral-royalty distinction arises in large part because of the judicial approach exemplified in the following quotation from a recent decision:

> "It will be observed that the cited cases deal with reservations in conveyances and conveyances of minerals not encumbered by existing oil and gas leases. These decisions and others that might be noted, classically illustrate our pronouncements that every case must be approached for a concrete solution upon its individual facts. Absence of fraud or mutual mistake and no claim of ambiguity made, we must look to the four corners of the instrument and from it alone weigh the quantity and quality of the conveyance."[19]

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[14] Pease v. Dolezal, 206 Okla. 594, 246 P.2d 757 (1952) (no lease in existence at time of conveyance). In Maloy v. Smith, 5 Oil and Gas Rep. 565 (1956) it was held that a reservation of an undivided ½ interest in and to ⅛ "of the total production which may be produced" created a 1/16 perpetual royalty interest where the deed expressly granted, and did not reserve, the executive leasing power and the right to participate in bonus and rentals. By dictum the court indicated that the reservation of ½ of ⅛ of the total oil and gas production standing alone "might be properly construed as a reservation to an interest in the minerals in place." See also Surety Royalty Company v. Sullivan, 275 P.2d 259 (Okla. 1954), construing a conveyance of 1/16 of the gas and oil rights when coupled with the express grant of ingress and egress and the right to participate in rentals and bonuses as conveying a 1/16 mineral fee estate. McNeill v. Shaw, 295 P.2d 276 (Okla. 1956) holds that an instrument entitled "sale of oil and gas royalty" which conveyed a 1/32 interest in the oil and gas in and under certain described land, with a provision that the grantee should be entitled to 1/32 of all rents and royalites under an existing lease in the same manner as if the grantee had been the owner in fee of a 1/32 interest in the lands at the time of execution of the lease, conveyed only a 1/32 mineral fee estate, entitling the grantee to 1/32 of the ⅛ royalty and not to 1/32 of the net production.

[15] Hartness v. Young, 299 P.2d 699 (Okla. 1956). Designation of the instrument in question as "Conveyance of Oil and Gas Royalty" was held not determinative of the nature of the interest conveyed.

[16] Cook v. McClellan, 6 Oil and Gas Rep. 638 (Okla. 1956), *opinion superseded on petition for rehearing*, 311 P.2d 244 (Okla. 1957). The first decision is an excellent example of the judicial confusion which plagues the title examiner attempting to distinguish mineral from royalty interests. As the commentator in 7 Oil and Gas Rep. 87 points out, the opinion in the first decision "gave the reader the feeling that the court had signaled for a left-hand turn and then turned to the right."

[17] 174 Okla. 40, 50 P.2d 377 (1955).

[18] 302 P.2d 157 (Okla. 1956).

[19] Meeks v. Harmon, 207 Okla. 459, 461, 250 P.2d 203, 205 (1952).

THE WESTERN STATES

CALIFORNIA

Although several earlier decisions of the California Court of Appeals had touched upon the problem,[20] it was not until 1935 in *Callahan v. Martin*[21] that the California Supreme Court expressly recognized the right of a landowner to sever and convey a portion of his royalty interest in oil and gas, the court holding that an assignee of a royalty interest in oil rights under an assignment by the landowner "has an interest or estate in real property in the nature of an incorporeal hereditament." An unfortunate dictum in the same decision, however, immediately confused the issue. While characterizing a conveyance of 3% of all oil, gas and other hydrocarbon substances produced, extracted and saved as a "royalty interest," presumably entitling the holder to 3% of the gross production, the court inconsistently declared that the royalty owner became a tenant in common with his assignor, and was privileged to enter upon the land and drill for and produce his share of the oil. The confusion persisted in later California decisions, notably *Dabney-Johnson Oil Corp. v. Walden*,[22] *Barnard v. Jamison*,[23] and the first decision in *Little v. Mountain View Dairies*.[24] The failure to recognize the basic distinction between the expense-free, nonparticipating royalty interest which does not entitle the holder to produce the oil and gas or execute leases granting that privilege to others, and ownership in a fractional interest in the oil and gas in fee carrying with it all of the attributes of the mineral

[20] Dabney-Johnson Oil Corp. v. Hitchcock, 25 P.2d 867 (Cal. App. 1933); Beam v. Dugan, 132 Cal. App. 546, 23 P.2d 58 (1933); Clark v. Richfield Oil Co., 127 Cal. App. 495, 16 P.2d 162 (1932); Jones v. Pier, 124 Cal. App. 444, 12 P.2d 646 (1932); Merrill v. California Petroleum Corp., 105 Cal. App. 737, 288 Pac. 721 (1930).

[21] 3 Cal. 2d 110, 43 P.2d 788 (1935). The case also places California among the "qualified ownership" jurisdictions. For other California decisions characterizing a royalty interest as a profit *a prendre*, and an incorporeal hereditament, see Standard Oil Co. v. John P. Mills Organization, 43 P.2d 797 (Calif. 1935); Dabney v. Edwards, 5 Cal. 2d 1, 53 P.2d 962 (1935); Scheel v. Harr, 27 Cal. App. 2d 345, 80 P.2d 1035 (1935); Morrow v. Coast Land Co., 29 Cal. App. 2d 92, 84 P.2d 301 (1938); Lever v. Smith, 30 Cal. App. 2d 667, 87 P.2d 66 (1939); Pementel v. Hall-Baker Co., 32 Cal. App. 2d. 697, 90 P.2d 588 (1939); Sandrini v. Branch, 32 Cal. App. 2d 707, 90 P.2d 593 (1939); Andrews v. W.K. Company, 94 P.2d 604, (Cal. App. 1939); Macklin v. Brittain, 37 Cal. 2d 120, 98 P.2d 744 (1940). Oil royalty has also been described as the equivalent of "rent," *i.e.*, the compensation which the occupier of land pays for the privilege of occupation and use, Denio v. City of Huntington Beach, 22 Cal. 2d 580, 140 P.2d 392 (1943).

