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Oil and Gas Interests in a Decedent's Estate

By JOSEPH W. MORRIS*

I.

INTRODUCTION

The law of oil and gas as it has been formulated, to a certain degree at least, cuts across the whole field of American law. No longer is interest in this segment of the law localized among lawyers practicing in the major oil and gas producing states. True, its principal intrigue and following will be among lawyers residing in such states, but the importance of knowledge concerning this phase of the law is becoming recognized everywhere.¹

One striking example of how the law of oil and gas becomes important to a lawyer who is not currently and daily faced with oil and gas problems arises in connection with decedents' estates. That is to say, it is not uncommon for a person residing, for example, in New York or in Philadelphia, to die owning mineral interests in one or more oil and gas producing states. If that occurs, then the attorney representing the decedent's family or the attorney representing an oil and gas lessee may be called upon for advice concerning problems which arise because of the ownership by the decedent of these various mineral interests. For example, the attorney for the family may be called upon for advice concerning whether ancillary administration will be necessary. The attorney for the family or the attorney for the lessee may be asked to advise how delay rentals and royalties should be paid or how a mineral interest may be leased for oil and gas. It will be the purpose of this paper to discuss some of the problems which arise in dealing with mineral interests owned by a decedent at the time of his death.

This paper will not concern itself with oil and gas problems which may be peculiar to land which was the homestead of the decedent, nor with problems which may arise under the "open mine" doctrine, nor with questions pertaining to guardians and wards. Furthermore, no attempt will be made to discuss problems which may arise because the decedent was the owner of an oil and gas leasehold estate, or a royalty interest as distinguished from a mineral interest.²

II.

THE NATURE OF A MINERAL INTEREST

It should be pointed out at the outset that there is a thoroughly recognized principle of law that A, the owner of land in fee simple, may convey by deed or by will all, or merely as undivided interest in, the oil, gas, and other minerals in and under a given tract of land.³ If this is done by deed the instrument conveying the minerals is usually called a mineral deed, and the grantee becomes the owner of what is commonly referred to as a mineral

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¹Although courses in oil and gas law have been offered for many years in most law schools located in the principal oil and gas producing states, many well known law schools have not included such a course in their curriculums until recently. For example, see the University of Michigan Law School announcement 1953-54 at p. 29, and Columbia University Law School announcement 1952-53 at p. 41.

²For a discussion of this distinction, see Section II, *infra*.

³KULP, OIL AND GAS RIGHTS, § 10.6 (1954) or 2 AMERICAN LAW OF PROPERTY, § 10.6 (1952).

fee.⁴ Conversely, A, owning the fee simple, may convey to B by warranty deed but except and reserve unto himself all, or merely an undivided interest in, the oil, gas, and other minerals. In other words, the minerals may be severed by proper conveyance.⁵ Or, as Professor Summers has said: "A landowner may create a separate legal interest or estate in the oil and gas under his land, apart from the interest in the land itself, by a direct grant of the oil and gas, or by a grant of the land with an express reservation or exception of the oil and gas."⁶ The precise nature of the interest so severed will depend upon what theory of ownership has been adopted in the state in which the land lies.⁷ But in all states one who owns a mineral interest is said to own land⁸ or an interest in land, which for most legal purposes, takes on all the attributes of the land itself.⁹

For the purposes of this discussion a mineral interest should be distinguished from a royalty interest. As the term is used herein a mineral interest will be used to denote that type of interest in the minerals wherein the owner thereof, as an incident of his ownership,¹⁰ has the power to lease for oil and gas, the right of ingress and egress, and the right to receive bonuses, delay rentals, and royalties. As already noted, many writers refer to this as a mineral fee, but it shall be referred to herein simply as a mineral interest. Conversely, the owner of a royalty interest, as defined herein, does not have the power, under normal circumstances, to execute an oil and gas lease, nor does he have the right to receive bonuses or delay rentals. He is merely entitled to a share of the oil or the proceeds therefrom if, as, and when produced. In most jurisdictions it is possible to create by a proper conveyance a royalty interest as above defined.¹¹ However, as has already been pointed out, this paper will deal only with mineral interests.

III.

THE NECESSITY FOR ADMINISTRATION

The general function of an administration proceeding is said to have a threefold purpose:¹² (1) To collect the assets, (2) to pay claims and satisfy creditors of the estate, and (3) to distribute the remaining assets to the next of kin or legatees. Thus the necessity for administration, particularly in

⁴1A SUMMERS, OIL AND GAS, § 131 (1954); Walker, *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEXAS L. REV. 125 (1928). It is spoken of as a mineral fee even in states which have rejected the ownership in place theory. See *Little v. Mountain View Dairies*, 35 Cal. 2d 232, 217 P.2d 416 (1950).

⁵For a lucid discussion concerning severance of the minerals, see the opinions by Justice Gunn in *Jilek v. Chicago, Wilmington & Franklin Coal Co.*, 382 Ill. 241, 47 N.E.2d 96 (1943) and *Shell Oil Co. v. Moore*, 382 Ill. 556, 48 N.E.2d 400 (1943). See also *Carlson v. Lindauer*, 119 Cal. App. 2d 292, 259 P.2d 925 (1953).

⁶1A SUMMERS, OIL AND GAS, § 133 (1954).

⁷1A SUMMERS, OIL AND GAS, § 136 (1954).

⁸*Shell Oil Co. v. Moore*, 382 Ill. 556, 48 N.E.2d 400 (1943); *Jilek v. Chicago, Wilmington & Franklin Coal Co.*, 382 Ill. 241, 47 N.E.2d 96 (1943); *Holloway's Unknown Heirs v. Whatley*, 133 Tex. 608, 131 S.W.2d 89, 123 A.L.R. 843 (1939). See also the remarks of Chief Justice Rinfret in *Turta v. C. P. R. and Imperial Oil, Ltd.*, (1954), 12 West Weekly R. (n.s.) 97 at 108.

