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Oil and Gas -- The Effect of Theories of Ownership Upon the Remedies of an Oil and Gas Lessee

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NOTES

Oil and Gas

The Effect of Theories of Ownership Upon the Remedies of an Oil and Gas Lessee

As Cardozo once said: 1

The law of our day faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth.

It is with no little temerity that the writers here attempt to satisfy, in a very limited field of course, the first need underscored by the late Justice.

In the law of oil and gas, a constant source of confusion has been the flood of "interests" said to be created by an oil and gas lease. The nature of this interest created is in a large measure determined by the theory of ownership smiled upon in any one state. And in a practical sense, legal remedies are often molded by the theory of ownership and, too, by the nature of the interest created in an oil and gas lease.

The following will be a discussion, in a selection of states, of some of the remedies available to an oil and gas lessee, as influenced by the local theory of ownership and by the nature of the lessee's interest.

I.

Texas

Texas, which boasts one of the largest producing areas in the world, upholds the theory of absolute ownership of oil and gas in place,2 limited, of course, by the rule of capture 3 and, to some extent,

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by conservation legislation. So emphatically have Texas courts embraced this theory of ownership that upon occasion, they have held that an oil and gas lease operates as a present sale of the oil and gas in place. Summers concludes that:

Since the decision of Stephens County v. Mid-Kansas Oil & Gas Co., the Texas courts have steadily adhered to the principle that an oil and gas lease, regardless of the character of the granting clause, creates in the lessee a corporeal defeasible or determinable fee interest in the oil and gas. With the lessee given so dignified an interest, one might well predict that full use of possessory remedies would be allowed him. And this is generally true.

Texas has replaced common law ejectment with a statutory remedy of trespass to try title. In keeping with the property interest acquired by the oil and gas lessee, he is allowed to utilize this action to protect his mineral estate for the following reasons:


5 Southern Oil Co. v. Colquitt, 28 Tex. Civ. App. 292, 69 S.W. 169, 171 (1902). See also Howell v. Commissioner of Internal Revenue, 140 F. (2d) 765, 767 (5th Cir. 1944), where a federal court ruled that "Under the law of Texas an oil lease is a present sale of oil and gas in place."


7 TEX. STAT., REV. CIV. art. 7364 (1948): "All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by an action of trespass to try title."

8 Watkins v. Certain-Teed Products Corp., 231 S.W. (2d) 981, 985 (Tex. Civ. App. 1950). True, this case involved not a conventional oil and gas lease, but instead an absolute deed conveying "all of the gypsum . . . and all other minerals of any kind whatsoever . . ." Id. at 982. But in Texas even the orthodox delay rental type of oil and gas lease conveys absolute title to the oil and gas in place, subject to defeasance. Sheppard v. Stanolind Oil & Gas Co., 125 S.W. (2d) 643 (Tex. Civ. App. 1939). Thus, until condition broken, by failure to drill, produce, or pay delay rentals, an absolute deed and an oil and gas lease are similar in operative effect. This conclusion is strengthened by the words of the court in Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160,
... possession of the surface after severance of the mineral from the surface estate will not affect ownership of the mineral estate; ... fee ownership of mineral estate is of equal dignity as surface estate. ...

When the holder of an oil and gas lease uses this remedy to assert his title to the mineral estate, he is under the burden of establishing his own title under the lease and he cannot recover on the weakness of his lessor's title.9

The right of the lessee to compel specific performance, though recognized in Texas, may be limited in some instances. For example, in Elder v. Miller,10 where the plaintiff sought to enforce, in his favor as lessee, a lease of the oil, gas and mineral rights, it was held that the action must be brought in the county wherein the land lies because "oil and gas in place are realty, and ... the conveyance of the same, even by a so-called mineral lease, is nevertheless a conveyance of an interest in land."11

Partition in Texas is governed by a statute12 which has been construed not to confer the right to compulsory partition upon the lessee of one cotenant as against his lessor or other tenants.13 The rationale here, rather simple but at variance with other holdings which outline the nature of the lessee's interest, is that the interest of the lessee and the lessor are not common interests, the estate of the lessee being of less dignity and subservient to that of the landowner.14 This seems opposed to Watkins v. Certain-Teed Products Corp.,15 which held that the lessee obtained a fee interest in the mineral estate equal in dignity to that of the surface estate. Of course, the lessee or owner of an undivided one-half interest in an oil and gas estate may compel partition.16

A lessee, by reason of the property interest he acquires under his lease, may cause a receiver to be appointed to protect the property

254 S.W. 290, 294 (1923): "... there is no real difference in the title conveyed, whether an instrument takes the form of a grant of the exclusive right to mine and appropriate all of a certain mineral ... or takes the form of a demise of the land, for the sole purpose of mining operations, coupled with a grant of the exclusive right to produce and dispose of the mineral ... or takes the form of a grant of the mineral with the exclusive right to mine for, produce, and dispose thereof. . . ."

11 Id. at 1173.
12 Tex. Stat., Rev. Civ. art. 6082 (1948): "Any joint owner or claimant of . . . petroleum, or gas lands, whether held in fee or by lease or otherwise, may compel a partition thereof between joint owners or claimants thereof. . . ."
14 Id. at 334.
from a trespassing party who has drilled upon his lease or who has
trespassed beneath the surface and has a well bottomed upon the
lessee's property.\textsuperscript{17} However, in order to be allowed this remedy, the
lessee cannot wait until the well of the trespasser is ready to be
brought in before objecting. He will be estopped from obtaining a
receiver unless he attempts to obtain an injunction or sequestration
within a reasonable time after he becomes aware of the trespass.\textsuperscript{18}
In either instance, a surface or subsurface trespass, the lessee is
entitled to receivership because the oil or gas that the receiver
is taking from the ground belongs to him.