[22] 4 Cal. 2d 637, 52 P.2d 237 (1935).

[23] 78 Cal. App. 2d 136, 177 P.2d 341 (1947).

[24] 208 P.2d 361 (Calif. 1949). See also LaLaguna Ranch Co. v. Dodge, 18 Cal. 2d 132, 114 P.2d 351 (1941).

estate, continued to confound the California courts until 1950, when the second decision in *Little v. Mountain View Dairies*[25] was rendered. This decision is unequivocally committed to the view that a conveyance of "8-1/3% of all oil, gas and other hydrocarbon substances, and minerals, in, under and/or which may be hereafter produced and saved" creates a mineral fee estate, entitling the holder to receive only 8-1/3% *of* the royalty oil and gas, and not 8-1/3% of the total production as the court had held in the first *Little* case. Although one later decision apparently fails to recognize the fundamental revision of approach which has occurred in California,[26] a case in late 1954 reiterates the principle enunciated in the *Little* opinion.[27] As yet, there are no California cases dealing directly with the pure royalty interest and recognizing its existence as a distinct type of property right permitting the holder to share in production without creating a tenancy in common in the mineral fee estate.

KANSAS

Two decisions, *Miller v. Sooy*[28] and *Lathrop v. Eyestone*,[29] have cast a pall over the perpetual royalty interest in Kansas, which the courts have not yet had the opportunity or the inclination to dispel. The *Miller* case construed an instrument conveying an undivided ½ interest in all royalties, rents, bonuses and other considerations to accrue by virtue of any oil and gas lease then in existence, or which might thereafter be executed, as being valid against a contention that the transfer violated the Rule Against Perpetuities. In holding that the conveyance did not run afoul of the Rule, however, the court placed its decision on the ground that the obligation created by the assignment did not pass with the land and continue indefinitely inasmuch as the instrument did not by its terms bind the assignors' successors and assigns. The court concluded that the royalty interest in question related only to production under leases executed by the assignors, and not to those which might be executed by subsequent landowners. The clear implication of the decision was that perpetual royalty conveyances where the grantee is given the right to participate in production under any future lease no

[25] 35 Cal. 2d 232, 217 P.2d 416 (1950), reversing on rehearing, Little v. Mountain View Dairies, *supra* note 24.

[26] Paddock v. Vasquez, 122 Cal. App. 2d, 265 P.2d 121 (1954), commented on in 32 Texas L. Rev. 766 (1954), where the court found no inconsistency between a granting clause conveying "3% of 100% of all petroleum, oil, gas and other hydrocarbons within or underlying, or which may be produced" from property, and a "subject-to" clause providing that the grantee should be entitled to 6/25ths of all bonuses, rents and royalties to accrue under the existing or any future leases. The court relied heavily on the "double-grant" theory prevalent in Texas and enunciated in such decisions as Richardson v. Hart, 143 Tex. 392, 185 S.W.2d 563 (1945) and Hoffman v. Magnolia Petroleum Co., 273 S.W. 828 (Tex. Comm. App. 1925).

[27] Robinson v. Southwestern Development Co., 275 P.2d 825 (Calif. 1954). For a discussion of some of the California cases, and the judicial mutation which has occurred, see Maxwell, *A Primer of Mineral and Royalty Conveyancing*, 3 U.C.L.A. L. Rev. 449 (1956). A treatise dealing with the earlier decisions is Levy, *"Oil Royalties—A Distinct Species of Property,"* 11 So. Calif. L. Rev. 319 (1938).

[28] 120 Kan. 81, 242 Pac. 140 (1926).

[29] 170 Kan. 419, 227 P.2d 136 (1951).

matter by whom executed, would violate the Rule Against Perpetuities.

Oddly enough, the question was not again raised until the *Lathrop* case in 1951, in which the Kansas Supreme Court in a much criticized decision held that a perpetual royalty interest violates the Rule Against Perpetuities. Unfortunately, the opinion is not characterized by lucidity of logic or expression. One glaring inconsistency is the application of the Rule, which is traditionally applied only to interests in land, to a royalty interest which the court then characterized as personal property.

Although a perpetual royalty interest cannot be safely created in Kansas until the *Lathrop* decision is expressly overruled, later cases have made substantial inroads on its enunciated principle. A 1952 decision held that a pooling provision contained in an oil and gas lease is not violative of the Rule,[30] and a 1954 case declares that an assignment of overriding royalty under an existing lease "or any extension or renewal thereof" is valid.[31] Illustrative of the quandry in which the Kansas Supreme Court now finds itself, however, is *Froelich v. United Royalty Company*,[32] where the court in order to avoid application of the Rule Against Perpetuities construed a conveyance of a ½ interest "in an to the oil and gas royalty, which is or may hereafter be reserved . . . exclusive of the oil and gas bonus and oil and gas rental money . . ." as vesting a ½ interest in the minerals in place, even though the grantor expressly reserved the right to execute oil and gas leases without participation by the grantee.

