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Law of Oil and Gas

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THE LAW OF OIL AND GAS*

III

(3) *The Granting Clause, including the Determination of Rights Created by an Oil and Gas Lease.*

I

The lessor hereby grants to the lessee, his heirs and assigns, the exclusive right to mine and produce from the following described land petroleum and natural gas, with possession of so much of such land as may be necessary for such purpose.[32]

II

The lessor has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the lessee * * * for the sole and only purpose of mining and operating for oil, gas and other minerals * * * all that certain tract of land.[33]

III

Lessor hereby grants and conveys unto the lessee, his heirs or assigns, all the oil and gas in and under the following described premises, together with the exclusive right to enter thereon at all times for the purpose of drilling or operating for oil, gas, or water.[34]

The granting clauses set forth above, with unimportant variations, typify the provisions of this character which will be found in oil and gas leases. It will be noted that each of these clauses covers both oil and gas, this being universally characteristic of the present-day lease. In the early period, however, the leases did not include a grant of the natural gas.[35] At the outset we must impress our minds with the difference in the technical language employed in these several clauses. The first clause grants the right to operate

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[32] *Kelly* v. *Keys*, 213 Pa. 295, 62 Atl. 911 (1906).

[33] *Barnsdall* v. *Bradford Gas Co.*, 225 Pa. 338, 74 Atl. 207 (1909).

[34] *Carr* v. *Huntington Light & Fuel Co.*, 33 Ind. App. 1, 70 N. E. 552 (1904).

[35] *Rynd* v. *Rynd Farm Oil Co.*, 63 Pa. St. 397, (1869); *Hicks* v. *American Natural Gas Co.*, 207 Pa. 570, 57 Atl. 55 (1904); *Munroe* v. *Armstrong*, 96 Pa. St. 307 (1880); *Marshall* v. *Forest Oil Co.*, 198 Pa. 83, 47 Atl. 927 (1901).

for oil and gas, with possession of the leased premises for that purpose. The second clause grants, demises, leases and lets the land itself for the purpose of conducting these operations, while the third clause grants the oil and gas as such, together with the use of the land for the purpose of exploration. Ordinarily, the several clauses are used interchangeably, but the decisions in some of the jurisdictions evidence a preference for one form over the others. Thus in Pennsylvania the leases embody clauses of either the first or second type, while in Ohio, Indiana and Texas the lease generally employed contains the clause granting the oil and gas with the use of the land for operating purposes.[36]

Inasmuch as some of the courts find a distinction in the legal effect of these several provisions, it is appropriate here to enter upon an inquiry of great moment. The question is this: What right, title, interest or estate passes to or vests in the lessee by virtue of an oil and gas lease? The decisions touching this matter illustrate in a marked degree the utter confusion in the cases which characterizes the subject generally. In this situation it becomes necessary to examine the holdings of each jurisdiction separately. Pennsylvania determines the question here involved by first impression, and accordingly the attitude of the courts in the other jurisdictions should be considered in the light of the Pennsylvania cases.

The leading Pennsylvania case is *Funk* v. *Haldeman*.[37] This holding is cited repeatedly in the opinions of the courts of the other jurisdictions, but nowhere, excepting in California and Kentucky, perhaps, is the exact limitation of the doctrine of *Funk* v. *Haldeman* observed. The granting clause involved here was of the class first described, that is, the lease granted the right to explore for oil. It was said that the grant passed no estate or property either in the soil or minerals; that it created an incorporeal right, a profit *a prendre*, the court concluding with this language:

[36] *Ohio Oil Co.* v. *Kelly*, 9 Ohio Circ. Ct. Rep. 511 (1895); *Ohio Oil Co.* v. *Lane*, 59 Ohio St. 307, 52 N. E. 791 (1898); *Langmede* v. *Weaver*, 65 Ohio St. 17, 60 N. E. 992 (1901); *Van Etten* v. *Kelly*, 66 Ohio St. 605, 64 N. E. 560 (1902); *Brown* v. *Fowler*, 65 Ohio St. 507, 63 N. E. 76 (1902); *Logansport Gas Co* v. *Ross*, 32 Ind. App. 639, 70 N. E. 544 (1903); *Carr* v. *Huntington Light & Fuel Co.*, 33 Ind. App. 1, 70 N. E. 552 (1904); *Indiana Gas Co.* v. *Leer*, 34 Ind. App. 61, 72 N. E. 283 (1904); *Ohio Oil Company* v. *Detamore*, 165 Ind. 243, 73 N. E. 906 (1905); *Manhattan Oil Co.* v. *Carrell*, 164 Ind. 526, 73 N. E. 1084 (1905); *National Oil & Pipe Line Co.* v. *Teel*, 95 Texas 586, 67 S. W. 545 (1902); *O'Neil* v. *Sun Co.*, 58 Texas C. App. 167, 123 S. W. 172 (1909); *Witherspoon* v. *Staley*, 156 S. W. (Tex., 1913) 557; *Texas Co.* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717 (1915); *Pierce-Fordyce Oil Ass'n.* v. *Woodrum*, 188 S. W. (Tex., 1916) 245; *Munsey* v. *Marnett Oil Co.*, 199 S. W. (Tex., 1917) 686; *Key* v. *Big Sandy Oil Co.*, 212 S. W. (Tex., 1919) 300.