II.

Pennsylvania

As in Texas, the ownership in place theory is given judicial blessing
in Pennsylvania. One of its courts, in \textit{Westmoreland & Cambria Nat.
Gas Co. v. De Witt}, stated: \textsuperscript{19}

They [oil and gas] belong to the owner of the land, and are part
of it, so long as they are on or in it, and are subject to his control;
but when they escape, and go into other land, or come under another's
control, the title of the former owner is gone.

From this position one would expect the same approach to remedies
as in Texas: that peculiarities in lease verbiage give way to an
interpretation in which a full property interest passes to the lessee.
But this is not the case.

Instead, Pennsylvania courts rely upon the phraseology of the
granting clause to determine the nature and extent of the lessee's
interest, and ultimately his remedies. As clearly explained elsewhere,\textsuperscript{20}
an instrument giving merely the right to enter and operate for minerals
is similar to an English mining \textit{license},\textsuperscript{21} and the holder of the right

\textsuperscript{17} Simmons v. East Texas Oil Refining Co., 68 S.W. (2d) 302 (Tex. Civ.

\textsuperscript{18} Simmons v. East Texas Oil Refining Co., 68 S.W. (2d) 302, 305 (Tex.
Civ. App. 1933).

\textsuperscript{19} 130 Pa. 235, 18 Atl. 724, 725 (1889).

\textsuperscript{20} 1 SUMMERS, \textit{op. cit. supra} note 6, § 155; 3 SUMMERS, \textit{op. cit. supra} note
6, § 532; Comment, \textit{Interests Created by Oil and Gas Leases in Pennsylvania},

\textsuperscript{21} "Much confusion as to the true nature of the legal interest created by
oil and gas leases is due to the unfortunate usage by the English courts of the
term 'license' to distinguish between the legal interest created by certain types
of grants for the purpose of mining solid minerals, one of which they called
a 'mining license' and the other a 'mining lease.' . . ."

The English authorities have defined the interest created by a so-called license
to mine as an irrevocable, assignable, nonpossessory, or incorporeal interest in
land..." 1 SUMMERS, \textit{op. cit. supra} note 6, § 154.
cannot protect himself through use of ejectment, until he enters and produces oil or gas. But if the granting clause speaks of a lease of the land, even though merely for the sole and only purpose of mining and operating for oil and other minerals, then a corporeal hereditament, giving the lessee the remedy of ejectment, is raised.

But, to be sure, as in Texas, an absolute conveyance of the minerals, including the oil and gas in place, can be accomplished by means of a mineral deed, if the words used definitely evince the intent.

Turning to trespass, it is patent that only the lessee with the "license" type lease will be interested in trespass quare clausum fregit as a remedy to protect his rights in the premises. And this lessee is given this action. On the other hand, the lessee who has the "lease" type, since he has a corporeal interest, will find more effective relief in ejectment. And, of course, there is no question raised here about the use of trespass de bonis asportatis or trover where oil or gas, either severed initially by the plaintiff or by the wrongdoer, has been tortiously taken. Presumably Pennsylvania would sanction application of these devices.

In connection with injunctive relief, or negative specific performance, the Pennsylvania theory of ownership has played a unique, decisive role. Complainants in a prominent case had obtained a lease of land for oil and gas purposes. The lessor, claiming forfeiture by the complainants, leased the same land to the respondents for oil and gas operations. When the complainants sued to enjoin respondents' drilling, the master ruled that the complainants, though they were controlling the only well into the producing formation, were out of possession, and that the lessor, admittedly in command of the surface,

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22 E.g., Kelly v. Keys, 213 Pa. 295, 62 Atl. 911, 912-3 (1906). But it should be noted that this case has been discounted to some extent. One Pennsylvania court has remarked that Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 Atl. 207 (1909), "corrected an oversight in the Kelly Case and in effect overruled the earlier case as a reference to the leases set forth in the paper books in those cases will show. In the earlier [Kelly] case the lease was treated as a mere license which was contrary to many previous decisions..." Appeal of Baird, 132 Pa. Super. 573, 1 A. (2d) 485, 489 (1938), aff'd, 334 Pa. 410, 6 A. (2d) 306 (1939).


27 See Valley Smokeless Coal Co. v. Hager, 292 Pa. 440, 141 Atl. 257 (1928), which involved the wrongful taking of coal. No Pennsylvania case directly in point was found.

was in. This, according to the master, allowed the lessor to lease the same land to the respondents. The Supreme Court of Pennsylvania reversed and granted the injunction on the ground that

The real subject of possession to which complainant is entitled under the lease was the oil or gas contained in the land. The learned master says gas is a mineral, and while in situ is part of the land, and therefore [the lessor's] possession of the land is possession of the gas.

After pointing out that, contrary to the master's theory, oil and gas are owned by the owner of the surface only until they escape or come under another's control, the court ruled that the complainants had, by means of their well, taken control of the gas in issue, were thus in possession, and had not forfeited their lease. No difficulties, such as lack of contract mutuality, were encountered, or, if so, they went unmentioned.

Pennsylvania has no statute expressly allowing partition, either in kind or by sale, of the lessee's interest, but common law partition has been used.