Prior to the *Lathrop* decision, a number of Kansas cases recognized the fundamental differences between a nonparticipating royalty interest and ownership of the oil and gas in place, construing various instruments as creating perpetual or term royalty interests.[33] Most of the decisions define a royalty interest as personal rather than real property, and no mention is made of the Rule Against Perpetuities.[34]

Another line of Kansas decisions adopts sound judicial reasoning in construing conveyances of fractional interests in the oil and

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[30] Kenoyer v. Magnolia Petroleum Co., 173 Kan. 183, 245 P.2d 176 (1952).

[31] Howell v. Cooperative Refinery Ass'n, 176 Kan. 572, 271 P.2d 271 (1954).

[32] 178 Kan. 503, 290 P.2d 93 (1955), on rehearing, 297 P.2d 1106 (Kan. 1956). See also Tegarden v. Beers, 175 Kan. 610, 265 P.2d 845 (1954). For discussions of the Rule Against Perpetuities and the perpetual royalty interest, see Kuntz, *Rule Against Perpetuities and Mineral Interest*, 8 Okla. L. Rev. 183 (1955); Meyers, *Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests*, 32 Texas L. Rev. 369 (1954); Note, 21 Kan. B.A.J. 95 (1952); Note, 15 So. Calif. L. Rev. 119 (1941). The *Froelich* decision might have been distinguished from the *Lathrop* case on the grounds that the grant in *Froelich* was limited to 21 years and as long thereafter as oil or gas was produced, but the court did not utilize this approach. For a brief treatment of this possible rationale, see Discussion Note, 5 Oil and Gas Rep. 326, 328.

[33] Leydig v. Commissioner, 43 F. 2d 494 (10th Cir. 1930); Riffel v. Dieter, 159 Kan. 628, 157 P.2d 831 (1945) (12 years and as long thereafter as oil or gas produced); Hickey v. Dirks, 156 Kan. 326, 133 P.2d 107 (1943) conveyance limited to 10 years and as long thereafter as production in paying quantities; Davis v. Hurst, 150 Kan. 130, 90 P.2d 1100 (1939) where the court construed a reservation of ½ "of the oil and gas royalties" as creating a pure royalty interest, not entitling the holder to share in rentals or bonus paid under a lease; Anderson v. Allen, 129 Kan. 502, 283 Pac. 509 (1929); Bellport v. Harrison, 123 Kan. 310, 255 Pac. 52 (1927); Robinson v. Jones, 119 Kan. 609, 240 Pac. 957 (1925), where "royalty" is defined as "the compensation provided in oil and gas leases for the privilege of drilling for oil and gas, [consisting] of a share in the oil and gas produced under existing leases [but not being] a perpetual interest in the oil or gas as they lie in the ground." The case recognizes that a conveyance of ½ of the oil and gas in and under certain lands with a right of ingress and egress and the privilege of sharing in rentals and bonuses constitutes a grant of the oil and gas in place and does not convey a mere royalty interest.

[34] But compare In re Randolph's Estate, 266 P.2d 315 (Kan. 1954).

gas in and under *and which may be produced* from specified lands as creating fee mineral estates in the oil and gas in place, even though the instruments involved were labeled "Sale of Oil and Gas Royalty."[35] These decisions have not been repudiated, but the case of *Skelly Oil Co. v. Cities Service Oil Co.*,[36] should be noted. There the court construed a conveyance entitled "Sale of Oil and Gas Royalty" as creating a pure royalty interest as opposed to ownership in the oil and gas in place, although the granting clause conveyed a ½ interest in and to all of the oil, gas and other minerals in and under and that might be produced from certain described lands, with the grantee having the right of ingress and egress for development. The basis for the decision appears to be the fact that the instrument expressly excluded the grantee from participation in money rentals under the existing lease, and rentals and bonuses from future leases. The court discounted the grant of ingress and egress on the basis that since the lands were then under lease, only the lessee could exercise such right. Finally, in partial contradiction of earlier decisions holding that the title of the instrument was immaterial in its construction, the court indicated that while the label is not "altogether controlling," the content of the document must make it clear that it is something other than what its title indicates.

MONTANA

Two well-reasoned Montana decisions clearly establish that a conveyance or reservation of a fractional interest in all of the "oil and gas produced and saved," creates an expense-free royalty interest, to be distinguished from fee simple ownership of the oil and gas in place.[37] On the other hand, a reservation of 12½% "interest and royalty in and to all oil and gas and other minerals of whatsoever nature, found in or located upon or under said land or premises . . . or that may be produced therefrom,"[38] has been construed as an interest in the oil and gas in place. *Krutzfeld v. Stevenson*[39] is another example of the confused conveyancer. The case involved a deed which first granted an undivided 5% interest in and to all of the oil,

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[35] Fry v. Dewees, 151 Kan. 488, 99 P.2d 844 (1940); Hushaw v. Kansas Farmers' Union Royalty Co., 149 Kan. 64, 86 P.2d 559 (1939); Sledd v. Munsell, 149 Kan. 110, 86 P.2d 567 (1939); Serena v. Rubin, 146 Kan. 603, 72 P.2d 995 (1937); Shaffer v. Kansas Farmer's Union Royalty Co., 146 Kan. 84, 69 P2d 4 (1937), *appeal dismissed*, 303 U.S. 623 (1938); Richards v. Shearer, 145 Kan. 88, 64 P.2d 56 (1937). Of interest also is Carlock v. Krug, 151 Kan. 407, 99 P.2d 858, 860 (1940), where the court in establishing the "non-apportionment" rule, notes in passing that a conveyance of a 1/32 interest in the oil and gas in place was inconsistent with a recitation in the deed that the grantee should receive ¼ of the ⅛ royalty under any future leases, stating that "ownership of a 1/32 interest in the oil *in place* is not equivalent to a 1/32 interest in the oil *produced under a lease*.

