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Partition of Oil and Gas Interests and the Effect on Mineral Rights of Surface Partition

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OIL AND GAS — PARTITION OF OIL AND GAS INTERESTS AND THE EFFECT ON MINERAL RIGHTS OF SURFACE PARTITION

Introduction

Interests in oil and gas in place are of three kinds: ownership of minerals independent of surface ownership, royalty interests, and "working" or leasehold interests.¹ All three are forms of property, susceptible of ownership by cotenants, and cotenancies of the first and third categories are at least theoretically open to actions for partition.

Partition of interests in oil and gas raises practical legal difficulties in three areas: (1) How does mineral ownership fit into the statutory partition scheme? (Each of the nation's fifty states has a statute concerning partition of either realty or personalty or both.) (2) How is a suit for partition of mineral interests affected by the jurisdiction's theory of mineral ownership? (3) How does partition of mineral interests resemble or differ from common law (*i.e.*, equitable) partition of estates in realty as to type of partition, parties, etc.?

The topic, finally, suggests a brief inquiry into the effects on mineral ownership of partition of surface tracts.

I. PARTITION STATUTES

Only six state legislatures have specifically mentioned oil and gas in their partition statutes. The most explicit of the provisions is that in Texas, permitting partition of oil and gas rights, whether held in fee or by lease.² The Texas court, in fitting the statute into its common law scheme, said:

The purpose of the statute . . . was to enable joint owners of a mineral estate, quarrelling among themselves over its management or operation, to divide it so that each will have a segregated portion thereof, which he may manage according to his own notions.³

The remedy in Texas extends to cotenants with the state⁴ and, as a matter of right rather than judicial discretion, to any estate holder coming within its terms.⁵ The remedy has been held to require that plaintiff have both a possessory interest and an interest in immediate possession in some part of the tract concerned.⁶ The statutory remedy doesn't extend to royalty interests which are non-possessory.⁷ Although no cases have been noted in which the Texas court fell back on its traditional equity powers in partitioning mineral estates, it has, in partition of surface tracts, held that the statutory remedy does not diminish the availability or potency of equitable partition.⁸

Arkansas allows partition of oil and gas estates in cases where there is no production on the tract and no mineral leases have been executed; the statute provides only for partition by sale and distribution of proceeds.⁹ Arkansas shares with Illinois, Virginia, and West Virginia, a statutory provision permitting court-supervised

1 For a concise outline of the incidents of each of these three kinds of mineral ownership see Prendergast, *What Hath Wimple Bought: A Short Course on the Law of Oil and Gas*, 45 A.B.A.J. 915 (1959).

2 TEX. REV. CIV. STAT. ANN. § 6082 (1949).

3 *Hardin v. Eubank*, 245 S.W.2d 554, 555 (Tex. Civ. App. 1952).

4 *State v. Williams*, 326 S.W.2d 551 (Tex. Civ. App. 1959).

5 *Texas Co. v. Cain*, 177 S.W.2d 251 (Tex. Civ. App. 1944); *Johnson v. Bussey*, 95 S.W.2d 990 (Tex. Civ. App. 1936). The remedy has been extended by construction to life tenants. *Bearden v. Texas Co.*, 41 S.W.2d 447 (Tex. Civ. App. 1931), *aff'd*, 122 Tex. 445, 60 S.W.2d 1031.

6 *Manchaca v. Martinez*, 136 Tex. 138, 148 S.W.2d 391 (1941); *Douglas v. Butcher*, 272 S.W.2d 553 (Tex. Civ. App. 1954).

7 *Hudgins v. Lincoln Nat'l Life Ins. Co.*, 144 F. Supp. 192 (E.D. Tex. 1956).

8 *Scoggins v. Taylor*, 248 S.W.2d 549 (Tex. Civ. App. 1952).

9 ARK. STAT. ANN. §§ 53-401 to 53-409 (1957).

development of oil and gas if the cotenants have reached such an impasse that harmonious production is impossible and neighboring wells are draining the oil or gas from under the cotenants' tract. Arkansas provides for a court-appointed receiver;¹⁰ Illinois, Virginia and West Virginia allow development by one cotenant, over the objection of other cotenants if, in the opinion of the court, circumstances warrant it.¹¹

The Arkansas statute does not provide for partition of leasehold estates (*i.e.*, "working interests") and the court has denied partition of leasehold mineral interests under its equity power,¹² even though it concedes that a lease of oil and gas is "an interest in the land."¹³

Kansas recently adopted a statute very like that of Texas,¹⁴ and in the only case construing the provision, the Kansas court treated an oil and gas lease as a chattel real and held that the statutory remedy is "special" and does not require averments bringing the case within the court's equity jurisdiction.¹⁵ But in Kansas, as in most states, the statutory remedy does not limit the court's equitable jurisdiction¹⁶ or bar the judges from using equitable principles to solve difficult partition problems.¹⁷