III.

West Virginia

Musgrave v. Musgrave shows that West Virginia supports the ownership in place theory. The court there announced:

That oil and gas are minerals and belong to the owner of the land cannot be denied. They are the property of him upon whose land they are produced. It is true that it is generally believed, and it may be conceded, that these minerals are more or less vagrant in their character. They do not persist in the same position in the earth at all times, but the owner of land has the right to develop the same for the purpose of producing oil and gas, and, if in the course of this development oil or gas from adjacent lands escapes to his premises, it belongs to him; and, vice versa. 

So much is clear. The character of the interest passed to a lessee under an oil and gas lease is not so well outlined.

29 Id., 18 Atl. at 725.
31 86 W. Va. 119, 103 S.E. 302 (1920).
32 Id., 103 S.E. at 303.
33 In fact, as Summers indicates, 1 Summers, op. cit. supra note 6, § 157, West Virginia courts have called the lessee's interest real estate, Carter v. Tyler County Court, 45 W. Va. 806, 32 S.E. 216, 218 (1889) (a tax case), and also personal property, Charter v. Maxwell, ....W. Va....., 52 S.E. (2d) 753, 759 (1949).
Generally speaking, the lessee's interest is inchoate until discovery of oil and gas. At that time, his interest, either a right to produce or title to the oil and gas, vests. As an ordinary lessee, he is still bound by the obligations found in the lease and restricted to the term specified.

Though taxation cases, which sometimes stretch and distort property law, are largely responsible, it is safe to say that the lessee's interest after discovery of oil and gas is a chattel real, taxable as personalty, and subject to a lien of execution.

In West Virginia, ejectment may be brought by any person claiming "real estate" either as heir, devisee, purchaser, or otherwise. Consequently, to be logical, the courts would be required to deny this remedy to an oil and gas lessee, since he claims a chattel real and not real estate. In Hall v. Vernon, involving partition, the court stated that a grant of oil and gas passes nothing for which ejectment will lie.

If a stranger wrongfully extracts oil and gas from land held by a lessee under an oil and gas lease, a trespass results. The lessee can

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34 E.g., Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S.E. 655, 658 (1902).
35 Harris v. Michael, 70 W. Va. 356, 73 S.E. 934, 936 (1912): "It is assuredly true that where a lessee enters upon the leased premises and discovers oil or gas his right to produce the oil or gas becomes a vested right."
36 Core v. New York Petroleum Co., 52 W. Va. 276, 43 S.E. 128, 129 (1903): "Under the authorities, whenever oil is discovered and produced under a lease of the character of the one in question, estate and property in the oil and gas underlying the premises is vested in the lessee and his assigns." Though the inconsistency between this case and the Harris decision is obvious, Harris, decided nine years later, does not mention Core.
37 For an excellent discussion of West Virginia law on this point, supported by citations, see Hutchinson v. McCue, 101 F. (2d) 111, 116-7 (4th Cir. 1939), cert. denied, 308 U.S. 564, 60 S. Ct. 75, 84 L. Ed. 473 (1939).
38 Charter v. Maxwell, 52 S.E. (2d) 753, 759 (1949).
41 W. VA. CODE ANN. § 5419 (1949).
42 47 W. Va. 295, 34 S.E. 764, 765 (1899) (concurring opinion): "A grant to the oil and gas passes nothing for which ejectment will lie. It is a right, not to the oil in the ground, but to the oil the grantee may find."
43 E.g., Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co., 84 W. Va. 449, 100 S.E. 296 (1919). When pressed to explain how the plaintiffs, holders of an oil and gas lease, a mere chattel real, could sue in trespass for injury to land, the court answered, id., 100 S.E. at 299: "This can make no difference in the application of the principle, for the reason that the trespass committed here was to the plaintiffs' rights, regardless of what they were. Admittedly plaintiffs had the exclusive right to drill this land for oil and gas, and the defendants wrongfully took this right from them. . . . It makes no difference as to the extent of the plaintiffs' interests, the result is that they have been deprived of them, and that by the defendants' unwarranted acts." This analysis leaves much to be desired.
recover damages for the injury inflicted upon the estate or he can seek to recover the value of the oil and gas taken from the property. The measure of damages in the latter action is dependent on the nature of the trespass: willful, or mistaken and inadvertent. If willful, the measure is the value of the property at the time and place of the demand without deduction for labor and other expenses. If the trespass was unintentional and by mistake, the value of the article after severance, less the proper expenses of the severance, will be the measure of the damages.

To be expected is the rule that the lessee can sue to regain severed oil and gas wrongfully taken. This proposition depends not at all upon the theory of ownership in West Virginia, since oil and gas, once removed from the ground, are admittedly personal property. The lessee can rely upon trover for their conversion, detinue, or trespass de bonis asportatis.

There is nothing in the nature of an oil and gas lease to prevent issuance of a decree for specific performance when the proper foundation for this relief exists. West Virginia supports this rule. In the usual case, the lessee has two remedies available: an action at law for damages, and an action in equity for specific performance. The latter is the only adequate remedy, since it is the only one that can directly maintain the value of the leasehold interest. Therefore, in Smith v. Root, equity had jurisdiction of a suit brought by a senior lessee against his lessor and a junior lessee for specific execution of his lease. As in Texas, there are limitations on the use of this remedy. For example, equity will not grant specific performance when the lessee has unreasonably delayed in performing his contract.