⁹1A Summers, OIL AND GAS, Sec. 134 (1954) and the cases cited therein.

¹⁰For a discussion relating to the various incidents of ownership of a mineral interest, see Morris, *Some Legal Consequences Resulting from a Separation of the Incidents of Ownership of a Mineral Interest*, 7 OKLA. L. REV. 291 (1954).

¹¹3 SUMMERS, OIL AND GAS, § 571 (1938).

¹²ATKINSON ON WILLS, § 198 (1937); Bayse, *Dispensing With Administration*, 44 MICH. L. REV. 329 (1945).

the domiciliary state, will in all likelihood be determined not by whether the decedent owned a mineral interest, but by whether he had any debts or assets to be collected. Sometimes, however, the necessity for administration may stem solely from the fact that the decedent did own a mineral interest. This is especially true, as will subsequently be pointed out, in connection with ancillary administration proceedings.¹²

A. *Leased Mineral Interests*

1. Domiciliary Administration—Intestate Estates

Suppose A dies intestate, domiciled in and a resident of the State of Illinois. He is the owner of two mineral interests. Both mineral interests are covered by valid leases. One lease is within its primary term and, hence, delay rentals are payable thereunder. The other lease is being held by production and royalties are payable thereunder. Let us further assume that administration proceedings are properly instituted and that delay rentals and royalties become due and payable during the course of administration. The question then arises: To whom should the lessee pay the delay rentals and royalties?

The answer to this question is largely dependent upon the powers of the administrator over land, as determined by the statutes in the various oil and gas producing states. That is to say, in case of intestacy it seems to be a principle recognized everywhere that title to land descends directly to the heirs upon the death of the decedent.¹³ However, in some jurisdictions, and many of these are oil and gas producing states, land descends to the heirs subject to administration and subject to the possession of the administrator, who is, in some instances, specifically empowered by statute to collect the rents and profits from land coming into his possession during the course of administration. Therefore, the proper determination of the question as to who is entitled to the delay rentals and royalties may well depend upon the provisions of the statutes in effect.

In Illinois it would appear that the powers of an administrator or executor over the land of the decedent are extremely limited.¹⁴ In fact, Justice Gunn has said: "The executor, unless granted an estate by the will, has no control or concern with the real estate of the deceased, except a power to subject it to sale for the payment of debts in the manner provided by the statute."¹⁵ It therefore seems clear in our hypothetical case that in Illinois delay rentals and royalties payable during the course of administration are properly paid if paid to A's heirs at law.¹⁶ Indeed, this would seem to be in accord with common law concepts in the absence of statute giving the personal representative power over land.¹⁷

¹²See Section III-A-2, *infra*.

¹³3 AMERICAN LAW OF PROPERTY, § 14.6 (1952).

¹⁴Alward v. Borah, 381 Ill. 134, 44 N.E.2d 865 (1942); Healea v. Verne, 343 Ill. 325, 175 N.E. 562 (1931).

¹⁵Alward v. Borah, 381 Ill. 134, 44 N.E.2d 865, 867 (1942).

¹⁶Lipschultz v. Robertson, 407 Ill. 470, 95 N.E.2d 357 (1950); Central Pipe Line Co. v. Hutson, 401 Ill. 447, 82 N.E.2d 624 (1948); People v. Phillips, 394 Ill. 119, 67 N.E.2d 281 (1946); Ohio Oil Co. v. Wright, 386 Ill. 206, 53 N.E.2d 966 (1944); Hayne v. Fenton, 321 Ill. 442, 151 N.E. 877 (1926); Sherman v. Dutch, 16 Ill. 283 (1855); Pritchard v. McGregor, 205 Ill. App. 362 (1917).

¹⁷In Sherman v. Dutch, 16 Ill. 283 (1855), the court said: "The law is well settled that an executor or administrator cannot distrain, or sue for rent which has ac-

By way of contrast, let us momentarily assume that A had died intestate while domiciled in Texas. Let us further assume that administration on his estate has been taken out and that delay rentals and royalties become due and payable during the course of administration on Texas mineral interests. Here we find the situation quite different, for by statute the executor or administrator during the course of administration is given considerable power and control over the real estate of his decedent. The Texas statute provides as follows:¹⁹

“When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees, and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject however, to the payment of the debts of the testator or intestate, except such as may be exempted by law; and, whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exceptions aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate; but upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and he shall recover possession of and hold such estate in trust to be disposed of in accordance with law.”

Many oil and gas producing states have statutes quite similar in nature. Thus the executor or administrator is entitled to possession of real estate and to the rents and profits²⁰ therefrom during the course of administration in Kansas,²¹ California,²² Oklahoma,²³ Montana²⁴ Nebraska,²⁵ Colorado,²⁶ North

crued or become due after the death of the owner of the land. The rent, in such cases, goes to the heir * * * Our statute does not change the common law. It gives the executor no right to control the real estate, or the rents of such estate accruing after the death of the owner of the land.” See also 3 AMERICAN LAW OF PROPERTY, § 14.30 (1952) where the following observation is made: “As a heritage of the common law doctrine that land passes immediately upon death to the heirs or devisees, one must start with the proposition that the personal representative has nothing to do with the decedent’s land in absence of statutory or testamentary provision.” In the absence of statute ordinary rent goes to the heir or devisee. 3 AMERICAN LAW OF PROPERTY, § 14.34 (1952); 2 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, § 300 (1923).

¹⁹TEX. CIV. STAT. ANN., Art. 3314 (Vernon, 1935).

²⁰Not all of these statutes expressly provide that the executor or administrator is entitled to collect the rents and profits, but as Professor Simes and Mr. Bayse point out “* * * this would seem to be implied where he is given a right to possession.” Simes and Bayse, *The Organization of the Probate Court in America*, 43 MICH. L. REV. 113, 129 (1944).