The West Virginia Code, alone of the partition statutes, excepts oil and gas leases from statutory partition. Partition of mineral interests in fee has been, by construction, brought within the statute.¹⁸ The Nebraska statute extends in terms to "any mineral, coal, petroleum or gas rights,"¹⁹ and has been broadly construed to include even unaccrued royalties. Nebraska apparently follows Texas in the language and construction of its partition statute.²⁰ The North Carolina statute authorizes partition of minerals which have been separated from surface interests.²¹

Eight of the forty-four statutes which do not mention oil and gas extend by terms or by construction to both realty and personalty.²² The great majority of the statutes provide for sale of realty and distribution of proceeds in cases where partition in kind would work "great prejudice"²³ or be "impracticable or highly inconvenient."²⁴ Most of the statutes also extend the remedy to lessees and life tenants of realty.

Most jurisdictions have decided that the statutory remedy is declaratory of or supplemental to common law,²⁵ but a few make the remedy a "special" action.²⁶

Seven states allow the court to partition part of a tract in kind and sell part

10 *Id.*, § 53-406.

11 ILL. ANN. STAT. c. 104, §§ 25-33 (Smith-Hurd Supp. 1958); VA. CODE ANN. § 8-692 (1950); W. VA. CODE ANN. § 3642 (Supp. 1959).

12 *Pasteur v. Niswanger*, 226 Ark. 486, 290 S.W.2d 852 (1956).

13 *State Highway Comm'n v. Cochran*, 327 S.W.2d 733 (Ark. 1959).

14 KAN. GEN. STAT. ANN. § 60-2101 (Supp. 1957).

15 *Strait v. Fuller*, 184 Kan. 120, 334 P.2d 385 (1959).

16 *Shell Oil Co. v. Seeligson*, 231 F.2d 14 (10th Cir. 1955).

17 *Gillet v. Powell*, 174 Kan. 88, 254 P.2d 258 (1953).

18 W. VA. CODE ANN. § 3640 (1955).

19 NEB. REV. STAT. § 25-2170 (1956).

20 *Krone v. Lacy*, 168 Neb. 792, 97 N.W.2d 528 (1959), citing *Garza v. De Montalvo*, 147 Tex. 525, 217 S.W.2d 988 (1949). But the Nebraska court apparently stands alone if it follows its dictum in this case permitting partition of royalty interests. See SULLIVAN, HANDBOOK OF OIL AND GAS LAW § 53 (1955).

21 N.C. GEN. STAT. § 46-4 (1950).

22 ALA. CODE § 184-191 (1950); CAL. CIV. PROC. CODE § 1100-1106; MONT. REV. CODES ANN. § 93-6301 (1949); TENN. CODE ANN. § 23-2101 and § 23-2105 (1955); UTAH CODE ANN. § 78-39-1 (1953); VA. CODE ANN. § 8-690 and § 8-703 (1955); WIS. STAT. ANN. § 276.01, and § 277.01 (1956).

23 *E.g.*, MINN. STAT. ANN. § 558.01 (1947).

24 *E.g.*, NEV. REV. STAT. § 39.010 (1957).

25 See, *e.g.*, FLA. STAT. ANN. § 66.01 (1943) and GA. CODE ANN. § 85-1501 (1955).

26 N.C. GEN. STAT. § 46-1 and § 46-3 (1950); *Ukase Investment Co. v. Smith*, 92 Ore. 337, 181 Pac. 7 (1919), construing what is now ORE. REV. STAT. § 105.205 (1957).

of it,²⁷ a provision which ought to clear the way for separate treatment of mineral ownership. Three states provide for protection of lessees when partition is ordered by a court or achieved through agreement between cotenants.²⁸ At least two statutes permit lien creditors of a cotenant to compel partition to satisfy debts.²⁹ The Mississippi statute allows partition disputes to be submitted to arbitration.³⁰

II. OWNERSHIP THEORY

American jurisdictions differ on conceptual pigeon holes used to define interests in undisturbed oil and gas in place. The two common theories are (1) absolute ownership of minerals in place and (2) the "capture theory," that the minerals are analogous to animals *ferae naurae* and belong to no one until they are "captured."³¹

Converging upon these theories is a jurisdictional difference on what mineral "ownership" separated from surface "ownership" carries with it. Some jurisdictions hold that mineral "ownership" is a form of personalty, others that it is an interest in fee, a species of real property.³² Still other courts side-step the conceptual argument and hold that mineral "ownership" is "an interest in land,"³³ subject, for the purposes considered here, to statutory or equitable partition.³⁴

A third theoretical difficulty arises in defining leasehold interests. Texas considers an oil and gas lease a determinable fee, the conditional limitation taking its origin in the "thereafter" clause of the lease.³⁵ A more common approach is that a lease is a right of ingress and egress coupled with an interest in personalty in the underground minerals.³⁶

The Supreme Court of Kansas, wrestling with its judge-made theory that leasehold mineral interests are personalty, held in effect last year that Kansas' statutory partition of oil and gas leases has eliminated the practical results of the personalty theory.³⁷ Kansas now has a partition statute almost identical in terms to the Texas statute, a judge-made "ownership" theory contrary to the Texas theory and fresh case law that suggests that the statutory remedy will be applied there regardless of how much violence is done to concepts.