Focusing attention on injunctive relief, one finds that the principal ground for this form of remedial action is irreparable injury. As

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44 Id., 100 S.E. at 298.
45 Ibid.
47 MORRISON-DE SOTO, OIL AND GAS RIGHTS 202 (1920).
48 An example is Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 S.E. 836 (1909), though the court spoke in terms of injunctive relief to avoid forfeiture. Id., 64 S.E. at 841.
51 See text at note 10 supra.
52 Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S.E. 433, 436-7 (1903).
53 Bettman v. Harness, 42 W. Va. 433, 26 S.E. 271, 272-3 (1896). The broad rule announced here, that injunctive relief will be afforded to prevent irreparable injury to land even though the equity court will also decide questions of legal title, was limited by Freer v. Davis, 52 W. Va. 1, 43 S.E. 164, 165 (1903), to oil and gas controversies where no fact-finding problems, such as location of boundaries and markers, are involved.
established above, oil and gas in place are considered part of the land in West Virginia. Their wrongful extraction by one lawfully in possession is waste, and if by a stranger, it is trespass. In both situations, it is irreparable injury which may be enjoined.

As to partition in this state, early vacillation has been transformed into statutory certainty. In Hall v. Vernon, a partition of oil and gas by joint owners not owning the surface was declared void. The court held that equity has no jurisdiction to partition, in kind, property rights in oil and gas. A concurring judge explained the court’s ruling:

Equity never undertakes to divide the unseen or invisible, but only that which it can see and measure so as to produce equality. Air, gas, water, and oil are not susceptible of partition in kind, independent of land, either when hidden beneath the surface or floating above it, but only when reduced to actual possession and control.

Although the rights and privileges to acquire possession of oil and gas granted by an oil and gas lease are not susceptible of partition in kind, later cases have decided that they might be sold and the proceeds divided. Therefore, the lessee of a co-tenant’s mineral estate in land is entitled to be paid, for the value of his lease, out of the proceeds assigned to his lessor upon partition of the minerals by sale. The legislature, following the reasoning of Hall v. Vernon, amended the section on partition in the code to read: “Tenants in common, joint tenants and coparceners of real property, including minerals, and lessees of mineral rights other than lessees of oil and gas minerals, shall be compelled to make partition. . . .”

Receivership is a recognized form of ancillary aid in West Virginia, but as is true of most of this state’s remedies, its recognition is not due to a direct influence of the theory of ownership or the nature of the lessee’s interest.

54 Williamson v. Jones, 43 W. Va. 562, 27 S.E. 411, 412-3 (1897). Difficult as it is to understand why a lessee, holder of a chattel real interest, is allowed to enjoin trespass or waste, these being injuries to real property, nevertheless this is the rule in West Virginia. See notes 42 and 49 supra. If natural gas is alone involved, then a statute, W. Va. Code Ann. § 2479 (1949), can be relied upon by the lessee in a suit to enjoin waste.

55 47 W. Va. 295, 34 S.E. 764 (1889).

56 Id., 34 S.E. at 765.


60 Ohio Fuel Co. v. Burdett, 72 W. Va. 803, 79 S.E. 667, 668 (1913). The peculiar importance of this remedy warrants further discussion. The object of the appointment of a receiver in a pending cause is the protection and preservation of the subject in litigation from spoliation, waste, or deterioration. Commercial Banking & Trust Co. v. Dodridge County Bank, 118 W. Va. 37, 188 S.E. 663, 666 (1936). A temporary injunction restricting operations will not in all cases afford adequate relief, as when the land in dispute is being drained by wells on adjoining lands. Summers hits at the basic inadequacy when he writes: “If the
Switching the focus of attention to the non-ownership theory, we come first to California where one of its courts had this to say: 61

There are intimations of approval of the oil and gas in place doctrine in some of the decisions in this state. . . . But other cases unequivocally declare that the owner of land does not have an absolute title to oil and gas in place as corporeal real property, but, rather, the exclusive right on his premises to drill for oil and gas, and to retain as his property all substances brought to the surface on his land.

Now, as far as the lessee's interest is concerned, California has long held that his interest amounts to real estate for tax purposes. 62 However, before 1935 much confusion was to be found in California cases which attempted definition of a lessee's interest. 63 Since that time, the decisions have consistently adopted the view that the oil and gas lessee receives the landowner's exclusive right to drill plus a right to such possession of the property as may be required for drilling, but that no ownership rights are created by the lease. 64 According to

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61 Callahan v. Martin, 3 Cal. (2d) 110, 43 P. (2d) 788, 792 (1935).
63 An early California decision looked to the nature of the interest of the lessee under a lease which gave him not only to drill for oil but also to the possession of the surface in allowing him to maintain an action for possession of the land against wrongful intrusion. The court noted that the lease vested in the plaintiff " . . . a corporeal interest in the land, and estate for years, with right of possession for a limited purpose." Chandler v. Hart, 161 Cal. 405, 119 Pac. 516, 524 (1911).
64 Schiffman v. Richfield Oil Co. of Cal., 8 Cal. (2d) 211, 64 P. (2d) 1081 (1937); Callahan v. Martin, 3 Cal. (2d) 110, 43 P. (2d) 788 (1935); Dabney-Johnston Oil Corp. v. Walden, 4 Cal. (2d) 637, 52 P. (2d) 237 (1935).
these cases, the lessee's interest, if it is to endure for years, is not
real property or real estate, but is an interest or estate in real prop-
erty in the nature of an incorporeal hereditament, a profit a prendre,
which is a chattel real. If it is to endure in perpetuity or for life,
it is a freehold and real estate as well as an estate in realty. Thus,
these decisions reject completely the ownership theory and the Texas
view that a lease creates a corporeal real property interest.