²¹KAN. GEN. STAT. (1949) § 59-1401. The statute provides that the executor or administrator shall collect the “rents and earnings.” This language was adopted by the draftsmen of the Model Probate Code. See § 124.

²²CAL. PROB. CODE ANN., §§ 300, 581, 582 (Deering 1953). It should be pointed out however, that a time limitation exists with respect to the possession of real property by the personal representative. Sec. 582 provides as follows: “When the time to file or present claims has expired, the executor or administrator must deliver possession of the real property to the heirs or devisees, unless the income therefrom for a longer period or a sale thereof is required for the payment of debts of the decedent.”

²³58 OKLA. STAT. ANN. § 290.

²⁴REV. CODE OF MONT. 1947, §§ 91-402, 91-3201.

²⁵REISSUE REVISED STAT. OF NEBR. 1943, § 30-406.

²⁶1935 COLO. STAT. ANN. REPLACEMENT VOL. IV-B, § 176-115.

Dakota,⁷⁷ South Dakota,⁷⁸ and Wyoming.⁷⁹ It is interesting to note that the Model Probate Code similarly provides that the personal representative *shall* take possession of the property of the decedent and *shall* collect the rents and earnings therefrom.⁸⁰

In these states there would seem to be no question but that delay rentals and royalties accruing after the death of the decedent are properly paid when paid to the duly appointed personal representative,⁸¹ although in some circumstances payment to the heirs at law may also be proper and this may be true notwithstanding the fact that an administrator has been appointed.⁸²

2. Ancillary Administration—Intestate Estates

Suppose A dies intestate while domiciled and residing in the State of New York. Let us assume that at the time of his death he was the owner of both real and personal property situated in New York and likewise was the owner of an undivided one-half ($\frac{1}{2}$) interest in the oil, gas, and other minerals in and under Blackacre located within the State of Kansas. Assume oil and gas is being produced and that A had been receiving royalties up until the time of his death. Administration proceedings are commenced and an administrator appointed by the Surrogate Court in New York. The question then arises: Is it necessary to have ancillary administration in Kansas?

Ancillary administration may be demanded by Kansas creditors. Conversely, to render the title to the minerals marketable, administration may be

⁷⁷N. D. REV. CODE 1943, § 30-1304.

⁷⁸S. D. CODE 1939, § 35.1101.

⁷⁹WYO. COMP. STAT. ANN. 1945, § 6-1309.

⁸⁰§ 124.

⁸¹*California*

In Re De Bernal, 165 Cal. 223, 131 Pac. 375 (1913); *In Re Porter's Estate*, 129 Cal. 86, 61 Pac. 659 (1900); *Washington v. Black*, 83 Cal. 290, 23 Pac. 300 (1890); *In Re Woodworth*, 31 Cal. 595 (1867); *Carlson v. Lindauer*, 119 Cal. App. 2d 393, 259 P.2d 925 (1954); *In Re Jameson's Estate*, 93 Cal. App. 2d 35, 208 P.2d 54 (1949).

Colorado

Calligan v. Thomas S. Hayden Realty Co., 62 Colo. 477, 163 Pac. 295 (1917).

Kansas

In Re Estate Randolph, 175 Kan. 685, 266 P.2d 315 (1954); *In Re Jones' Estate*, 174 Kan. 506, 257 P.2d 116 (1953); *In Re Cline's Estate*, 170 Kan. 496, 227 P.2d 157 (1951).

Montana

Swanberg v. National Surety Co., 86 Mont. 340, 283 Pac. 761 (1930); *In Re Bradford's Estate*, 69 Mont. 247, 221 Pac. 531 (1923).

Oklahoma

Globe Indemnity Co. v. Bruce, 81 F.2d 143 (1935); *Cook v. Craft*, 207 Okla. 125, 248 P.2d 236 (1952); *Bryan v. Seiffert*, 185 Okla. 496, 94 P.2d 526 (1939); *In Re Gentry's Estate*, 158 Okla. 196, 13 P.2d 156 (1932); *Nolan v. Mathis*, 147 Okla. 155, 295 Pac. 801 (1931); *Nolan v. Mathis*, 134 Okla. 66, 272 Pac. 874 (1928).

South Dakota

Federal Land Bank of Omaha v. Fjerstad, 66 S. D. 429, 285 N.W. 298 (1939).

Texas

Jones v. Gibbs, 133 Tex. 627, 130 S.W.2d 265 (1939).

Wyoming

Bamforth v. Ihmsen, 28 Wyo. 282, 204 Pac. 345 (1922); *Cook v. Elmore*, 25 Wyo. 393, 171 Pac. 261 (1918).

⁸²In Nebraska it has been held that it is optional with the executor or administrator as to whether he wishes to take possession of real estate and that rents and profits are properly payable to the heir or devisee if possessory rights are not asserted by the personal representative. See *Hahn v. Verret*, 143 Neb. 820, 11 N.W.2d 551 (1943); *In Re Dovey's Estate*, 102 Neb. 147, 166 N.W. 353 (1918); *Lewon v. Heath*, 53 Neb. 707, 74 N.W. 274 (1898).

necessary to bar creditors or to determine heirs.⁸³ Indeed, it has been said that "Administration may be necessary or highly desirable even when the testator leaves only land. Though the title to realty passes directly to the heir or devisee, this is a defeasible title because the property may be sold in the course of administration to pay claims. One can never be certain that the land will not be sold unless the claims are paid or barred in the course of administration."⁸⁴ It should be added, however, that statutes have been passed in some jurisdictions which will bar the claims of creditors after specified periods of time, even though no administration proceedings are commenced.⁸⁵

Assuming, however, that these problems do not exist or can be solved, is it necessary to insist on ancillary administration so that the accruing royalties may be paid to the local Kansas administrator? That is to say, under circumstances such as these, oil and gas lessees and purchasers of the crude are frequently requested to pay the domiciliary personal representative. Such a request seems reasonable to the heirs of the decedent who are anxious to eliminate unnecessary expense. To that end they wish to dispense with ancillary administration. So the problem really becomes this: Under existing law may royalties be safely paid to the domiciliary administrator?