A comparison of cases in Texas, Oklahoma, Kansas and Louisiana, all heavy oil producing states, suggests that partition is subject to the same difficulties and is probably equally available, either in kind or by sale, in states with widely differing

27 IOWA CODE ANN. § 651-3 (1950); MASS. ANN. LAWS c. 241, § 31 (1956); NEV. REV. STAT. § 39.010 (1957); N.J. REV. STAT. § 2A:56-6 (1952); UTAH CODE ANN. § 78-39-9 (1953); VA. CODE ANN. § 8-692 (1950); WASH. REV. CODE § 7.52.080 (1956). N.C. GEN. STAT. § 46-3 (1950) has been construed as not permitting partition of part of a tract. *Luther v. Luther*, 157 N.C. 499, 73 S.E. 102 (1911).

28 MASS. ANN. LAWS c. 241, § 1 (1956); S.D. CODE § 37-1417 (1939); WIS. STAT. ANN. § 276.01 (1958).

29 W. VA. CODE ANN. § 3640 (1955); VA. CODE ANN. § 8-690 (1950).

30 MISS. CODE ANN. § 960 (1942).

31 SULLIVAN, HANDBOOK OF OIL AND GAS LAW § 12 (1955).

32 See, e.g., *Bacon v. Wahrhaftig*, 97 Cal. App. 2d 599, 218 P.2d 144 (1950); *contra*, *Strait v. Fuller*, 184 Kan. 120, 334 P.2d 385 (1959).

33 *Garza v. De Montalvo*, 147 Tex. 525, 217 S.W.2d 988 (1949). See *Krone v. Lacy* 168 Neb. 792, 97 N.W.2d 528 (1959).

34 *State Highway Comm'n v. Cochran*, 327 S.W.2d 733 (Ark. 1959). See *Aurora Gasoline Co. v. Coyle*, 174 F. Supp. 331 (E.D. Ill. 1959), and Note, *Partition: Mineral Interests in Oklahoma*, 11 OKLA. L. REV. 345 (1958).

35 *Vernon v. Union Oil Co.*, 270 F.2d 441 (5th Cir. 1959).

36 *Fawfor v. Crain*, 6 So.2d 227 (La. App. 1942). See *Pasteur v. Niswanger*, 226 Ark. 486, 290 S.W.2d 852 (1956); *Hurst v. Paken Oil Co.*, 228 Ky. 257, 152 S.W.2d 981 (1941). See discussion in Note, *Can Co-Lessees Under An Oil and Gas Lease Compel a Partition in Kind?*, 3 WYO. L.J. 144 (1949); Annot., 173 A.L.R. 854 (1948).

37 *Strait v. Fuller*, 184 Kan. 120, 334 P.2d 385 (1959). Summers, in his recent treatise on oil and gas, skirts discussion of the theories and outlines, instead, the rights and duties of owners of minerals. 1 SUMMERS, OIL AND GAS, ch. 1-2 (1958).

statutory provisions, mineral interest theories, and oil and gas leasehold concepts.³⁸

III. COMPULSORY PARTITION IN KIND OF INTERESTS IN OIL AND GAS

Common law partition is confined to a metes and bounds distribution of the property; the usual holding is that only under statute may the court order the property sold and its proceeds distributed to the cotenants.³⁹ Partition by sale being possible only under a statute, the party seeking it, either as plaintiff or as defendant answering plaintiff's petition for partition in kind, must bring himself within the statutory terms.⁴⁰

Most state courts have decided that partition in kind is the fundamental solution to the problem of quarrelling cotenants, and that the alternative of sale and distribution can only arise when partition in kind is inequitable.⁴¹ The Mississippi court, pondering a division of interests in subsurface gravel, denied partition by sale when plaintiff failed to show that it was more equitable than partition in kind, even though neither alternative, apparently, would have been unfair.⁴² The Louisiana court reversed a "partition by licitation" order last year because the plaintiff could not prove that partition in kind of a surface tract would cause a loss in value of the tract held in joint tenancy or otherwise work a hardship on any of the joint tenants concerned.⁴³ West Virginia requires a party seeking partition by sale to show both that partition in kind would be inconvenient to the cotenants and that partition by sale would promote their interests. Kentucky permits partition by sale of minerals if it can be shown — as it almost always can — that subsurface mineral distribution is uncertain.⁴⁴ Problems of mineral distribution cannot be skirted by partitioning only the surface and leaving the minerals in cotenancy;⁴⁵ the court is expected to draw upon its equitable resources in finding a solution.⁴⁶