In view of this 1935 decision, Callahan v. Martin, which removed
judicial doubts found in earlier opinions by describing the lessee's
interest as an incorporeal hereditament, California courts must logi-
cally deny a lessee the use of ejectment or any similar suit for
possession of the land, because ejectment will not lie to recover an
incorporeal hereditament.

By statute, recovery of damages for underground trespass, wrongful
use or occupancy of real property by wells and for conversion of oil
and gas, is authorized. This statute has been construed as not limited
to subterranean trespass, but applies to surface trespass as well.
The courts of this jurisdiction have recognized a right in the lessee
to recover damages and obtain an accounting from an underground
trespasser for the oil removed, and he may receive injunctive relief
against continued trespass as well. The theory here is that the lessee
becomes the owner of the oil and gas when they are reduced to pos-
session on his leasehold, either by himself or by the trespasser.
The exact moment at which this possession commences is unsettled.

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65 Callahan v. Martin, 3 Cal. (2d) 110, 43 P. (2d) 788 (1935).
66 Dabney-Johnston Oil Corp. v. Walden, 4 Cal. (2d) 637, 52 P. (2d) 237,
243 (1935): “Thus, although the oil and gas in place doctrine is rejected, interests
in oil rights which are estates in real property may be granted separate and apart
from a grant of surface title.”
67 3 Cal. (2d) 110, 43 P. (2d) 788 (1935).
68 City and County of San Francisco v. Grote, 5 Cal. Unrep. 612, 47 Pac.
938 (1897).
69 CAL. CODE CIV. PROC. § 34934 (1949).
70 Standard Oil Co. of California v. United States, 107 F. (2d) 402, 417
(9th Cir.), cert. denied, 309 U.S. 654, 60 S. Ct. 469, 84 L. Ed. 1003 (1940).
71 Union Oil Co. of California v. Domeneaux, 30 Cal. App. (2d) 266, 86
P. (2d) 166 (1939); Bell Corp. v. Bell View Oil Syndicate, 24 Cal. (2d) 587,
76 P. (2d) 167 (1938); Union Oil Co. of California v. Mutual Oil Co., 65 P.
(2d) 896 (Cal. App. 1937).
72 Pacific Western Oil Co. v. Bern Oil Co., 81 P. (2d) 207 (Cal. App. 1938),
aff’d, 13 Cal. (2d) 60, 87 P. (2d) 1045 (1939); Union Oil Co. of California v.
73 See People v. Associated Oil Co., 211 Cal. 93, 294 Pac. 717, 721 (1930),
which quotes with approval a United States Supreme Court case originating in
West Virginia, saying: “If an adjoining owner drills his own land, and taps a
deposit of oil and gas, extending under his neighbor’s field, so that it comes into
his well, it becomes his property.”
But Union Oil Co. of California v. Mutual Oil Co., 65 P. (2d) 896, 899 (Cal.
App. 1937), holds that “When oil is moved from the ground by either the lessee
However, a logical basis for an action of trespass against realty would be that possession and, consequently, the title pass when the oil and gas enter the lessee's well, because they would still be realty until removed from the earth. Under this view, the requisite possession and claim of title would be present.

California by statute denies specific performance against one party to an obligation "unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." With this statute in mind, California courts have consistently held that an agreement to execute an oil and gas lease under which the lessee could abandon at will is not specifically enforceable by him because lacking in mutuality. The court in Pimentel v. Hall-Baker Co. pointed out that "Where, as is usual, the obligations of an oil lease are not mutual and reciprocal and there is no mutuality of remedies, an action for specific performance cannot be maintained by one party against another." However, as pointed out in a subsequent California case, Gavina v. Smith, the decisions arriving at this rule all involved actions to enforce agreements to execute a lease, no lease having been executed. The Gavina court continued:

... and there is no analogy between a lease that is perfectly valid in itself but subject to conditions subsequent that may at some future time bring it to an end and an instrument that so far lacks mutuality that it can be terminated at any time by the lessee under it.

Thus, it would seem that the cases denying specific performance of unexecuted agreements to execute a lease have no effect upon actions for specific performance of an executed lease.

By statute, California allows partition "When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or

or a trespasser, it becomes personal property and, . . . we are of the opinion that title to and the right to possession of the oil so removed becomes vested in the lessee holding the exclusive right to remove such oil from the premises."

74 Nonamaker v. Amos, 73 Ohio St. 163, 76 N.E. 949 (1905); Kelley v. Ohio Oil Co., 57 Ohio St. 317, 49 N.E. 399 (1897); Williamson v. Jones, 43 W. Va. 562, 27 S.E. 411 (1897).

75 CAL. CIV. CODE § 3386 (1949).


77 32 Cal. App. (2d) 697, 90 P. (2d) 588, 591 (1939).


79 148 P. (2d) at 891.

80 CAL. CODE CIV. PROC. § 752 (1949).
lives, or for years. . .” Since, as noted above, the oil and gas lessee in California has an incorporeal hereditament, which is an estate of inheritance, he should be able to obtain partition against a cotenant of the leasehold. As pointed out in *Bacon v. Wahrhaftig*, the rights of any lessee of an oil and gas lease must be set forth in the complaint, since these parties are necessary and proper to the action. Thus, if these parties are necessary to another’s suit for partition, it should follow that they could also bring partition.