The answer to this problem is not a simple one. There are, however, certain well recognized principles of law which must be considered in arriving at an answer. First of all, it seems to be recognized everywhere that the powers of a foreign personal representative are coextensive with the boundaries of the state in which he is appointed. His powers are not extraterritorial unless by statute or by court decision he is given extraterritorial powers.⁸⁶ Or, as the Missouri Supreme Court has put it:⁸⁷

" * * * 'An administrator's power, as such, does not extend beyond the boundaries of the state in which his letters of administration are granted; nor can he sue in the courts of any state, or take possession of property belonging to his intestate without becoming a trespasser, unless he first qualifies as administrator according to the laws of the state where suit is intended to be brought, or the property is situated. In other words, letters of administration have no extraterritorial force.' * * *."

This statement represents the orthodox view.⁸⁸ Therefore, considering this

⁸³For an analysis of this point, see Bayse, *Dispensing With Administration*, 44 MICH. L. REV. 329, 405 (1945). See also 3 AMERICAN LAW OF PROPERTY, § 14.43 (1952).

⁸⁴ATKINSON, WILLS, 537 (1937).

⁸⁵For a discussion of these statutes see Bayse, *Dispensing With Administration*, 44 MICH. L. REV. 329, 390 (1945).

⁸⁶*Cameron v. Riggs Nat. Bank of Washington, D. C.*, 53 F. Supp. 56 (1943); *Holyfield v. Guaranty Title & Trust Co.*, 22 F. Supp. 896 (1938); *Bowles v. R. G. Dun-Bradstreet Corp.*, (Del.), 25 Ch. 32, 12 A.2d 392 (1940); *In Re Thompson's Estate*, 339 Mo. 410, 97 S.W.2d 93 (1936); *Emmons v. Gordon*, 140 Mo. 490, 41 S.W. 998 (1897); *Keenan v. Tonry*, 91 N.H. 220, 16 A.2d 705 (1940); *Fisher v. Durand*, 179 Tenn. 635, 169 S.W.2d 671 (1940). Professor Stumberg has said: "The theory is that the administrator has no authority to act outside the state of his appointment and that, therefore, in the absence of statute he cannot sue elsewhere on claims which belonged to the decedent." STUMBERG, *CONFLICT OF LAWS*, 444 (1951).

⁸⁷*Emmons v. Gordon*, 140 Mo. 490, 41 S.W. 998, 1001 (1897).

⁸⁸The reason for the rule is to insure the protection of local creditors. In one case it has even been held that a foreign personal representative may not collect a debt in a state other than the state of his appointment though a statute was in force specifically permitting and protecting debtors who paid foreign personal representatives.

principle alone, it would seem that a lessee would not be unreasonable in declining to pay royalties to the New York administrator.

There is, however, still another matter which should not be overlooked. A mineral fee is land, or an interest in land.³⁹ It is an immovable. As such, the situs for its administration is within the state in which it lies. As a matter of fact, Professor Beale has said that⁴⁰ "An executor or administrator has no power over foreign land belonging to the estate. He can make no agreement with regard to the land, for instance, he cannot rent the land, nor can he receive the rent for foreign land so as to discharge the lessee." Essentially the same position is taken by the Restatement of Conflicts where it is said that⁴¹ "Land within a state can be administered only in that state, by an administrator appointed by a competent court of that state." Royalties incident to the mineral interest accruing after the death of the decedent are either part of the corpus or are in the nature of rents and profits issuing out of the land.⁴² After administration they are distributed to the person to whom the land is devised or descends upon the death of the ancestor.⁴³ Viewed in this light, turning to our hypothetical case, it would seem that only a Kansas administrator would have the power to administer a Kansas mineral interest. It would therefore appear that insistence on local administration so that royalty payments can be made to the Kansas administrator is certainly warranted. Or to put it another way, it would seem that there is some risk involved in making royalty payments to the domiciliary administrator in view of the principles heretofore discussed. The problem here involved is not unlike those problems which arise in connection with voluntary payments of debts to a foreign administrator. In this connection, Professor Beale has also observed:⁴⁴ "It thus appears that by the great weight of authority in this country a voluntary payment to a foreign executor or administrator, even though it be one appointed in the state of domicile of the decedent, will not discharge a debt due to the decedent unless there is no one prejudiced by the payment."

On occasions payments have been made to the foreign administrator or perhaps to the heirs at law notwithstanding the risks above mentioned. One writer has remarked that in such a situation "it is seldom that such persons are called upon to account again to a local administrator."⁴⁵ And it must be frankly admitted that ancillary administration does increase expenses and

Joy's Ex'r. v. Swanton Savings Bank & Trust Co., 111 Vt. 106, 10 A.2d 216 (1940). This rule has been sharply criticized as being unrealistic. Bayse, *Dispensing With Administration*, 44 MICH. L. REV. 329, 409 (1945) and Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321, 339 (1947).

³⁸See footnotes 8 and 9.

³⁹3 BEALE, CONFLICT OF LAWS, § 487.1 (1935).

⁴¹RESTATEMENT OF CONFLICTS, § 487 (1934). See also STUMBERG, CONFLICT OF LAWS, 456 (1951).

⁴²McIntire's Adm'r. v. Bond, 227 Ky. 607, 13 S.W.2d 772 (1929); Crain v. West, 191 Ky. 1, 229 S.W. 51 (1921); Amberg v. Claussen, 186 Okla. 482, 98 P.2d 927 (1940); State v. Snyder, 29 Wyo. 163, 212 Pac. 758 (1923); Annotation in 18 A.L.R. 2d 98 (1951).

⁴³In Re Cline's Estate, 170 Kan. 496, 227 P.2d 157 (1951).