[36] 160 Kan. 226, 160 P.2d 246 (1945).

[37] Mitchell v. Hanna, 123 Mont. 152, 208 P.2d 812 (1949) (applying the doctrine of after-acquired title to a royalty assignment, with covenants of warranty); and Rist v. Toole County, 117 Mont. 426, 159 P.2d 340 (1945) (holding a pre-existing royalty interest, as opposed to a mineral-fee estate, terminated by a tax sale, even though taxes were assessed to the fee simple owner alone). See also Carroll v. Funk, 222 F.2d 508 (9th Cir. 1955).

[38] Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 P.2d 599 (1934), the court seizing on the words "in or located upon or under" and noting the absence of an express provision denoting the interest as expense-free.

[39] Krutzfeld v. Stevenson, 86 Mont. 463, 284 Pac. 553 (1930), overruling Hochsprung v. Stevenson, 82 Mont. 222, 266 Pac. 406 (1928) (where in construing an almost identical instrument the court concluded that the granting clause controlled and the mineral estate of the grantee was limited to the fractional interest therein expressed). In accord with the *Krutzfeld* decision is Broderick v. Stevenson Consolidated Oil Co., 88 Mont. 34, 290 Pac. 244 (1930). For discussions of these and other Montana decisions, see Moulton, *Problems and Pitfalls Arising From Mineral and Royalty Conveyances*, Proceedings, Mineral Law Section A.B.A. 258, 264 (1956) and Summers, *Transfers of Oil and Gas Rents and Royalties*, 10 Texas L. Rev. 1, 14 (1931).

gas and other minerals in and under and that might be produced from certain lands, and then provided that the grantee should be entitled to 2/5 of the rental and royalty under an existing lease, with a recitation that upon termination of such lease the minerals should be owned 3/5 by the grantor and 2/5 by the grantee. The court, in effect, construed the instrument as conveying an undivided 2/5 interest in the oil and gas in place.

New Mexico, North Dakota and Wyoming

While the decisions in New Mexico, North Dakota and Wyoming are few, these states appear to be committed to the orthodox view that a perpetual royalty interest in oil and gas constituting a right in real property may be created by grant or reservation. A recent New Mexico decision[40] construes a reservation of "½ of the ⅛ royalty interest" as vesting title to an interest in real property consisting of a perpetual 1/16 royalty in all oil and gas produced and saved. *Corbett v. LaBere*[41] in North Dakota, and *Denver Joint Stock Land Bank v. Dickson*[42] in Wyoming, acknowledge the distinction between ownership of oil and gas in place and a perpetual nonparticipating royalty interest, while declaring both to be interests in real property.

THE SOUTERN STATES

Arkansas

Unlike Kansas, the Arkansas courts have defined perpetual nonparticipating royalty interests as real estate,[43] and one decision has expressly held that a conveyance of pure royalty does not violate the Rule Against Perpetuities.[44] The Oklahoma view that the word "royalty" standing alone is ambiguous, susceptible of interpretation as synonymous with "minerals," has been rejected in a

[40] Duvall v. Stone, 54 N.M. 27, 213 P.2d 212 (1949), expressly disapproving the Kansas view that a royalty interest is personal property. Other New Mexico decisions not precisely relevant to this discussion are New Mexico and Arizona Land Co. v. Elkins, 137 F. Supp. 767 (D.N.M. 1956) construing a reservation of "oil, gas and other minerals," as including uranium and thorium; and Schrader v. Gypsy Oil Co., 38 N.M. 124, 28 P.2d 885 (1933) determining the effect of an "entireties" clause in an oil and gas lease.

[41] 68 N.W. 2d 211 (N.D. 1955) "1% Royalty of all the oil and of all the gas produced and saved."

[42] 57 Wyo. 523, 122 P.2d 842 (1942), "one-sixteenth part of all minerals and oils produced and saved" is a royalty interest. For reference to other Wyoming cases dealing with mineral transfers, see Note, 1 Wyo. L.J. 93 (1946).

[43] Clampitt v. Ponder, 91 F. Supp. 535 (W.D. Ark. 1950); Arrington v. United Royalty Co., 188 Ark. 270, 65 S.W.2d 36 (1933); Allen v. Thompson, 169 Ark. 169, 273 S.W. 396 (1925).

