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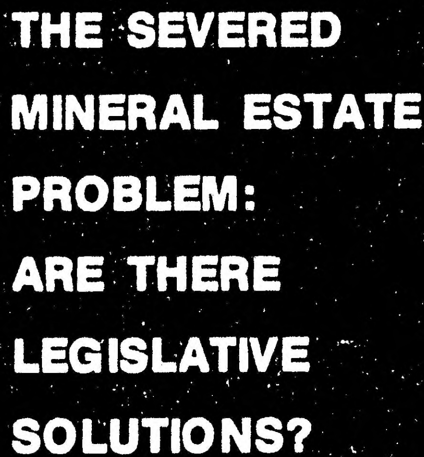

THE SEVERED MINERAL ESTATE PROBLEM: ARE THERE LEGISLATIVE SOLUTIONS?

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[illegible] Bodcaw Lumber Company v. [illegible] firmly placed Arkansas among "ownership in place" states.[1] Adopting the view of two of our neighboring [illegible] Texas and Oklahoma, and expressly rejecting the "servitude" doctrine of Louisiana, Chief Justice McCulloch [illegible] his opinion with the following paragraph:

"Counsel for appellee also discuss the question of public policy involved in the separation of mineral rights from surface rights, but we perceive no question of public policy involved, in the absence of an express statute declaring such policy."

Fifty years later, "the question of public policy involved in the separation of mineral rights from surface rights" is very much alive in Arkansas and, indeed, in practically all of the oil and gas producing states.

The problem has been well described in a 1972 article:[2]

"It is becoming increasingly apparent in jurisdictions which have a long established coal or oil and gas industry that something must be done to eliminate title problems stemming from mineral conveyances executed in years gone by. The problem results from the fact that perpetual or very long term mineral interests may be created during a period of activity in a particular industry, and these interests do not terminate when the activity ceases. Ownership of the minerals may thus be lodged in individuals who have long disappeared from the area, leaving no trace, and making it impossible to further develop the mineral estate at this time.

"The problem is inherent in our common law system in which a separate estate, which may be in fee simple absolute, may be created in the minerals. Such a mineral interest has all the sanctity of an estate in land generally in that title to it cannot be lost by abandonment, and yet it is virtually immune to the various title curative devices, such as adverse possession, the tax deed, and the marketable title act, which keep land in the stream of commerce."

1973, the Legislature adopted [illegible] Concurrent Resolution 34 creat- [illegible] Mineral Resources Commission [illegible] the problems of abandoned, [illegible] mineral interests." The Com- [illegible] is composed of 12 members,[illegible] [illegible] by the Governor, representing [illegible] facets of the problem and has [illegible] public hearings required by the [illegible] resolution. The Commission was [illegible] "to make such recommenda- [illegible] any, as the Commission deter- [illegible] necessary for legislation to assure [illegible] mineral resources of Arkansas [illegible] adequately and timely developed in [illegible] to meet the existing energy [illegible]

EXISTING ARKANSAS LEGISLATION

[illegible] first attempt at a legislative solu- [illegible] made in 1935 by providing a [illegible] as in partition for the sale of [illegible] and gas lease where there was no [illegible] and no outstanding lease [illegible] the entire oil and gas leasehold [illegible] Constitutionality was upheld in [illegible]

[illegible]unately, no record exists of his- [illegible] of laws enacted in the 1930's, but at [illegible] session of the legislature, in [illegible] a further attempt to deal with the [illegible] was made.[6] It should be noted [illegible] the 1935 Act had been limited to oil [illegible] gas and provided only for sale of [illegible] on the entire mineral interest in [illegible] land by a commissioner using the [illegible] procedure of partition. Provi- [illegible] had been made for the appointment [illegible] receiver if, prior to a sale of the [illegible] "it should be made to appear to [illegible] court that the interests of the various [illegible] would be more fully protected [illegible] the value of the various interests of [illegible] parties increased by the execution of [illegible] oil and gas lease, providing for the [illegible]ecting and drilling of oil and/or gas [illegible] the property involved in said suit, [illegible] property near thereto."[7]