The policy commitment of partition law in general is that an interest holder in realty should be allowed to take his share of "ownership" in land unless this would be prejudicial to other interest holders. The problem in oil and gas interests is born of a conflict between this policy and the universal uncertainty of what lies hundreds of feet beneath the surface of an undeveloped tract. The case law of mineral estates partition is principally a series of attempts to keep the policy and at the same time avoid what Thornton calls "the domain of mere speculation."⁴⁷

The leading case in Texas, *Henderson v. Chesley*,⁴⁸ construing that state's rather liberal statute,⁴⁹ set as the ideal, "segregation to an owner of any interest in real estate in the broadest sense."⁵⁰ Joint tenants, the Texas court said, are "joint owners of an interest in the land and entitled to possession, with the privilege or right to take their interest *from the ground*."⁵¹ The court there predicated a presumption

38 Cf. Wallace, *Partition of Mineral Interests*, NINTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 211 (1958); Note, *Partition: Mineral Interests in Oklahoma*, 11 OKLA. L. REV. 345 (1958).

39 See 2 THORNTON, OIL AND GAS, § 437, pp. 744-745 (5th ed. 1932); TIFFANY, REAL PROPERTY, § 307, p. 317 (abridged ed. 1940).

40 *Hardin v. Eubank*, 245 S.W.2d 554 (Tex. Civ. App. 1952); *Smith v. Greene* 76 W. Va. 276, 85 S.E. 537 (1915).

41 *Bardelon v. Sterkx*, 111 So.2d 791 (La. 1959). Cf. *Batchelder v. Monroe*, 335 Mass. 216, 139 N.E.2d 385 (1957); *Williams v. Skinner*, 195 Okla. 321, 157 P.2d 181 (1945); *Outlaw v. Bowen*, 285 S.W.2d 280 (Tex. Civ. App. 1955).

42 *Blake v. St. Catherine Gravel Co.*, 218 Miss. 713, 67 So.2d 712 (1953).

43 *Babineaux v. Babineaux*, 112 So.2d 620 (La. 1959).

44 *Bracken v. Everett*, 95 W. Va. 550, 121 S.E. 713 (1924); *Ball v. Clark*, 150 Ky. 383, 150 S.W. 359 (1912).

45 *Johnson v. Bussey*, 95 S.W.2d 990 (Tex. Civ. App. 1936).

46 *Gillet v. Powell*, 174 Kan. 88, 254 P.2d 258 (1953).

47 2 THORNTON, OIL AND GAS 437 (5th ed. 1932).

48 273 S.W. 299 (Tex. Civ. App. 1925), *aff'd per curiam*, 116 Tex. 335, 292 S.W. 156 (1927).

49 TEX. CIV. STAT. ANN. § 6082 (Vernon 1949).

50 273 S.W. 299, at 302.

51 *Ibid.* (emphasis supplied).

that oil and gas lies evenly beneath the surface of supposed mineral lands upon which there has been no development.

A lower Texas court a decade later ordered partition in kind when parties on both sides admitted that surface acreage was of equal value, acre for acre, in an oil field. This court explained its holding by saying that partition in kind of mineral estates would be ordered in any case where there was no reason to believe that there was oil and gas under the land or where each acre was of equal value in a known oil and gas field.⁵²

The presumption enunciated in *Henderson v. Chesley* disappears when evidence is introduced either as to uneven mineral distribution,⁵³ or even distribution,⁵⁴ and the case is then decided on its facts.

Other courts have not been as liberal as Texas. The leading case in Michigan, *Fortney v. Tope*,⁵⁵ denied partition in kind of an undeveloped tract in the middle of a producing oil and gas field. The court did not comment on evidence as to mineral distribution. A dissenting opinion urged Thornton's distinction between open mines, susceptible only of partition by sale, and closed mines, susceptible of partition in kind.⁵⁶

The Oklahoma court denies partition in kind in cases where there is mineral development on or near the land, oil or gas is known to exist under the land, or partition in kind could not be made without "manifest injury."⁵⁷ In Kentucky, the court defined oil and gas as "fugacious, uncertain and speculative," and denied partition in kind, stating:

Oil may underlie all or any part or none of [the tract] and a compulsory partition of such mineral rights by laying off sections of the surface is but an exchange of properties "sight unseen," and, however fairly conducted, bears more resemblance to a speculative enterprise than it does to an equitable division.⁵⁸

The same court, however, reversed a decree of partition by sale of a coal field, saying that partition in kind was mandatory if there was no mineral production and no mineral leases and metes and bounds division was possible without "great prejudice to any of the owners."⁵⁹ The difference may well be explained by the fact that Kentucky seems to rely on Thornton's broad assertion that partition in kind is not possible unless it is shown that minerals lie evenly beneath the surface. Thornton's principle is apparently not applied to interests in other minerals.⁶⁰

The Utah court, in a mine case which is possibly authority for oil and gas partition in that state, held that a cotenant had an "inherent right" to partition in kind unless the contesting cotenant could show "by a preponderance of the evidence" that division would result in "great prejudice."⁶¹ Kansas has denied par-

52 *Humble Oil and Refining Co. v. Lasseter*, 95 S.W.2d 730 (Tex. Civ. App. 1936), followed in *Amerada Oil Corp. v. Cheesman*, 223 S.W.2d 74 (Tex. Civ. App. 1949). See *Outlaw v. Bowen*, 285 S.W.2d 280 (Tex. Civ. App. 1955), giving a jury the chore of deciding whether partition in kind is fair.