[44] Hanson v. Ware, 274 S.W.2d 339 (Ark. 1955) (1/16 of all "oil and gas produced and saved" is a royalty interest).

case declaring that "the ordinary and legal meaning of the term [royalty] is a share of the product or profit, to be paid to the grantor or lessor by those who are allowed to develop the property."[45]

There are several cases limiting a royalty conveyance to production secured under an outstanding lease recited in the deed, the intention to so restrict the royalty right being derived from the language of the instruments in question.[46] A reservation of "½ royalty of all oil, gas and other minerals on the above described land" has been construed as creating a perpetual nonparticipating royalty interest, giving the holder the right to ½ of any royalty paid under existing or future leases.[47] A recent decision involving the construction of an extremely ambiguous conveyance, holds that a grant of "all full royalty interest in and to all of the oil, gas and other minerals" transfers a perpetual royalty interest, under which all of the royalty reserved under oil and gas leases must be delivered to the grantee, who would have no right, however, to share in bonuses or rentals.[48]

A troublesome case is *O'Neal v. Bank of Parkdale*,[49] where the court held that the owner of a reserved 1/16 interest in all oil, gas and other mineral rights and property for a term of ten years, was vested only with a right in the oil and gas which might be discovered and reduced to possession, and was not entitled to share in bonuses and rentals paid under an oil and gas lease. Insofar as the holding might apply to perpetual mineral interests, it has been expressly disapproved in a later decision,[50] but the rights of owners of term mineral interests are still questionable.

LOUISIANA

Litigation in Louisiana concerned with distinguishing royalty from mineral interests arises principally because of the Civil Code concept of prescription under which interests in real property are lost by nonuse for ten years. Both interests in the minerals in place (referred to in Louisiana judicial parlance as "mineral servitudes") and naked royalty interests are subject to prescription for nonuser. Since mineral servitudes carry with them the right of ingress and egress to produce the severed mineral interest, "user" may be accomplished through the drilling of a well by the holder of the mineral servitude or his lessee. On the other hand, because the owner of a royalty interest does not have the right to remove the minerals

[45] Longino v. Machen, 217 Ark. 641, 642, 232 S.W.2d 826, 827 (1950), the court also pointing out "that the ordinary meaning of royalty does not include a perpetual interest in oil and gas in the ground."

[46] Davis v. Collins, 219 Ark. 948, 245 S.W.2d 571 (1952); McWilliams v. Standard Oil Co., 205 Ark. 625, 170 S.W.2d 367 (1943); Keaton v. Murphy, 198 Ark. 799, 131 S.W.2d 625 (1939) (although there is considerable question as to the correctness of this decision in light of the language contained in the instrument). Compare Smiley v. Thomas, 220 Ark. 116, 246 S.W.2d 419 (1952) (conveyance of ½ of the minerals in place, followed by a clause granting ½ the royalty and rental under an existing lease was held not to terminate on expiration of the lease).

[47] Clampitt v. Ponder, 91 F. Supp. 535 (W.D. Ark. 1950).

[48] Arkansas Valley Royalty Co. v. Arkansas-Oklahoma Gas Co., 222 Ark. 213, 258 S.W.2d 51 (1953) (a lesson in what to avoid when completing the blanks of a printed form).

[49] 180 Ark. 901, 23 S.W.2d 257 (1930).

[50] Segars v. Goodwin, 196 Ark. 221, 117 S.W.2d 43 (1938). For other cases discussing ownership of minerals in place, see Citizen's Investment Co. v. Armer, 179 Ark. 376, 16 S.W.2d 15 (1929) (conveyance of 1/16 of the oil and gas in place, followed by a recitation that upon termination of the existing lease the grantee should own ½ of the minerals was held to vest ½ mineral ownership, at least subsequent to expiration of the lease); and Rowland v. Griffin, 179 Ark. 421, 16 S.W.2d 457 (1929).

to which his royalty interest attaches, the drilling of a well without production will not interrupt the prescriptive period.

Louisiana decisions acknowledging the legal existence and validity of the severed royalty interest are numerous.[51] Only a few instances, however, has a Louisiana court been called upon to construe a conveyance and determine its operative effect as a transfer of a mere royalty right or a grant of minerals in place. Apparently considering the term "royalty," as a word of art, the Louisiana Supreme Court has construed a reservation of "1/64 royalty in all oil, gas and mineral rights" as creating a royalty interest not permitted to participate in the executive leasing right, bonuses or rentals.[52] As against a contention that a royalty right only was created, a conveyance of a fractional interest in all of the oil, gas and other minerals in and under "and that may be produced and saved" was held to transfer a mineral servitude.[53] Depriving the

[51] Spiner v. Phillips Petroleum Co., 94 F. Supp. 273 (W.D. La. 1950); Continental Oil Co. v. Landry, 215 La. 518, 41 So.2d 73 (1949) "royalty defined as the right . . . to share in the production of oil, gas, and other minerals, if and when they are produced." Although the question was apparently not raised, all parties proceeding on the assumption that a royalty interest had been created under the deed, this conclusion is open to considerable doubt. St. Martin Land Co. v. Pinckney, 212 La. 605, 33 So. 2d 169 (1947) (referring to the royalty right as a "passive interest"); Humble Oil & Ref. Co. v. Guillory, 212 La. 646, 33 So. 2d 182 (1947) (court in the first opinion held a conveyance of a future royalty interest under any lease invalid for uncertainty, and then reversed its position on rehearing); Union Sulphur Co. v. Lognion, 212 La. 632, 26 So. 2d 845 (1947); Bennett v. Robinson, 25 So. 2d 641 (La. App. 1946); Vincent v. Bullock, 192 La. 1, 187 So. 35 (1939) (where a Louisiana court first recognized a royalty interest in minerals as subject to severance separate and apart from a mineral lease).

[52] Gulf Refining Co. v. Goode, 212 La. 502, 32 So. 2d 904 (1947).