[illegible] principal objection to the 1935 Act, [illegible] may have prompted the 1937 [illegible], was the requirement that the [illegible] be sold by the commissioner on [illegible] entire mineral estate in the land, [illegible] as a matter of practice, in most in- [illegible] one or more of the owners of un- [illegible] minerals would have already [illegible] a lease. Therefore, the neces- [illegible] for leasing through court procedure [illegible] only to the unleased, un- [illegible] mineral interests. In addition, the [illegible]advantages of a public auction were [illegible] in eliminating opportunities to [illegible] for such terms as additional [illegible], amount of delay rental, length or [illegible] term, etc.

The 1937 Act met some of these ob- [illegible] by permitting the appointment [illegible] a receiver on the application of less [illegible] all of the mineral owners and giving [illegible] receiver some latitude to privately negotiate the terms of the lease.

However, the 1937 Act proved defici- ent in a number of Oil and Gas Commis- sion to integrate unleased interests in drilling units.[12] In 1963, the statute was amended to empower the Commission to fix risk factor penalties or even require a transfer (or lease, in practice) by the non-consenting parties on terms fixed by the Commission. While this procedure is effective where drilling units have been established for a producing field and drilling is imminent, it has no practical application in a wildcat-area where mineral owners' whereabouts or exist- ence are unknown.

POSSIBLE LEGISLATIVE SOLUTIONS

In 1955 two Senate Bills, Nos. 114 and 443, approached the problem on the ba- sis of reuniting the mineral interests with the surface title in the absence of de- velopment or payment of taxes. Senate Resolution No. 27 directed the Research Department of the Arkansas Legislative Council to make a study of the legal problems involved. The result was Re- search Report No. 54 raising serious constitutional questions.

Since 1955, almost every session has seen a bill of some type directed to a solution of this problem, but none has achieved passage.

Most of the bills introduced have used the assessment and payment of taxes approach to reunite the dormant mineral interest with the surface ownership. The underlying practical objection to this suggested solution, regardless of consti- tutional questions, is the reluctance, and even refusal, of tax assessors to assess non-producing mineral interests. Since only a nominal value can be accorded, the tax realized is often said to be less than the cost of assessing and attempt- ing to collect the tax.

The other approach has been that used in S.B. 114 of 1955: that after a severance of 20 years or more the owner of the surface might bring an action to quiet title to the land, including the severed mineral interests, on the theory of abandonment. While the general opin- ion has been that such a law could only act prospectively, because of constitu- tional requirements, as we shall see, a similar law has recently been adopted in Virginia and successfully overcome such constitutional important aspects, primarily the problem of obtaining juris- diction over the mineral owners whose existence or whereabouts were un- known and incapable of being deter- mined. As originally enacted, the 1937 Act also required that all mineral owners be made parties even though some had already leased.

An attempt was made in 1963[8] to clari- fy the language of the 1937 law and re- solve the problems mentioned and others which existed. The Mineral Sec- tion of the Arkansas Bar Association drafted the remedial legislation and it was sponsored by the Arkansas Bar Association in the General Assembly.

The principal objectives of the 1963 legislation were (i) elimination of the re- quirement that existing lessors be made parties, (ii) provision for the payment of the bonus, rents and royalties received by the receiver into the Registry of the Court, and (iii), an effort to provide more finality to the jurisdictional problem.[9]

In 1972, this effort received a very thor- ough review in **Davis v. Schimmel**[10], and the constitutionality of certain provisions was upheld, although the case did not involve a frontal assault on constitutional questions. However, the court went to some lengths to interpret various provi- sions so as to bring them within constitu- tional requirements of due process.