⁴⁴Beale, *Voluntary Payment to a Foreign Administrator*, 42 HARV. L. REV. 596, 606 (1929). See also STUMBERG, CONFLICT OF LAWS, 450 (1951); Annotation in 10 A.L.R. 272 (1921).

⁴⁵Bayse, *Dispensing With Administration*, 44 MICH. L. REV. 329, 410 (1945).

certainly is not desirable unless it is really necessary. In fact, Dean Niles in commenting on the whole question of ancillary administration has said that "One of the greatest defects in the law governing administration of decedents' estates in America today is in ancillary administration. There is such diversity in the different states in substantive law and procedure that administration of out-of-state assets is unreasonably difficult and expensive. Local statutes are usually designed to protect local creditors. Such solicitude is usually unnecessary. It is believed that in the vast majority of cases there would be no risk in granting the domiciliary representative power to deal as freely with assets located outside the decedent's domicile as with the assets within it when there is no local representative."⁶

No one would disagree with his theme. Nevertheless, both of these statements, clearly point up one important point, namely—*there is a risk*. The risk may be slight but the consequences may be great. If royalties or rentals are paid to a person not duly authorized to receive them, the person so paying may stand to suffer a severe loss. It would seem therefore, that the answer to the problem is not for the lessee to assume the risk *merely because it is small*, but to secure the passage of remedial legislation which will permit the lessee, without any risk, to make payment to a foreign administrator.⁷ This is the desirable solution from all points of view.

B. *Unleased Mineral Interests*

Domiciliary and Ancillary Administration—Intestate Estates

Now let us consider some of the problems which arise in connection with unleased mineral interests. Specifically, let us consider this hypothetical situation. Suppose A dies intestate in Indiana owning an undivided three-fourths ($\frac{3}{4}$) interest in the oil, gas, and other minerals in and under Blackacre located within the State of Oklahoma. This three-fourths ($\frac{3}{4}$) mineral interest is unleased. An Indiana administrator is appointed but no administrator is appointed in Oklahoma. Shortly after A's death, oil activity develops in the area surrounding his Oklahoma mineral interest. Let us assume that you have a client who is desirous of purchasing an oil and gas lease covering this three-fourths ($\frac{3}{4}$) mineral interest. He comes to you for advice as to how he should proceed.

First of all, under the rules of law already discussed, it is clear that the Indiana administrator does not have the power to lease the Oklahoma mineral interest. Hence, immediately you can rule out advising your client to secure a lease from the Indiana administrator. Having so determined that the domiciliary administrator is powerless to lease the Oklahoma land, we now seek to ascertain who is empowered to lease it.

There are two alternatives. You may advise your client to take a lease directly from A's heirs at law, assuming them all to be *sui juris*. That is, since the title to the mineral interest descends directly to the heirs at law, they are, as the owners of the mineral fee, in a position to execute an oil and gas lease.

The second alternative is to advise your client to request administration proceedings in Oklahoma and have an Oklahoma administrator appointed in

⁶Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321, 339 (1947).

⁷See Section IV, *Infra*.

the county where the land lies. Immediately after his appointment steps may then be taken to secure an oil and gas lease from him. That is to say, there is a statute in Oklahoma, as there are in several oil and gas producing states, which specifically authorizes executors and administrators to lease land of a decedent for oil and gas purposes if in the judgment of the court it will be in the best interests of the estate to do so. The Oklahoma statute is rather typical and provides in part as follows:⁴⁸

“Administrators and executors of estates of deceased persons and guardians of the estates of minors and incompetent persons are hereby authorized to sell and execute oil and gas or other mining leases upon the lands belonging to the estates of said deceased persons, or of said minors or incompetent persons, for a term not to exceed ten years and as long thereafter as oil, gas or other mineral may be produced in paying quantities, * * *.”

Statutes of this general nature exist in several states, including California,⁴⁹ Colorado,⁵⁰ Indiana,⁵¹ Kansas,⁵² Michigan,⁵³ Nebraska,⁵⁴ North Dakota,⁵⁵ South Dakota,⁵⁶ Texas,⁵⁷ and Wyoming.⁵⁸ The Model Probate Code likewise provides that mineral interests may be leased for oil and gas under court order if it appears to be “in the best interests of the estate.”⁵⁹

Which of these two suggested methods of securing a lease covering A's mineral interest is more desirable? Arguments may be advanced in support of both. In favor of taking a lease directly from the heirs at law it may be said that in the usual case this is the quickest and most direct manner of dealing. It simply is a matter of private negotiation between the party who is desirous of purchasing the lease (in this case your client) and the heirs at law of the decedent. Furthermore, if your client is willing to go this route, it may avoid the necessity of ancillary administration in Oklahoma, assuming there are no other reasons for administration.

On the other hand, there are some rather cogent arguments against proceeding in this manner. First of all, your client, in securing leases directly from the heirs at law of the decedent, would have to determine at his own risk who all of the heirs at law may be, and would also have to satisfy himself that the decedent in fact did not leave a will which might be probated at a later date. Let us assume, however, that these facts could be determined with sufficient certainty so that your client might be willing to rely on affidavits to that effect. A more compelling argument may be said to be this: Your client has no assurance that administration will not subsequently

⁴⁸OKLA. STAT. ANN., § 924. See also §§ 925 and 926.

⁴⁹CAL. PROB. CODE (1953) §§ 840-843 (Deering).

⁵⁰COLO. STAT. ANN. 1949 REPLACEMENT VOL., c. 176, §§ 128-131 and 133.

⁵¹IND. STAT. ANN. 1949 REPLACEMENT VOL. tit. 31, §§ 401-403 (Burns). However, unless the estate is insolvent, the heirs or their guardians, if the heirs are minors, must join in the execution of the lease.

⁵²GEN. STAT. OF KAN. (1949), c. 59, §§ 1409, 2301, 2302, and 2304.