[53] Standard Oil Co. v. Futral, 204 La. 215, 15 So. 2d 65 (1943) (court failed to comment on the inconsistency between the grant of a 1/64 mineral interest, and a provision in the deed reciting that the grantee should receive 1/8 of the royalty under any lease, although noting that this clause did not convert the instrument into a royalty transfer). See also Smith v. Anisman, 85 So. 2d 351 (La. App. 1956) for a similar holding.

grantee of the right to execute oil and gas leases does not alter the character of the interest conveyed from a fee mineral interest (or in Louisiana, a mineral servitude) to a royalty right.[54]

MISSISSIPPI

Mississippi adheres to the doctrine of absolute ownership of the oil and gas in place, and, like Texas, denominates the interest of an oil and gas lessee as a determinable fee estate in the minerals.[55] A reservation of a fractional interest in and to all oil and gas "that might hereafter be discovered" has been held to constitute a mineral fee estate rather than a nonparticipating royalty interest.[56]

A perpetual nonparticipating royalty interest has been denominated as realty,[57] and is defined in Mississippi as a share of proceeds, free and clear of all expense.[58] The word "royalty" has assumed such a definite judicial meaning that one case held a devise of "all my royalties" insufficient to pass title to fractional mineral interests owned by the testator.[59] It is doubtful that the testator's purpose was accomplished, and the wisdom of the decision is open to question. A reservation of the "profits" from oil or gas discovered creates a royalty interest rather than a mineral fee estate,[60] although the holder's right to participate in bonus and delay rentals has never been determined. A reservation of "all rentals" under an existing oil and gas lease does not include the privilege of sharing in royalties on oil and gas produced.[61] A reservation of all oil, gas and other minerals entitles the grantor to execute oil and gas leases, even though the deed provides that all bonuses and delay rentals are to be the property of the grantee.[62] On the other hand, a conveyance of a fractional interest in and to all of the oil, gas and other minerals in and under certain lands was construed to effectuate a royalty grant only, where the grantor reserved the exclusive leasing power and the right to receive all bonuses and delay rentals.[63] A recent decision holds that a reference to "royalty acres" does not alter the construction of a granting clause which otherwise conveyed a mineral estate in the oil and gas in place.[64]

In many respects, the decisions of the Mississippi Supreme Court are among the most logical and well reasoned in the mineral-royalty field, and although the court has sometimes been hampered

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[54] Horn v. Skelly Oil Co., 224 La. 709, 70 So. 2d 657 (1954). In connection with the right of a fractional mineral owner to whom the executive leasing power for the full mineral estate has been granted, to collect 100% of the bonus and rentals, see Ledoux v. Voorhies, 222 La. 200, 62 So. 2d 273 (1952), and Mt. Forest Fur Farms v. Cockrell, 179 La. 795, 155 So. 228 (1934).

[55] Koenig v. Calcote, 199 Miss. 435, 25 So. 2d 763 (1945).

[56] McNeese v. Renner, 197 Miss. 203, 21 So. 2d 7 (1945). Cf. Armstrong v. Bell, 199 Miss. 29, 24 So. 2d 10 (1945), where a reservation of "1/32 of all gas, oil or minerals which may hereafter be found, discovered, mined or produced" with a provision that the holder should receive 1/4 of the 1/8 royalty under the existing lease, and "1/32 royalty" from future leases, was construed as creating a 1/32 perpetual royalty interest, against a strong dissent.

[57] Merrill Engineering Co. v. Capitol Nat'l Bank, 192 Miss. 378, 5 So. 2d 666 (1942).

[58] Palmer v. Crews, 203 Miss. 806, 35 So. 2d 430, 4 A.L.R.2d 483 (1948).

[59] *Ibid.*

[60] Hassie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551 (1952); Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So. 2d 516 (1947).

[61] Abney v. Lewis, 203 Miss. 105, 56 So. 2d 48 (1952).

[62] Westbrook v. Ball, 77 So. 2d 274 (Miss. 1955).

[63] Texas Gulf Producing Co. v. Griffith, 65 So. 2d 823 (Miss. 1953).

[64] Ford v. Jones, 85 So. 2d 215 (Miss. 1956).

by a rigidity of approach,[65] the law relating to the creation and transfer of royalty and mineral interests is reasonably consistent and predictable in this state.

West Virginia

The West Virginia decisions best exemplify the so-called minority rule which adheres to the viewpoint that an attempted grant or reservation of what in most states would be designated a royalty interest, creates a mineral fee estate.[66] In one early decision, a majority of the West Virginia Supreme Court was of the opinion that royalty was not oil in the ground or the title thereto, but a separate and distinct entity.[67] This view was unquestionably disapproved, however, in a later case,[68] and the theory that a grant or reservation of royalties, rentals and income which might arise from the operation of land for oil and gas purposes is, in fact, a grant or reservation of such minerals in place, was reasserted.

The deficiencies of the West Virginia rule are well illustrated in *McIntosh v. Vail*,[69] involving a deed under which the grantor first reserved all of the oil and gas in place, and then agreed in the event such substances were found on the lands involved, to "yield and pay" to the grantee 1/16 of the oil and gas produced and mar-

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[65] See, e.g., Anderson v. Butler, 203 Miss. 512, 35 So. 2d 709 (1948), where a conveyance of 1/16 of the oil, gas and other minerals was held to be a 1/16 interest in the minerals in place, despite a provision that the grantee should receive ½ of the grantor's rights under any existing or future lease.