On the whole, the consensus of the bar now seems to be that the receiver procedure obtained a judicial blessing in the Davis case so as to remove critical doubts of constitutionality. However, ser- ious problems still exist in the practicali- ties of the present law and may be sum- marized as follows:

1. The expense of judicial proceed- ings.
2. The problem of jurisdiction over de- fendants whose existence or where- abouts are unknown and cannot be determined.
3. The effectiveness of the receiver, who, usually serving as an accommoda- tion to the plaintiff-lessee, is placed in serious conflict-of-interest situations **vis- a-vis** the lessee and the absent de- fendants.[11]

One other existing procedure should be mentioned that touches the problem to a limited extent, namely, the power of the Arkansas objections in the State Supreme Court.[13]

Enacted legislation in other states has taken one of two general approaches. First, and most numerous, are the so- called "registration" statutes, which pro- vide that in the absence of production or conveyance for a period of years (usually 20 to 25 years) such interests shall be deemed to have been aban- doned, unless the owner registers in some manner in the county where the land is located within a short period (of- ten 3 to 5 years) his name, whereabouts, and other pertinent information. Such statutes have been adopted in Illinois, Michigan, and Nebraska.[14]

In 1973 a bill of that type (H.B. 552) probably caused the adoption of HCR 34 creating the "Mineral Resources Com- mission." An interesting feature of H.B. 552, however, differing from the Michi- gan-type statutes that would unite the dormant mineral with surface ownership.

(Continued on page 130)

...ued from page 129)

...e provision that:
...e owner or owners of the surface
...e date when such severed min-
...terest is deemed abandoned shall
...e exclusive beneficiary or bene-
...es of the leasing privileges and
...ts and the abandoned interest be-
...e a non-participating royalty inter-

...ther variation is a 1971 Indiana
...e providing that the dormant inter-
...ert to "the owner of the interest
...which it was carved."[15] This would
...e objection that has often been
...e in Arkansas that the surface
...e should not logically be the reci-
...of the "windfall," but rather it
...revert to the mineral estate.
...e draftsman of the Indiana statute
...tten a very illuminating article[16] in
...ng the general problem, review-
...e legislation in other states, and
...ing copious notes to the Indiana
... While the logic behind this ap-
... may be salutary, identifying the
...nt of the reverting interest will no
...e raise many complex and litigous
...ons. The draftsman himself sug-
... a number, but one that readily
...s to mind is the case of a mineral
...st acquired through a mortgage
...osure proceeding. If the interest
...ses, to whom does it go, the mort-
...r the mortgagee, or, conceivably,
...ommissioner?
...nia has taken a different ap-
...h one similar to that used in Sen-
...ll 114 of the 1955 General Assem-
...eviously mentioned. The Virginia
...e provides for a judicial proceeding
... severence of 35 years, during
... there has been no development,
...sion to taxation, or conveyancing.
...tute raises a rebuttable presump-
...which the defendant-owner must
...ome in order to avoid an ex-
...nment of his interest. It further al-
... the defendant a grace period of six
...s after the case has been dock-
...and set for hearing in which to com-
...e development of the minerals.
...e Virginia Court met the constitu-
... objections by reasoning that
...e the facts and circumstances es-
...h the non-existence of anything of
... nothing is being taken. How far
... a theory would be accepted in
... jurisdictions or in the United States
...me Court is surely a matter of
... conjecture.
...e not a legislative solution, men-
...hould be made of the 1968 decision
...e California Supreme Court[17] hold-
...at while a severed mineral interest
...e be a fee estate from the standpoint
...ation, it is, nevertheless, properly
...cterized as a **profit a' prendre**, an
...poreal hereditament, capable of be-
...abandoned.[18]

In order to establish abandonment, the California court held that it was necessary to find, in addition to mere non-user, "either that the owner's future use of the right could result only from a palpably unsound business judgment, or that the owner had given a further indication of his intent to abandon."

CONCLUSION

The variety of approaches taken by different states indicates the difficulty of a satisfactory solution, legislative or otherwise. It is too early to properly appraise the various alternatives; only experience in their use will provide answers.

In the meantime, Arkansas is fortunate to have judicial and administrative procedures that have stood the tests of time and legal attack. Improvements are needed, to be sure, but a good base is already available.