⁵³COMP. LAWS OF MICH. (1948) Vol. IV, c. 9, § 709.5.

⁵⁴REV. STAT. OF NEB. (1953), §§ 57-210, 57-212 and REV. STAT. OF NEB. (1952), §§ 57-511, 57-212.01.

⁵⁵N. D. REV. CODE (1943), §§ 38-1001—38-1004 and 38-1007.

⁵⁶S. D. CODE (1943), §§ 42.0807-42.0811 (Supp. 1952).

⁵⁷ANN. STAT. OF TEX., Arts. 3554-3557 (Vernon).

⁵⁸WYO. COMP. STAT. (1945), §§ 8-203—8-205 (Supp. 1953).

⁵⁹§ 152 and § 3(m).

be taken out and the mineral interest sold for the payment of debts. It is believed that in such a situation an oil and gas lessee stands in no better position than one who takes a deed to land from the heirs at law and the land is subsequently sold for the payment of debts. In that kind of a situation, the rule is that the title of the purchaser from the heirs at law is divested upon the sale of the land by the administrator.⁶⁰

In this same vein of thought, there is still another argument against taking a lease directly from the heirs at law. If a lease is taken directly from the heirs at law and subsequently administration proceedings are taken out, the duly appointed administrator may execute and sell an oil and gas lease pursuant to the statutes heretofore mentioned, which lease probably will be superior to the lease given by the heirs at law. It, therefore, becomes apparent that there are rather strong and persuasive reasons against taking a lease directly from the heirs at law either prior to or during the course of administration although admittedly it is sometimes done.

What can be said for the other alternative, namely, taking a lease from an Oklahoma administrator instead of from the heirs at law? First of all, it becomes obvious that the risks heretofore enumerated do not exist. In addition, from the point of view of the heirs at law, this may prove to be by far the most expedient and least expensive means of leasing the land if the decedent's heirs at law include minors or incompetents. In such case it eliminates the necessity of appointing a guardian for each person under disability and going through a guardian lease sale proceeding on each fractional interest. It may, therefore, be the answer to what might otherwise be a difficult and complex problem.

It should also be added that the lease sale proceedings by an executor or administrator are subject to careful scrutiny by the court having jurisdiction of the decedent's estate. Statutes provide for appropriate notice to all interested persons prior to the date of the sale. The sale of such a lease is usually at either a private or public sale in the discretion of the court, though in some jurisdictions only public sales are permitted.⁶¹ All of such lease sale proceedings are subject to confirmation by the court.

Mention should be made of the fact that leases given by personal representatives pursuant to a statute of the type just mentioned are effective and binding upon the heirs at law or devisees after the estate is closed and dis-

⁶⁰*Parks v. Lefebber*, 162 Okla. 265, 20 P.2d 179, 86 A.L.R. 392 (1933); *Alward v. Borah*, 381 Ill. 134, 44 N.E.2d 865 (1942); *Thomas v. Williams*, 80 Kan. 632, 103 Pac. 772, 25 L.R.A. (n.s.) 1304 (1909). In *Parks v. Lefebber*, *supra*, the court said: "We hold that a devisee under the provisions of a will may convey the real estate devised while the probate proceeding is pending and prior to the entry of the decree of distribution, subject to the payment of the indebtedness against the estate, the costs of administration, and such other orders as the county court is authorized to make under its probate jurisdiction; the purchaser thereof buying at his own risk subject to administration." See also 3 AMERICAN LAW OF PROPERTY, § 14.22 (1952) and the cases cited, where it is said: "Of far greater practical importance are the situations in which the contest is between the personal representative attempting to exercise his statutory power of sale of land to pay debts, or his vendee at such sale, and one who buys from the heir or devisee before or during administration of the estate. Here the almost universal rule is that the sale by the heir or devisee does not affect the power of the personal representative to sell or the validity of the title of purchasers from him. The philosophy of these holdings is that purchasers from the heirs or devisees are charged with knowledge that it may be necessary to realize upon the decedent's realty through statutory sale in order to satisfy claims established in the subsequent course of administration."

⁶¹58 OKLA. STAT. ANN., §§ 925, 926.

tribution is made. However, in Texas a lease so given is not binding upon the heirs or devisees unless actual development has been commenced prior to final distribution of the estate.⁶²

The problem of determining from whom the lease should be purchased is essentially the same whether the mineral interest to be leased is situate in the domiciliary state or the foreign state, assuming there is an appropriate statute permitting executors and administrators to lease land for oil and gas. That is to say, if A died domiciled in Oklahoma owning an Oklahoma mineral interest, there would be no problem of ancillary administration, but the question of whether to purchase a lease from the heirs at law or from the administrator would be the same as the one heretofore discussed. Of course, if there is no statute in the jurisdiction authorizing executors and administrators to lease for oil and gas, then there is no alternative but to purchase the lease from the heirs at law. In this connection, however, it may still be advisable to have administration so as to bar creditors.

C. *Leased Mineral Interests—Testate Estates*

Professor Simes and Mr. Bayse have said that⁶³ "In nearly every jurisdiction a testamentary disposition of land must be admitted to probate before devisees can claim under it. This result in many states is based upon statutes to the effect that no will is effectual to pass title to real or personal property without probate or that a will cannot be introduced in evidence until admitted to probate." This principle is applicable, of course, to mineral interests. Therefore, if a decedent owns mineral interests in various states, before the devisee may assert title it is necessary that the will be probated in all of the states in which such interests are situated. In other words, "probate at the situs of the land is as necessary for proof of title in case the testator was domiciled elsewhere as if he were domiciled locally."⁶⁴ With these thoughts in mind let us consider some of the questions which arise in connection with mineral interests in a testate estate.