The appointment of receivers is authorized by the California Code of Civil Procedure.

In an action . . . between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or funds, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

V.

Illinois

*Watford Oil & Gas Co. v. Shipman*, an Illinois decision, contains a clear statement of the theory of ownership used in that state:

In the eye of the law oil and natural gas are treated as minerals, but they possess certain peculiar attributes not common to other minerals which have a fixed and permanent situs. Owing to their liability to escape, these minerals are not capable of distinct ownership in place. . . . It [a grant of the oil and gas] is a grant, not of the oil that is in the ground, but to such part thereof as the grantee may find.

Illinois courts agree that the interest obtained by a lessee under an oil and gas lease, if unlimited in duration, is a freehold. A freehold has been defined in Illinois “as any estate of inheritance or for life in either a corporeal or incorporeal hereditament—existing in or arising from real property of free tenure.”

As applied to the oil and gas lease, it would appear that, since the lessee does not own any of the oil and gas until found, his lease-
hold rights would be more in the nature of an incorporeal hereditament, which is a right arising out of a thing corporate, whether real or personal, or concerning, or annexed to, or exercisable within it.\textsuperscript{88} However, Illinois does not follow this view in dealing with taxation cases. Courts in Illinois instead hold that, despite the incapability of absolute ownership of oil and gas, if the lessee has the right under the lease to go on the land and carry on normal operations to find and produce gas, a corporeal, tangible freehold estate passes for tax purposes.\textsuperscript{89}

Dealing with ejectment, dictum in \textit{Watford} shows that "A grant to the oil and gas passes nothing which can be the subject of an ejectment or other real action."\textsuperscript{90} This case has generally been followed in Illinois in denying ejectment to the lessee of an oil and gas lease.\textsuperscript{91} The decisions relied upon in \textit{Watford}, in refusing ejectment to the lessee, all based their refusal on the lack of a corporeal interest, the interest required as the subject of this real action.\textsuperscript{92} Any deviation in theory found in tax cases should be credited to a desire to give full effect to the state's policy of taxation, and should not be deemed significant in matters of orthodox property law.\textsuperscript{93}

Illinois has allowed the lessee to recover damages in trespass for removal of oil from the leasehold,\textsuperscript{94} and to obtain an accounting for past removal.\textsuperscript{95} Injunctive relief to prevent its continuance is also

\textsuperscript{88} Lake v. Sealy, 231 Ala. 466, 165 So. 399, 401 (1936), holding that interests in oil and gas leases, landlords' royalties and oil, gas and mineral rights are incorporeal hereditaments. See also Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86, 89 (1918), holding that the granted or reserved right to oil and gas is an incorporeal hereditament, or, more specifically, a profit a prendre, analogous to a profit to hunt and fish on another's land.

\textsuperscript{89} Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645, 649 (1921): "The conveyance, however, of the right to enter upon the land for the purpose of prospecting and operating for oil and gas, laying pipe lines, and building powers, stations, and structures to produce, save, and care for the products is a conveyance of an interest in the land itself, which, if of indefinite duration, is a freehold estate in the land."

\textsuperscript{90} 223 Ill. 9, 84 N.E. 53, 54 (1908).

\textsuperscript{91} Guffey v. Smith, 237 U.S. 101, 35 S. Ct. 526, 59 L. Ed. 856 (1915); Carter Oil Co. v. Liggett, 371 Ill. 482, 21 N.E. (2d) 569 (1939); Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N.E. 219 (1908).

\textsuperscript{92} Dark v. Johnston, 55 Pa. 164 (1867); Hall v. Vernon, 47 W. Va. 295, 34 S.E. 764 (1899); Wood County Petroleum Co. v. West Virginia Transportation Co., 28 W. Va. 210 (1886).

\textsuperscript{93} Chicago, Wilmington & Franklin Coal Co. v. Minier, 127 F. (2d) 1006 (7th Cir.), \textit{cert. denied}, 317 U.S. 669, 63 S. Ct. 74, 87 L. Ed. 538 (1942); Updike v. Smith, 378 Ill. 609, 39 N.E. (2d) 325, 328 (1942); Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645 (1921).

\textsuperscript{94} Superior Oil Co. v. Harsh, 50 F. Supp. 358 (E.D. Ill. 1943).

\textsuperscript{95} Shell Oil Co. v. Manley Oil Corp., 50 F. Supp. 21 (E.D. Ill. 1942). An Illinois oil lessee was able to obtain a directional survey of the wells of an adjoining producer to determine whether they were bottomed upon his lease.
NOTES

available.96 Some doubt resulted from these holdings because the measure of damages against a good faith and against a bad faith trespasser was identical. A distinction was drawn between the two by a later Illinois case which held that a good faith trespasser would be entitled to credit for drilling expenses, whereas a willful trespasser would not.97

This state affords equitable relief to an oil and gas lessee faced with trespass, waste, or other irreparable injury to his freehold.98 Although often termed specific performance, this remedy in its essence is instead a prohibitory injunction.99 Because of the presence of the surrender clause in favor of the lessee, the earlier decisions in this jurisdiction refused equitable relief to the lessee either on the ground of lack of mutuality100 or because of the policy of equity courts which frowns upon rendering a decree which one of the parties could nullify.101 However, a more liberal trend, noticeable in the later Illinois cases, generally favors the use of equity’s injunction and bill to remove cloud on title.102 This relief is “to protect a present vested leasehold, amounting to a freehold interest, from continuing and irreparable injury calculated to accomplish its practical destruction.”103 Ejectment being unavailable to the lessee, the courts ruled that he consequently had no adequate remedy at law.104