53 *White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967 (1948).

54 *Irons v. Fort Worth Sand & Gravel Co.*, 284 S.W.2d 215 (Tex. Civ. App. 1955).

55 262 Mich. 593, 247 N.W. 751 (1933).

56 2 THORNTON, OIL AND GAS, § 436, p. 742 (5th ed. 1932). The dissenting opinion misconstrues Thornton, who favors a presumption exactly contrary to that adopted in Texas. *Id.*, § 437, p. 745.

57 *Collier v. Collier*, 184 Okla. 38, 84 P.2d 603 (1938).

58 *Union Gas & Oil Co. v. Wiedemann Oil Co.*, 211 Ky. 361, 277 S.W. 323, 332 (1924); followed in *Warfield Natural Gas Co. v. Cassady*, 266 Ky. 217, 98 S.W.2d 495 (1936).

59 *Tuggle v. Davis*, 292 Ky. 27, 165 S.W.2d 844 (1942).

60 2 THORNTON, OIL AND GAS § 437 (5th ed. 1932).

61 *Ryan v. Egan*, 26 Utah 241, 72 Pac. 933 (1903). One expert's testimony was not, in this case, evidence enough to satisfy the court. See *Manley v. Boone*, 159 Fed. 633 (9th Cir. 1908), construing Alaska's statute, now ALASKA COMP. STATS. ANN. § 56-1-41 (1949), patterned on what is now ORE. REV. STAT. § 105.205 (1957).

tion in kind of a tract on which there were two producing oil wells⁶² but Kansas law is open to renewed conjecture since the passage of a mineral interests partition statute in that state⁶³ and judicial construction implicitly admitting that the personalty theory of mineral ownership followed there has been diminished.⁶⁴

Oklahoma has refused to partition only part of a mineral estate over the objection of defendant cotenants.⁶⁵ An unusual 1958 case in that state ruled that, where surface and minerals were separately owned but both had been sold at a partition sale, distribution of the proceeds had to be governed by bids received before the sale of the separate estates.⁶⁶ The case suggests that the court tried to preserve the better of two worlds by letting partition by sale be governed by the value of the separate estates, not exceeding in the aggregate the market value of the whole.

Louisiana has taken an extremely conservative view of partition in kind of mineral interests. In at least one case, partition in kind of surface interests was apparently defeated by an allegation that the land contained minerals.⁶⁷ In another case the court said, in denying partition in kind to an oil and gas lessee, that land known to have oil and gas under its surface is not susceptible of partition in kind.⁶⁸

The broad problem seems to be whether a petitioning cotenant should be allowed to have a bird in the bush if he wants it—even at the price of forcing other cotenants to submit to the same uncertainty. The presumption followed in the Texas courts, obviously a fiction in cases like *Henderson v. Chesley* where nothing whatever is known about the minerals concerned, has just that tendency.

IV. PARTIES PLAINTIFF AND DEFENDANT: THE LESSEE'S ABILITY TO PARTITION

Even assuming in the abstract that partition of a mineral interest is possible, courts still face a struggle in deciding who may compel it. Since the greatest share of the risk and most of the capital in an oil and gas field is represented by the "working interest,"⁶⁹ the ability of an oil and gas lessee to compel partition is a basic practical question.

The Texas statute is construed as giving cotenants of an oil and gas lease the ability to compel partition of their interests,⁷⁰ but the power does not extend to lessee attempting partition as against non-joining cotenants of the lessor. The court requires an equality of possessory interest.⁷¹ Neither is the lessee a necessary party to a partition suit between cotenants of the fee interest when the lessee does not contest the partition.⁷² A grant of an interest in the minerals without ingress and egress has been held in Texas to be an overriding royalty interest rather than an "interest in the land." The royalty owner in this case was denied the power to compel partition.⁷³

Oklahoma, refusing to decide whether the interest was realty or personalty, permitted partition of an oil and gas lease on the same criteria followed there in partitioning mineral fee interests.⁷⁴ In a later case, when one cotenant's interest was

62 Fry v. Dewees, 151 Kan. 488, 99 P.2d 844 (1940).

63 KAN. GEN. STAT. ANN. § 60-2101 (Supp. 1957).

64 Strait v. Fuller, 184 Kan. 120, 334 P.2d 385 (1959).

65 Coon v. Mitchell, 205 Okla. 339, 237 P.2d 885 (1951).

66 Jones v. Hayton, 329 P.2d 1056 (Okla. 1958).

67 Gulf Refining Co. v. Hayne, 138 La. 555, 70 So. 509 (1915).

68 Connette v. Wright, 179 La. 478, 89 So. 626 (1921).

69 Prendergast, *What Hath Wimble Bought: A Short Course on the Law of Oil and Gas*, 45 A.B.A.J. 915 (1959).

70 Texas Co. v. Cain, 177 S.W.2d 251 (Tex. Civ. App. 1944).

71 Medina Oil Co. v. Murphy, 233 S.W. 333 (Tex. Civ. App. 1921). But this is apparently not the law in Oklahoma. See Note, *Partition: Mineral Interests in Oklahoma*, 11 OKLA. L. REV. 345 (1958).