[66] Collins v. Stalnaker, 131 W. Va. 543, 48 S.E.2d 430 (1948); United Carbon Co. v. Presley, 126 W. Va. 636, 29 S.E.2d 466 (1944); Robinson v. Milam, 125 W. Va. 218, 24 S.E.2d 236 (1942); Lockhart v. United Fuel & Gas Co., 105 W. Va. 69, 141 S.E. 521 (1928); Hale v. Grow, 88 W. Va. 173, 106 S.E. 409 (1921); Snodgrass v. Koen, 82 W. Va. 337, 96 S.E. 606 (1918); Paxtum v. Benedum-Trees Co., 80 W. Va. 187, 94 S.E. 472 (1917); Horner v. Philadelphia Co., 71 W. Va. 345, 76 S.E. 662 (1912) (refusing to construe a grant of ½ royalty as perpetual, but limiting the estate to participation in royalty under an existing lease); Updegraff v. Coal & Land Co., 74 W. Va. 316, 81 S.E. 1050 (1914) (reservation of oil and gas royalties reserves the oil and gas in place); Toothman v. Courtney, 62 W. Va. 167, 58 S.E. 915 (1907); Harris v. Cobb, 49 W. Va. 360, 38 S.E. 559 (1901), holding that a reservation of "one-half part of the usual royalty of one-eighth" reserved both a ½ royalty interest and 1/16 of the oil and gas in place. (This decision, insofar as it holds that the grantee received 1/16, rather than ½, of the oil and gas in place is disapproved in the Paxtum decision, cited *supra*, this note). But cf. McDonald v. Bennett, 112 W. Va. 347, 164 S.E. 298 (1932), where the court declared a reservation of "⅛ of all the oil and gas in and underlying said tract of land that may be produced therefrom" as retaining ⅛ of the oil and gas produced, "as contradistinguished from ⅛ of the oil and gas in place"; and Jackson v. Dulaney, 67 W. Va. 309, 67 S.E. 795 (1910), construing a reservation of 1/10 of the mineral oil produced to be delivered free of cost as constituting "a royalty in the oil, possessing the same quality of estate as royalty reserved in the usual oil and gas lease."

[67] Campbell v. Lynch, 81 W. Va. 374, 94 S.E. 739 (1918).

[68] Walker v. West Virginia Gas Corp., 121 W. Va. 251, 3 S.E.2d 55 (1939).

[69] 126 W. Va. 395, 28 S.E.2d 607 (1944). But compare, McIntosh v. Vail, 126 W. Va. 395, 28 S.E.2d 607 (1943), where the court construed a deed reserving all oil and gas with the right of ingress and egress, but providing that in the event of production the grantee "shall be entitled to one full sixteenth of all oil marketed and one half of the net proceeds from all gas sold," as conferring an oil and gas interest in the nature of a "royalty" on the grantee entitling him to ½ of the net proceeds of all the gas then being sold.

keted. The court construed the covenant in favor of the grantee as a mere personal obligation enforceable only against the grantor, and not attaching to the mineral estate as a covenant running with the land.

Both the judiciary and the practitioners of West Virginia have encountered considerable difficulty with the fraction "1/16."[70] Early decisions seemed to equate 1/16 of the oil and gas in place with ½,[71] but these cases were later overruled.[72]

It is interesting to note that the Colorado Supreme Court in *Simson v. Langholf*[73] cited several West Virginia decisions in support of its holding that the interest there in question constituted ownership of the oil and gas in place as opposed to nonparticipating royalty.

Alabama, Florida & Kentucky

The Supreme Courts of Alabama and Florida have each handed down one decision bearing on the mineral-royalty question. In *McCall v. Nettles*,[74] which is strikingly similar to the *Simson* case in Colorado, it was held that a reservation of 50% of all rentals that may be derived from coal, oil, gas or other mineral leases, and 50% of all royalties, whether derived in kind or money, created "an interest in the minerals themselves as they are imbedded in the ground before there is an effort to extract them." The opinion is unsatisfactory in both result and reasoning, particularly when the court continues to the effect that the deed implied a power conveyed to the grantee to make leases of the mineral rights, and that in making such leases the grantee would be in a "sort of trust relation to the grantors." Regrettably, the court in a case of first impression, failed to draw the distinction between ownership of the oil and gas in place and the mere right to participate in the proceeds of production. The Florida Supreme Court, on the other hand, in *Neel v. Rudman*,[75] takes judicial cognizance of the difference between a conveyance of royalty and the grant of minerals in place, and the standard form of instruments then in use in Florida by which such interests are created.

A 1955 Kentucky decision seems to adopt the Oklahoma view that reference to royalty is ambiguous as to whether the parties mean royalty in the strict sense of a share in production, or as referring to a full mineral interest.[76] One decision construes the transfer of a fractional part of all the oil and gas in and underlying and produced from certain land as a conveyance of a mineral fee

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[70] See Summers, *Transfers of Oil and Gas Rents and Royalties*, 10 Texas L. Rev. 1, 9 *et seq.* (1931) and the West Virginia cases there discussed.

[71] Harris v. Cobb, 49 W. Va. 360, 38 S.E. 559 (1901) and see also Kilcoyne v. Southern Oil Co., 61 W. Va. 539, 56 S.E. 888 (1907).

[72] Paxtum v. Benedum-Trees Co., 80 W. Va. 187, 94 S.E. 472 (1907).

[73] 133 Colo. 208, 293 P.2d 302 (1956).

[74] 251 Ala. 349, 351, 37 So. 2d 635, 637 (1948).