It is to be hoped that the Mineral Resources Commission and the Mineral Section of the Arkansas Bar Association will continue to monitor the experience in other jurisdictions and weave into existing or future legislation those improvements which meet the requirements of fairness and practicality.

FOOTNOTES

1. 160 Ark. 48, 254 S.W. 345 (1923); Summers Oil and Gas Section 131; 38 Am. Jur. (2) 477.
2. Polston, **Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles,** 8 Land and Water L. Rev. 73 (1972). Increasing interest in the problem is evidenced by acceleration in legal writing: Street, **Need for Legislation to Eliminate Dormant Mineral Interests,** 42 Mich. St. B.J. 49 (1963) Note, **Severed Mineral Interests, A Problem Without a Solution,** 46 N. Dak. L. Rev. 451 (1970); Kuntz, **Oil and New Solutions To the Problems of the Outstanding Undeveloped Mineral Interest,** Twenty-Second Institute on Oil and Gas Law and Taxation 81 (Southwestern Legal Foundation 1971).
3. i) A member of the Arkansas Oil and Gas Commission;
   ii) A member of the Mineral Section of the Arkansas Bar Association;
   iii) A member of the Arkansas Geological Commission;
   iv) An oil and gas lease broker;
   v) A member of the Legislative Council;
   vi) An owner of substantial severed mineral interests;
   vii) A member of the Arkansas Forestry Commission;
   viii) An employee of a major oil company;
   ix) An employee or owner of an independent oil company;
   x) An abstracter licensed to do business in this State;
   xi) A county tax assessor;
   xii) An owner of a substantial surface interest of lands in this State.
4. Act 15 (Ark. Stats. Anno. Sections 53-401 et seq.).
5. **Overton v. Porterfield,** 206 Ark. 784, 177 S.W. 2nd 735 (1944).
6. Act 220 (Ark. Stats Anno. Sections 52-201 et seq.).
7. Ark. Stats. Anno. Section 53-406.
8. Act 84.
9. Ark. Stats. Anno. Section 52-203.
10. 252 Ark. 1201, 482 S.W. 2d 785 (1972).
11. A similar statute in Mississippi makes the Chancery Court Clerk the receiver in all cases. Miss. Code, 1972, Section 11-17-34. The Mississippi law applies only to (1) non-residents, and (2) persons whose whereabouts are unknown "after diligent search and inquiry." The law has never been before the Mississippi Supreme Court.
12. Ark. Stats. Anno. Section 53-115.
13. Code of Va. Section 55-154; **Love v. Lynchburg Nat'l. Bank & Trust Co.,** 140 S.E. 2d 650, 22 O.&G.R. 235 (Va. 1965).
14. Ill Rev. Stat., Ch. 30 Sections 197-198 (1969); Mich. Comp. Laws Anno. 554.191; Nev. Rev. Stat. Sections 57-228 to 57-231. Professor Kuntz, Note 2 **supra,** critizes this type of statute: "It is also submitted that the developing statutory pattern that requires a periodic filing of a claim by the owner in order to avoid a loss of title does not strike a good balance in that it impairs security of ownership without necessarily protecting the right of the property enjoyment. It impairs the security of ownership by exposing the owner to loss of title in the absence of the filing of a claim. It does not necessarily protect the right of property enjoyment in that the enterprising co-tenant may be frustrated by the simple filing of a claim by an uncooperative or absentee co-tenant."
15. Indiana Code Sections 46-1807 et seq.
16. Polston, Note 2 **supra.**
17. Gerhard v. Stephens, 69 Cal. Rptr. 612, 412 P. 2d 692, 31 O.&G.R. 28 (1968).
18. Without the slightest suggestion that the case is authority in Arkansas, the language of Hanson v. Ware, 224 Ark. 430, 274 S.W. 2d 359 (1955), dealing with the nature of a non-participating royalty, is interesting: "It is hard for us to conceive of an estate in real property which vests barrel by barrel or stratum by stratum. In the analogous case of a **profit a prendre,** such as the perpetual right to take game or fish from another's land, the estate in real property is a present vested interest which is unaffected by the rule against perpetuities."