72 Garza v. De Montalvo, 147 Tex. 525, 217 S.W.2d 988 (1949).

73 Belgam Oil Co. v. Wirt Franklin Petroleum Corp., 209 S.W.2d 376 (Tex. Civ. App. 1948). See Lane v. Hughes, 228 S.W.2d 986 (Tex. Civ. App. 1950).

74 Wolfe v. Stanford, 179 Okla. 27, 64 P.2d 335 (1937), *overruling* Clark v. Mercer Oil Co., 139 Okla. 48, 281 Pac. 283 (1929). See Sweeney v. Bay State Oil & Gas Co., 192 Okla. 28, 133 P.2d 538 (1943).

to deposits lying deeper than the other's, the court permitted partition of interests held in common.⁷⁵ Kansas, identifying an oil and gas lease as personalty rather than realty, held that an action to partition a leasehold in minerals was an equitable action not controlled by that state's now modified statute. The case in equity being made, however, partition was granted.⁷⁶

In Louisiana a lessee has merely an interest in subsurface minerals as personalty and an ability to explore for them, not limiting the fee owner's ability to explore at the same time.⁷⁷ A sub-lease and voluntary division of a mineral lease is permitted there.⁷⁸ The Illinois court has construed the Illinois partition statute to include mineral leases and added that, in its opinion, common law would permit partition even if the statute did not.⁷⁹ A recent case in Arkansas places a lessee outside the purview of its partition statute.⁸⁰

V. JUDICIAL REMEDIES OTHER THAN PARTITION

Three states permit courts to supervise or compel production on tracts where cotenants' disagreement is resulting in loss of mineral wealth;⁸¹ this judicial action is apparently possible even in the absence of a statute.⁸² Another alternative is for the court to find that voluntary partition in fact has already occurred, a finding based on the fact that the cotenants had been living on separate portions of the tract for several years.⁸³

At common law a lease of the whole tract executed by one joint tenant severed the joint tenancy and ended the characteristic "right of survivorship." While this is not the necessary holding where an oil and gas lease is concerned, courts may find an accounting by the lessor-joint tenant called for, or a temporary severance, the joint tenancy being revived if the lease expires before the lessor-joint tenant dies, or even hold that there has been a partial severance, affecting only the part of the tract covered by the lease.⁸⁴ Development by one cotenant, claiming all the mineral ownership, may very well block an action for partition, at least until there has been an accounting for minerals already taken.⁸⁵

Courts putting a partition action under the judiciary's broad equity powers are liberal in sustaining novel solutions to partition problems, but the Tenth Circuit reversed a district court's attempt to compel cotenants to execute a development lease.⁸⁶

VI. VOLUNTARY PARTITION

Cotenants may end their joint ownership by mutual agreement, usually accom-

75 Harper v. Ford, 317 P.2d 210 (Okla. 1957).

76 Holland v. Shaffer, 162 Kan. 474, 178 P.2d 235 (1947). The rule is probably changed by KAN. GEN. STAT. ANN. § 60-2101 (Supp. 1957). See Strait v. Fuller, 184 Kan. 120, 334 P.2d 385 (1959).

77 Starr Davis Oil Co. v. Webber, 218 La. 231, 48 So.2d 906 (1950), discussed in 3 SUMMERS, OIL AND GAS 489 (1958). This is also the West Virginia approach; see Collins v. Stalnaker, 131 W. Va. 543, 48 S.E.2d 430 (1948).

78 Stacy v. Midstates Oil Corp., 214 La. 173, 36 So.2d 714 (1947).

79 Pierce v. Pierce, 4 Ill.2d 497, 123 N.E.2d 511 (1954).

80 Pasteur v. Niswanger, 226 Ark. 486, 290 S.W.2d 852 (1956).

81 ILL. ANN. STAT. c. 104 § 25-33 (Smith-Hurd 1955); VA. CODE ANN. § 8-692 (1950); W. VA. CODE ANN. § 3642 (Supp. 1959).

82 See Thlocco Oil Co. v. Bay State Oil & Gas Co., 207 Okla. 83, 247 P.2d 740 (1952), sustained under the court's broad equity powers. But see Shell Oil Co. v. Seeligson, 231 F.2d 14 (10th Cir. 1955), reversing Seeligson v. Eilers, 131 F. Supp. 639 (D. Kan. 1955).