[75] 160 Fla. 36, 33 So. 2d 234 (1948).

[76] Kavanaugh v. Clay, 275 S.W.2d 938 (1955), involving a deed conveying "the following described oil and gas royalties and interest in oil and gas . . . one undivided 1/64 oil and gas royalty." The court, noting the absence of an oil and gas lease, designated the instrument "ambiguous," and affirmed a lower court decision which, partly on the basis of parol evidence, construed the interest as 1/64 mineral fee, which was the entire interest of the grantor.

estate,[77] and another case resolves an inconsistency between the granting and "intention" clauses of a mineral deed in favor of the latter.[78]

MISCELLANEOUS JURISDICTIONS

ILLINOIS, OHIO & PENNSYLVANIA

Several decisions indicate adoption of the principle of qualified ownership of oil and gas in Illinois, although a mineral grant constitutes a conveyance of an interest in the land and creates a freehold estate.[79] A federal court decision in Illinois, however, seems to adopt the minority West Virginia rule in holding that a reservation of 3/4 of the oil, gas and other petroleum royalties under an existing or any future leases reserved fee simple title to the oil and gas rather than a mere royalty right.[80] On the other hand, a reservation of 1/16 of all oil and minerals produced for fifteen years was held to create a term royalty interest in *Hardy v. Greathouse*,[81] the court drawing a distinction between perpetual and term interests. A clause in a deed reciting an intention to vest ½ of the mineral ownership in the grantee has been held controlling over a granting clause conveying only 1/2 of 1/8 of the oil and gas.

Although its decisions are somewhat in conflict, Ohio, like Illinois and California, is now apparently numbered among the "non-ownership" states. Unlike most jurisdictions adopting this view, however, Ohio is reluctant to admit that title to the minerals may be separated from the surface estate, denoting an attempted severance as conveying only a license.[84] One decision implies disapproval of the West Virginia rule that the reservation of royalty is tantamount to an exception of the corpus of the minerals.[85]

Although there is a dearth of Pennsylvania authority, this state seems to acquiesce in the minority rule that conveyances of perpetual royalty interests create ownership in the corpus of the minerals in place.[86]

CONCLUSIONS

Despite the mass authority concerned with the mineral-royalty question, it is difficult to arrive at definite conclusions. Except in

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[77] Gillespie v. Blanton, 214 Ky. 49, 282 S.W. 1061 (1926).

[78] Stanley v. Slone, 216 Ky. 114, 287 S.W. 360 (1916).

[79] Miller v. Ridgley, 2 Ill. 2d 223, 117 N.E.2d 759 (1954) (reservation of "all oil rights"); Triger v. Carter Oil Co., 372 Ill. 182, 23 N.E.2d 55 (1937); Natford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908). But cf. Vandenbark v. Busiek, note 80, *infra*, where the court speaks of an interest in oil and gas in place.

[80] Vandenbark v. Busiek, 126 F.2d 893 (7th Cir. 1942), the court indicating that "the reservation of a perpetual interest in the royalty has the effect of reserving the thing for which the royalty is paid." The fact that the reservation expressly provided that the grantor should receive ¾ of all "bonuses, rents . . . and other benefits" as well as royalties could explain the decision.

[81] 406 Ill. 365, 94 N.E.2d 134 (1950).

[82] Smith v. Grubb, 402 Ill. 451, 84 N.E.2d 421 (1949).

[83] Back v. Ohio Fuel Gas Co., 113 N.E.2d 865 (1953); but cf. Pure Oil Co. v. Kindall, 116 Ohio St. 188, 156 N.E. 119 (1927).

[84] Back v. Ohio Fuel Gas Co., *supra* note 83.

[85] Pure Oil Co. v. Kindall, *supra* note 83.

[86] Mandle v. Gharing, 256 Pa. St. 121, 100 Atl. 535 (1917); Weakland v. Cunningham, 3 Sad.(Pa.) 519, 7 Atl. 148 (1886), reservation of ½ the "profits" of all minerals held to be a reservation of the corpus of such minerals in place.

Kansas, where the Rule Against Perpetuities is a factor, it should be possible for the draftsman in any jurisdiction to create a perpetual interest in production which does not participate in bonuses, rentals or leasing privileges, regardless of the legal appellation which may be affixed to such an estate. It is elementary, however, that extreme care must be utilized if such a result is to be achieved. The danger of relying solely on the word "royalty" is illustrated by many of the decisions.

The title examiner faces a more perplexing question. He must take the title as he finds it and if the chain includes a history of mineral conveyancing, the chances of entanglement predominate. Not only must the examiner be fully aware of the local decisions, he must also attempt to predict the judicial reaction to untested language. Even a casual perusal of the many cases discloses that the possible variations in phraseology are almost limitless. The solution does not lie in the use of printed forms presently in existence. The author has examined some twenty-three printed forms of mineral and royalty conveyances in general circulation.[87] More than half were mislabeled or contained provisions inviting litigation. The Kansas and Texas decisions demonstrate the pitfalls attendant to reliance on forms, as well as the problems arising from ineptness in their use. In light of the uncertainty surrounding conveyances and reservations of mineral and royalty interests, the examiner would be well advised to require curative documents in doubtful cases.

[87] The author gratefully acknowledges the assistance of Mr. A. W. Mitchem, Chairman of the Rocky Mountain Oil and Gas Association's Legal Sub-Committee on Printed Forms, in making these documents available.

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