Even though a statute105 expressly allows partition of lands, tenements or hereditaments, the holders of interests under oil and gas

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96 Shell Oil Co. v. Manley Oil Corp., 50 F. Supp. 21 (E.D. Ill. 1942).
100 Minnetonka Oil Co. v. Boyd, 143 Ill. App. 479 (1908) ; Ulrey v. Keith, 237 Ill. 284, 86 N.E. 696 (1908).
101 Carter Oil Co. v. Owen, 27 F. Supp. 74, 77 (E.D. Ill. 1939) ; "Thus, under the law of Illinois, it is established that the title under such an oil lease is a freehold; that to protect the same, equity has jurisdiction to remove clouds and to prevent waste and irreparable injury, there being no complete remedy at law." See also Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N.E. 219 (1908). For the requirements to remove clouds, see Ill. Stat. Ann. c. 106, § 13 (Jones 1936).
leases have been consistently denied partition.\textsuperscript{106} In \textit{Watford}, the court said partition in this instance was denied because “A lease of land to enter and prospect for oil is a grant of a privilege to enter and prospect, but does not give a title to the oil or gas until such products are found.”\textsuperscript{107} But the court also pointed out that the lease would create a freehold if unlimited in ultimate possible duration as was the lease then before it. Then, if it is a freehold which is in Illinois an “estate of inheritance or for life in either a corporeal or incorporeal hereditament,”\textsuperscript{108} it is difficult to comprehend why it is not a hereditament within the statute discussed above which allowed partition of hereditaments. Nevertheless, the \textit{Watford} rule has been uniformly upheld.\textsuperscript{109} A possible solution for the lessee might be in the rule that the lessors may maintain partition. This allows each oil and gas lease to attach to the portion of the land set apart for the respective lessor.\textsuperscript{110} Thus, a lessee, finding it impossible to continue joint operations with his co-lessee, might prevail upon his lessor to sue for partition and thus divide the underground interests.

In \textit{Carter Oil Co. v. McQuigg},\textsuperscript{111} it was held that a federal district court, in a suit to enjoin interference with alleged rights of an oil and gas lessee, had power to appoint a receiver to protect the interests of everyone involved. The protection required was the drilling of offset wells to safeguard the land from drainage. Receivership was denied, however, in a later Illinois case\textsuperscript{112} where the lessee sought to set aside the leases of the defendant which were allegedly fraudulent. This denial was based on the ground that receivership is an emergency measure, available only in clear cases of fraud or immediate damage to property. Further, it requires that the plaintiff show a clear right to the property involved and a reasonable probability that the petitioning party will prevail in the suit.

\textsuperscript{106} Webster v. Hall, 388 Ill. 401, 58 N.E. (2d) 575, 578 (1944); Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908).
\textsuperscript{107} Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53, 54 (1908). The court also relied heavily, in denying partition, upon the fact that the lessee could nullify any possible equitable decree for specific performance against him by surrendering the lease upon payment of one dollar.
\textsuperscript{108} Fowler v. Marion & Pittsburg Coal Co., 315 Ill. 312, 146 N.E. 318, 319 (1924).
\textsuperscript{109} See, e.g., Webster v. Hall, 388 Ill. 401, 58 N.E. (2d) 575 (1944). An interesting case which seems contra in principle to \textit{Watford} is Rohn v. Harris, 130 Ill. 525, 22 N.E. 587, 588 (1889), in which the court, in granting partition of a ferry franchise, said: “Strictly speaking . . . a ferry franchise is not real estate, but it partakes so far of the nature of real estate that . . . it may be partitioned in the same manner as real property.” Considering that \textit{Watford} refused partition primarily because the oil and gas lessee’s interest was not real estate, the distinguishing reasons for the decision are obscure. In each case there was merely a grant of a privilege.
\textsuperscript{110} Zeigler v. Brenneman, 237 Ill. 15, 86 N.E. 597, 601 (1908).
\textsuperscript{111} 112 F. (2d) 275, 281 (7th Cir. 1940).
\textsuperscript{112} Simpson v. Adkins, 311 Ill. App. 543, 37 N.E. (2d) 355 (1941).
In Louisiana

Oil and gas are fugitive minerals, and the owners of the lands which contain such deposits are not the owners of the oil and gas until they reduce these fugitive minerals to actual possession. The owners of land have a real right in their property to go upon it and explore it for these minerals, in order to gain ownership thereof by securing possession of them.

An oil and gas lease in Louisiana does not convey a separate estate in the oil and gas, but merely a right to go on the land for exploration and exploitation purposes. On various occasions, the courts have spoken of an oil and gas lease as a sale, as both sale and lease, as a lease and as a real right. Then, finally, came State ex rel. Bush v. United Gas Public Service Co. where it was said that it is "no longer a debatable question in this State" that a lessee under an oil and gas lease owns a servitude.

Because an oil and gas lease is not governed by the rules governing ordinary leases, it was held in Nabors Oil & Gas Co. v. Louisiana Oil Refining Co. that the rule denying a lessee the right to dispute his lessor's title during the term has no application to a lease of mineral rights.