83 Farra v. Johnson, 302 S.W.2d 570 (Ky. 1957).

84 These possibilities are discussed in Note, *Effect of Mineral Lease on Joint Tenancy*, 12 OKLA. L. REV. 302 (1959). See Mosburg, *Effect of Lessor's Assignment of Part of Leased Premises upon Right to Receive Oil and Gas Royalties*, 11 OKLA. L. REV. 149 (1958); Thompson v. Whitfield, 203 S.W.2d 268 (Tex. Civ. App. 1947).

85 See Dotson v. Branham, 197 Va. 674, 90 S.E.2d 783 (1956).

86 Shell Oil Co. v. Seeligson, 231 F.2d 14 (10th Cir. 1955), reversing Seeligson v. Eilers, 131 F. Supp. 639 (D. Kan. 1955).

panied by warranty deeds to one another. The effect of this, according to a recent decision by the Georgia court, is that:

A partition deed assigns to the heir or co-tenant only what is already his. He acquires no title to the land by such a deed. He already has title. . . . The partition deed merely fixes the boundaries to the share that he may hold it in severalty.⁸⁷

The agreement requires the concurrence of all parties and failure to join one party will render it invalid.⁸⁸ The Louisiana court has held that voluntary partition is an exception to its oft-repeated dictum that the only permissible partition of mineral interests is by licitation.⁸⁹ The agreement partitions both mineral and surface interests, even though it doesn't specifically mention the minerals,⁹⁰ but the agreement will apparently be upheld even though it affects only part of the tract held in cotenancy.⁹¹

Voluntary partition is invalid if its purpose is fraudulent and, if the agreement affects the interests of a party other than a cotenant, he must concur.⁹² A private agreement to sever land and minerals is not enforceable at a tax sale when both land and minerals have been assessed and taxed as one tract.⁹³

Conservation rules in Texas do not prevent severance of both the minerals and surface of a tract on which there is no mineral development, although the rules would apparently block such severance, or at least limit it, if the land were producing oil.⁹⁴ The Louisiana court will enforce a temporary agreement between cotenants not to partition, but only if it is made in unmistakable terms.⁹⁵ When the parties have consented to partition and the court appoints a board of appraisal commissioners, suggestions by the board are advisory and do not bind the court in making a partition order.⁹⁶

VII. EFFECT OF PARTITION ON PARTIES NOT IN POSSESSION

A voluntary partition of mineral fee interests does not affect a pre-existing oil and gas lease, which is still valid as to the entire tract, each partitioning cotenant being entitled to royalties according to his interests.⁹⁷ The lessee may, however, divide his own working interest.⁹⁸ Cotenants of a surface tract are amenable to partition, even if only one of them owns all the minerals under the tract,⁹⁹ and even in cases where partition will "disturb" the interests of an oil and gas lessee.¹⁰⁰ The California court is probably not in accord with the prevailing judicial attitude when it requires cotenants suing for partition to join oil and gas lessees as necessary parties.¹⁰¹ Owners of royalty interests may not compel partition,¹⁰² they are not

87 *Smith v. Smith*, 107 S.E.2d 530, 536 (Ga. 1959). See *Griffin v. Reilly*, 275 S.W. 242 (Tex. Civ. App. 1925). This is generally discussed in 3 SUMMERS, OIL AND GAS §§ 535-538, pp. 478-499 (1958).

88 *Gurule v. Chacon*, 61 N.M. 488, 303 P.2d 696 (1956).

89 *Garner v. Sims*, 191 La. 289, 185 So. 27 (1938).

90 *Garza v. De Montalvo*, 147 Tex. 525, 217 S.W.2d 988 (1949).

91 *Landgrebe v. Rock Hill Oil Co.*, 273 S.W.2d 636 (Tex. Civ. App. 1954).

92 *Carter Oil Co. v. McQuigg*, 112 F.2d 275 (7th Cir. 1940).

93 *Payne v. A.M. Fruh Co.*, 98 N.W.2d 27 (N. Dak. 1959).

94 See *Shell Petroleum Corp. v. Railroad Comm'n*, 116 S.W.2d 439 (Tex. Civ. App. 1938), *construing* TEX. REV. CIV. STAT. § 6014a (1949).

95 *Delta Drilling Co. v. Oil Finance Corp.*, 195 La. 407, 196 So. 914 (1940). But a permanent no-partition agreement is void. *Connette v. Wright*, 149 La. 478, 89 So. 626 (1921).

96 *Thlocco Oil Co. v. Bay State Oil & Gas Co.*, 207 Okla. 83, 247 P.2d 740 (1952).

97 *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924); *Garner v. Sims*, 191 La. 289, 185 So. 27 (1938); *Landgrebe v. Rock Hill Oil Co.*, 273 S.W.2d 636 (Tex. Civ. App. 1954). *But See* *Spikes v. Magnolia Petroleum Co.*, 158 Kan. 689, 149 P.2d 348 (1944).

98 *Stacy v. Midstates Oil Corp.*, 214 La. 173, 36 So.2d 714 (1948).