Suppose A dies testate domiciled in Illinois owning mineral interests in Illinois from which he has been receiving delay rentals and royalties. Let us assume he devises all his property to B in fee. His will is duly admitted to probate and the executor nominated in the will qualifies. The accepted view is that title to the minerals passes immediately to B, the devisee.⁶⁵ Whether B is entitled to the delay rentals and royalties or whether the executor named in the will is entitled to them during the course of administration will, of course, depend upon the applicable statutes, and will be governed by the same considerations heretofore discussed in connection with the powers of an administrator over a mineral interest owned by an intestate.⁶⁶ In other words, in some jurisdictions the executor would have the power to collect the delay rentals and royalties; in other jurisdictions he would not and they would go to the devisee.

Suppose A, being an Illinois resident, devises his North Dakota mineral interests to B. First of all, it will be necessary to have ancillary probate in

⁶²ANN. STAT. OF TEX., Art. 3556 (Vernon).

⁶³Simes and Bayse, *The Organization of the Probate Court in America*, 43 MICH. L. REV. 113, 123 (1944).

⁶⁴3 AMERICAN LAW OF PROPERTY, § 14.45, 750 (1952).

⁶⁵3 AMERICAN LAW OF PROPERTY, § 14.6. See also § 14.36, 716.

⁶⁶See discussion in Section III-A-1, *supra*.

North Dakota before B can assert title as devisee of the minerals. But probate and administration are two different things and this difference is pointed up in connection with ancillary probate and administration.⁸⁷ In other words, there are statutes which permit probate in the local state by recording the will and probate proceedings from the domiciliary state. But to have administration in addition to probate, it is necessary for the executor to qualify in the local state, to receive his letters and go about the duties of collecting the assets, and paying the debts.

Thus a similar question arises here as it did in connection with an intestate estate. In other words, whether the personal representative is an executor nominated by the testator in his will, or whether the personal representative is an administrator appointed by the court makes little difference. The question remains: Does a domiciliary representative have the power to collect delay rentals and royalties accruing subsequent to the decedent's death from a mineral interest situate in a foreign state? The reasons for and against paying delay rentals and royalties to the domiciliary personal representative have already been discussed.⁸⁸ In addition, to establish marketable title to the foreign mineral interest, ancillary probate and administration may be necessary. Certainly if the devisee is anxious to bar creditors and establish marketable title, he will insist on ancillary probate and administration proceedings.

D. *Unleased Mineral Interests—Testate Estates*

If a testator dies devising unleased mineral interests to B in fee it will, as has already been noted, be necessary to probate the will in the jurisdiction in which the land lies for B to assert title to his minerals. The usual questions of marketable title and of barring creditors may also necessitate administration. Furthermore, an oil play in the locale may make it highly desirable for B to lease his mineral interest. The risks incident to securing a lease directly from a devisee are similar to those in securing a lease directly from the heirs at law, where the ancestor died intestate, if there is a statute authorizing the executor to lease. These risks have already been considered.⁸⁹

However, an executor, unless he is empowered by the will to do so, may not, in the absence of statute, during the course of administration lease a mineral interest of his decedent for oil and gas purposes. Some states do have statutes, as we have already noted, empowering the personal representatives to lease for oil and gas. With respect to testate deaths, these statutes may have the added advantage of being particularly helpful in affording a quick, effective means of leasing for oil and gas if the testator has created contingent future interests. Especially is this true if he has limited remainders or executory interests in favor of a dubious or unascertained class of persons.

It can be seen, however, that in order to invoke the provisions of such a leasing statute it, in fact, will be necessary, if foreign land is involved, to have the domiciliary representative or an administrator with a will annexed qualify in the local state. This means that administration proceedings as

⁸⁷ATKINSON, WILLS, § 199 (1937).

⁸⁸See discussion in Section III-A-2, *supra*.

⁸⁹See Section III-B, *supra*.

distinguished from mere ancillary probate of a will must be instituted. This, of course, as many writers have already pointed out, runs up the cost of administration and is undesirable from that point of view. No doubt exists, however, but that under the law as it now exists, it is imperative that a local personal representative be appointed before the lease sale statutes may be invoked.

E. *Unleased Mineral Interests—Power to Lease Given by Will*

On occasions, a testator will expressly empower his executor to execute oil and gas leases during the course of administration. In fact, such a provision is rather common among testators who reside in oil and gas producing states. In such a case an executor may lease the mineral interest of his decedent pursuant to the power granted. It is also believed that the power to lease for oil and gas given to an executor should extend to land not situate within the domiciliary state if the decisions of the foreign state recognize a power of sale as being effective as to foreign land. That is to say, it has been recognized that a power of sale given to the executor named in the will is effective as to foreign land if the will has been proved and admitted to probate in the foreign state. This is true even though the executor named in the will has not received letters testamentary or qualified in the foreign state.⁷⁰ Under such circumstances if a power to sell is good, a power to lease for oil and gas should also be good.

On the other hand, if for the power to be effective it is necessary for the executor to qualify in the foreign state, another problem presents itself. Some states, by local statute, forbid a foreign corporation or non-resident from acting as the personal representative. Thus the testator's nominee may be disqualified from acting in the foreign state, necessitating the appointment of an administrator with the will annexed. Difficulties may therefore be encountered for the reason that it is generally considered in the absence of statute that an administrator with will annexed may not exercise a power of sale though such power is given to the executor named in the will.⁷¹ This is so held on the theory that the testator knew his nominee, had confidence in his judgment and that, therefore, the power was personal to him. This same theory would logically apply to a power to lease for oil and gas. In such a situation, if the executor fails to qualify in the foreign state, it may still be necessary to follow the lease sale proceeding if the state has statutes so authorizing a lease sale proceeding.

Many testators, however, do not expressly empower their executors to lease for oil and gas though they may give them broad powers, including the power to sell, mortgage, exchange, etc. In all probability where other broad powers to deal with the real property of the decedent have been given to the executor, the failure to give him the power to lease for oil and gas stems solely from not having thought about it. It is, therefore, submitted that if other wide discretionary powers are to be given the personal representative, a draftsman would be doing his client a favor if he included the power to lease for oil and gas.