Gulf Refining Co. of Louisiana v. Glassell held that a lessee in the usual mineral lease "merely obtains an obligatory or personal right but not a real right — a jus in re." According to the court, an oil and gas lease had the status of an ordinary lease of a farm, for instance, and the lessee's rights were accordingly limited to an action.

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114 Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207, 243 (1922).
115 Nabors Oil & Gas Co. v. Louisiana Oil Refining Co., 151 La. 361, 91 So. 765 (1922).
118 Vander Sluys v. Finfrock, 158 La. 175, 103 So. 730, 732 (1925).
119 185 La. 496, 169 So. 523, 524 (1936).
121 151 La. 361, 91 So. 765, 778 (1922).
for damages against the lessor.\textsuperscript{123} This decision, being at variance with \textit{Nabors} and the chain of cases which preceded it, startled the legal fraternity.\textsuperscript{124} Consequently, the effect of this \textit{Glassell} view was soon erased by legislation: \textsuperscript{125} That oil, gas and other mineral leases . . . are hereby defined . . . as real rights and incorporeal immovable property, and may be asserted, protected and defended in the same manner as may be the ownership or possession of other immovable property by the holder of such rights, without the concurrence, joinder or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land. Later, however, this statute was judicially limited to affect procedural matters alone,\textsuperscript{126} and the legislature again stepped in. This time the amendatory statute allowed no doubt that rights of substance were to be altered: \textsuperscript{127} This Section shall be considered as substantive as well as procedural so that the owners of oil, gas and other mineral leases . . . shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate. The broad language of the amendatory act apparently makes such rights real for all purposes, thus precluding a limitation similar to the one placed on the first statute.\textsuperscript{128} Therefore, it appears today that a mineral servitude in Louisiana is a terminable property right.\textsuperscript{129} Trespass was in issue in \textit{Gliptis v. Fifteen Oil Co.}\textsuperscript{130} Under the terms of the contract, the plaintiff was given the exclusive right to extract minerals from the earth in a given radius of 300 feet. The defendant drilled a well only 33 feet from the 300 foot radius, and the plaintiff sued to recover damages for killing his well. The court ruled that this subsurface invasion amounted to a trespass, that the plaintiff had the exclusive right to explore his land and that this necessarily excluded the right of any other person to invade the subsurface of the land involved. The court concluded with the statement that it could enjoin the continuous trespass and that it had the inherent power to order a well survey to determine whether a trespass actually occurred.\textsuperscript{131}

\textsuperscript{123} See Comment, 11 \textit{Tulane L. Rev.} 607 (1937).
\textsuperscript{125} La. Acts 1938, No. 205, § 1.
\textsuperscript{126} Lawrence v. Sun Oil Co., 166 F. (2d) 466, 469 (5th Cir. 1948); Wier v. Grubb, 215 La. 967, 41 So. (2d) 846, 847 (1949).
\textsuperscript{129} Haynes v. King, 219 La. 160, 52 So. (2d) 531, 538 (1950). As to the nature of a mineral interest in Louisiana in general, see Comment, 25 \textit{Tulane L. Rev.} 497 (1951).
\textsuperscript{130} 204 La. 896, 16 So. (2d) 471 (1943).
Lessees in Louisiana have seldom resorted to specific performance, probably because the state does not favor the use of this equitable remedy. But where possible, this remedy will be ordered.

Injunctive relief has usually been allowed the lessee where his legal remedies are inadequate. For example, it is relied upon to enjoin trespass, especially when continuous.

Land held by co-owners may be partitioned in this jurisdiction. And the co-owners must hold the property in common. Thus in one case, *Starr Davis Oil Co. v. Webber*, one having a fractional interest in the minerals was not a co-owner holding the property in common with the landowners and partition was denied. "There was not a joint ownership of a single right but two absolute rights, independent of each other."

**Conclusion**

If all of the states were as logical in following thesis to proper conclusions as Texas has been, many of the difficult reconciliations now needed in this area of law would never have arisen. Texas courts, whether right or wrong, announced their version of absolute ownership in place, and they have carried this theory with them with little hesitation to give the lessee all of the remedies he would have as owner of Blackacre. Other states, notably West Virginia, have recognized a type of absolute ownership in place, but have wavered when called upon to describe the lessee's interest as an outright ownership of minerals through sale.

Consistency has not been the friend of the ownership theory states alone, since California and Illinois courts, in applying the non-ownership theory, have been quite thorough in denying to lessees remedies available to actual landowners. The discrepancies found in taxation cases should probably not be held against them.

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131 The court relied on Union Oil Co. v. Reconstruction Oil Co., 4 Cal. (2d) 541, 51 P. (2d) 81 (1935), and Texas Co. v. Hollingsworth, 304 Ill. App. 607, 27 N.E. (2d) 67 (1940).


133 Goudeau v. Daigle, 124 F. (2d) 656, 658 (5th Cir. 1942); Pratt v. McCoy, 128 La. 570, 54 So. 1012, 1029 (1911).

134 1 Summers, *op. cit. supra* note 6, § 28.

135 Houston Ice & Brewing Ass'n v. Murray Oil Co., 145 La. 1050, 83 So. 239 (1919).

136 Gliptis v. Fifteen Oil Co., 204 La. 896, 16 So. (2d) 471 (1943).


139 218 La. 231, 48 So. (2d) 906 (1950).

140 *Id.*, 48 So. (2d) at 908. See also Denegre, *Co-ownership of Oil and Gas Interests in Louisiana*, 24 Tulane L. Rev. 288 (1950).