99 *Sadler v. Public Nat'l Bank and Trust Co.*, 172 F.2d 870 (10th Cir. 1949).

100 *Erwin v. Hines*, 190 Okla. 99, 121 P.2d 612 (1942).

101 *Bacon v. Wahrhaftig*, 97 Cal. App. 2d 599, 218 P.2d 144 (1950).

102 *Hudgins v. Lincoln Nat'l Life Ins. Co.*, 144 F. Supp. 192 (E.D. Tex. 1956).

necessary parties to a suit for partition,¹⁰³ and their interests are not disturbed by partition of either surface or minerals.¹⁰⁴

VIII. EFFECT ON OWNERS OF MINERAL INTERESTS OF PARTITION OF THE SURFACE

Both common law and partition statutes give to a cotenant of a surface tract the ability to compel partition in kind, in any case where this is not inequitable. The mere possibility of minerals under the tract will not destroy this standing.¹⁰⁵ A partition of the surface tract is a partition of unexploited minerals underlying the tract, no specific mention of the minerals being necessary in the decree.¹⁰⁶ The Kentucky court seems to express the universal attitude toward the effect of surface partition in areas where mineral development is barely possible when it says that "a springing hope" will not be given judicial cognizance. Something more, "a reasonable expectancy," is required.¹⁰⁷

The Texas court will not permit a partition of only the surface where mineral interests are in dispute¹⁰⁸ and Oklahoma requires separate consideration of minerals and surface where they are separately owned.¹⁰⁹ Partition of only part of the minerals is not permitted in Oklahoma.¹¹⁰

Conclusion

A galaxy of property theories and fifty different partition statutes have not created the amount of disagreement on mineral partition in the United States that might have been expected. The only significant areas of jurisdictional difference seem to be partition in kind of mineral lands and the ability of an oil and gas lessee to compel partition. The Texas court seems to be taking a realistic approach to both issues and it is possible that there is a tendency in other states to follow Texas' lead.

The presumption that minerals lie evenly beneath undeveloped lands, enunciated in *Henderson v. Chesley*,¹¹¹ is a fiction that seems to meet the speculative realities of mineral investment. It might be objected that the Texas court, in permitting partition in kind where there is no clear evidence that it is unjust, is forcing a dissenting cotenant to take the risk that his part of the tract will be barren. But this is, after all, the same risk he was taking as a cotenant. The alternative, sale and distribution, gives him no greater security; and it forces an owner who wants to take his chances to sell for less than he believes his interests are worth.

Partition by sale and distribution, rather than in kind, results in mineral interests being controlled by large investors and fosters a tendency to eliminate small, private development.¹¹² This was the precise argument that the Michigan court in *Fortney v. Tope* thought unworthy of judicial consideration.¹¹³

Finally, Texas seems to be more in accord with the expectations of a mineral

103 *Douglas v. Butcher*, 272 S.W.2d 553 (Tex. Civ. App. 1954); *Collins v. Stalnaker*, 131 W. Va. 543, 48 S.E.2d 430 (1948).

104 *Belgam Oil Co. v. Wirt Franklin Petroleum Corp.*, 209 S.W.2d 376 (Tex. Civ. App. 1948). This is equally true of owners of easements in gross. *Warm Springs v. Bulloch*, 213 Ga. 164, 97 S.E.2d 582 (1957).

105 *Tuggle v. Davis*, 292 Ky. 27, 165 S.W.2d 844 (1942).

106 *Coates v. De Garcia*, 286 S.W.2d 691 (Tex. Civ. App. 1956); *Morley v. Smith*, 93 W. Va. 682, 118 S.E. 135 (1923).

107 *Tuggle v. Davis*, 292 Ky. 27, 165 S.W.2d 844, 847 (1942).

108 *Johnson v. Bussey*, 95 S.W.2d 990 (Tex. Civ. App. 1936).

109 *Ellis v. Cook*, 205 Okla. 13, 234 P.2d 412 (1951).

110 *Ibid.*

111 273 S.W. 299 (Tex. Civ. App. 1925), *aff'd per curiam* 116 Tex. 335, 292 S.W. 156 (1927).

112 An argument made in Note, *Partition: Mineral Interests in Oklahoma*, 11 OKLA. L. REV. 345 (1958).

113 262 Mich. 593, 247 N.W. 751 (1933).

investor when it permits partition suits to be brought by cotenants of oil and gas leases. The oil and gas lessee is the focal point of mineral development. His interest is at the same time the most expensive and the most speculative in the field of oil and gas investment.¹¹⁴ Sound policy would seem to require that he be given the widest possible latitude in efforts to make his venture worth while.

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¹¹⁴ See Prendergast, *What Hath Wimble Bought: A Short Course on the Law of Oil and Gas*, 45 A.B.A.J. 915 (1959). It is at least arguable that Oklahoma is a jump ahead of Texas in permitting the lessee to compel partition as against cotenants of the mineral fee interest. See Note, *supra*, note 112.