⁷⁰McMillen v. Bliley, 115 Colo. 575, 177 P.2d 547 (1947).

⁷¹McMillen v. Bliley, 115 Colo. 575, 177 P.2d 547 (1947); Keel v. First Nat. Bank, 271 Ky. 745, 113 S.W.2d 33 (1938); Annotation in 116 A.L.R. 158 (1938); 3 AMERICAN LAW OF PROPERTY, § 14.28, 692 (1952).

However, in view of the fact that many wills fail, in specific language, to give the executor the power to lease for oil and gas, problems of construction frequently arise concerning whether the powers given may be said to include the power to lease for oil and gas. That is to say, if an executor is empowered to sell land, does this power include the power to lease for oil and gas? No definitive answer can be given. It must be said, however, that there are cases involving powers of trustees which have squarely held that the power of sale includes the power to lease for oil and gas.⁷² Of course, whether or not this will follow in a specific case as applied to executors will depend upon all the language in the will and it is, therefore, very difficult to lay down hard and fast rules. For example, in Kansas it has been held that the power of a trustee to sell land includes the power to lease for oil and gas.⁷³ On the other hand, it has also been held that where a life tenant is given the express power "to sell and convey," but is prohibited from encumbering the property, she may not lease for oil and gas because it constitutes an encumbrance.⁷⁴ It is obvious, therefore, that great care must be exercised in determining whether the power stated in the will includes the power to lease for oil and gas and each case will stand largely on its own facts.

IV.

EFFECT OF PROPOSED UNIFORM LAWS DEALING WITH DECEDENTS' ESTATES

It is believed that many of the problems which have been discussed herein and which now exist could be eliminated by the passage of the Uniform Powers of Foreign Representatives Act with perhaps slight elaboration in language to specifically cover the problems discussed. Oil companies constantly receive requests to pay accruing royalties and delay rentals to the domiciliary personal representative, heirs at law or the devisee of a decedent when administration is not contemplated in the local state. For reasons heretofore discussed, this sometimes simply cannot be done. If, however, the Uniform Powers Act were passed, then at least in those states where the executor or administrator is empowered by local statutes to take possession of real property and to collect the rents, profits and earnings therefrom, the foreign representative should be entitled to do likewise. This would seem to be the case under that section of the Uniform Powers Act which provides as follows:⁷⁵

"Powers of foreign representatives in general. When there is no administration or application therefor pending in this state, a foreign representative may exercise *all powers which would exist in favor of a local representative*, and may maintain actions and proceedings in this state subject to the conditions imposed upon non-resident suitors generally."

Thus, where the local representative is empowered to receive delay rentals and royalties, the passage of this Act should empower the foreign

⁷²Layman v. Hodnett, 205 Ark. 367, 168 S.W.2d 819 (1943); Heffelfinger v. Scott, 142 Kan. 395, 47 P.2d 66 (1935); Franklin v. Margay Oil Corp., 194 Okla. 519, 153 P.2d 486 (1944); cf. Avis v. First National Bank, 141 Tex. 489, 174 S.W.2d 255 (1943).
Contra: In Re Bruner's Will, 363 Pa. 552, 70 A.2d 222, 18 A.L.R.2d 92 (1950).

⁷³Heffelfinger v. Scott, 142 Kan. 395, 47 P.2d 66 (1935).

⁷⁴Woelk v. Woelk, 174 Kan. 130, 254 P.2d 297 (1953).

⁷⁵Section 2.

representative to receive delay rentals and royalties. Likewise, if the mineral interest is an unleased mineral interest, the above quoted section should permit the foreign representative to petition the local court having jurisdiction over decedents' estates so as to permit the sale of an oil and gas lease. The Uniform Powers Act would permit these things to be done without a full scale, full blown ancillary administration proceeding. Such an objective in the field of oil and gas law would seem to be eminently desirable. Should there be doubt as to whether the language of the Uniform Powers Act is sufficiently broad to permit a foreign representative to collect delay rentals, royalties, and to lease for oil and gas under an applicable leasing statute, then it would be a simple matter to specifically include such powers.

The crying need and earnest desire for the passage of this Act have been chiefly voiced in connection with matters which pertain not to the law of oil and gas, though it ought to be equally desirable from an oil and gas point of view. Strangely enough, however, though approved by the American Bar Association ten (10) years ago, no state yet has seen fit to enact it. Dean Niles forecast some seven (7) years ago that "It should face no obstacle except inertia,"⁷⁶ and indeed this seems to have been the case.

In commenting on the three Acts promulgated by the Commissioners on Uniform Laws involving ancillary administration and probate, Professor Atkinson has observed that⁷⁷ "To the writer the Uniform Powers of Foreign Representatives Act is the most important of the three acts. There are existing procedures for ancillary probate and administration under which we can struggle along as in times past, but the powers act would be the means of dispensing with many pointless ancillary administrations which are now necessary because of the unsatisfactory state of the law as to the foreign domiciliary representative's powers."

To this writer it would seem that these observations pointedly apply to mineral interests in a decedent's estate. For a person who invests his money in mineral interests, it is not at all uncommon to find that he owns such interests in five or six different states. Such interests may constitute the only property owned by him in such states. The productivity of such mineral interests may be nil or perhaps very small at the time of the death of the decedent. In such cases it seems unwise, from a monetary point of view, to have full scale ancillary administration in all such states. But because of the present state of the law it may be necessary to do so. The Uniform Powers Act with perhaps slight elaboration would eliminate, at least in some states, that necessity. It is submitted that lawyers representing both lessors and lessees would welcome its passage. They could then at long last advise their clients that they may, with safety, rely on the powers of a foreign domiciliary personal representative.

⁷⁶Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321, 339 (1947).

⁷⁷Atkinson, *The Uniform Ancillary Administration and Probate Acts*, 67 HARV. L. REV. 619, 630 (1954).