[37] *Funk* v. *Haldeman*, 53 Pa. St. 229. (1866).

> "But out of this results the difficulty of a strict classification of a right to take it as an incorporeal hereditament. If a mineral, it is part of the land, and a right to take land or any part of land is not, strictly speaking, an incorporeal hereditament. Nor is the right to *fire bote,* or *plow bote,* or *turves;* and yet for the want of a better classification, this is treated in law as an incorporeal interest. To the same head is to be referred these oil rights."

Right here it must be closely noted that the court experienced some difficulty and entertained some doubt in designating the interest of the lessee as an incorporeal hereditament. In a comparatively recent case[38] the Supreme Court of Pennsylvania observes that the conclusion in *Funk* v. *Haldeman* was reluctantly reached, supplementing that observation with the following:

> "This case (*Funk* v. *Haldeman*) was decided in 1866, a very few years after the great utility of natural oil and its immense value as an article of commerce had been demonstrated. Its extent under the earth, the means of discovery, and methods of production were still but imperfectly known. It may be doubted whether now, after forty years more of knowledge, if the question were first before us, we would hold that a grant of exclusive right to the oil under a definite tract of land, coupled with the exclusive right to portions of the surface for production and transportation, is an incorporeal hereditament. But in *Funk* v. *Haldeman* we did so classify it, and have followed that decision in many cases since. Having due regard, therefore, to the rule of *stare decisis,* we must continue to so classify such contracts."

Where a lease containing a granting clause of the type appearing in *Funk* v. *Haldeman* is involved, the Pennsylvania court has steadfastly adhered to the doctrine of that case.[39] *Kelly* v. *Keys*[40] presents a clear illustration of the doctrine announced in *Funk* v. *Haldeman.* In the *Funk* case the court observed that the test for determining whether the grant passed a corporeal or an incorporeal

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[38] *Hicks* v. *American Natural Gas Co.,* 207 Pa. 570, 57 Atl. 55 (1904).

[39] *French* v. *Brewer,* 9 Fed. Cas., p. 774, (1861); *Dark* v. *Johnston,* 55 Pa. St. 164, (1867); *Rynd* v. *Rynd Farm Oil Co.,* 63 Pa. St. 397, (1869); *Karns* v. *Tanner,* 66 Pa. St. 297, (1870); *Union Petroleum Co.* v. *Bliven Pet. Co.,* 72 Pa. St. 173, (1872); *Thompson's Appeal,* 101 Pa. St. 225, (1882); *Hicks* v. *American Natural Gas Co., supra; Kelly* v. *Keys,* 213 Pa. 295, 62 Atl. 911 (1906). *Contra: Barker* v. *Dale,* 2 Fed. Cas., p. 810, (1869).

[40] *Kelly* v. *Keys, supra.*

interest was whether the instrument would sustain an action in ejectment. In the *Kelly* case, Kelly, the plaintiff, held a lease of the same type involved in the *Funk* case. Kelly had never been in possession of the land. The lessor granted a second lease to Keys, who went into possession and found oil. Kelly then brought ejectment. The court cited the *Funk* case and kindred holdings to the effect that the lease created an incorporeal hereditament, and then concluded:

> "When it is determined that the subject of such a grant was an incorporeal hereditament and not an estate in the land or oil, it logically and necessarily results that it would not support an action in ejectment. It is therefore well settled in this jurisdiction that a lease granting the mere right to explore for oil and gas vests the lessee with a license or incorporeal hereditament only, which will not support an action of ejectment, at the suit of a lessor who has never been in possession."

Even here, however, a lessee who has once entered and then been ousted may maintain ejectment.[41] Moreover, where a lease of this kind is involved, and where the lessee has taken possession of the leased premises for purposes not contemplated in the lease, or where the lessee is in possession under the lease and the lessor claims that the lease has been forfeited, the lessor may maintain ejectment.[42]

Where, however, the granting clause is of the second class described under this head, and grants, demises, leases and lets the land for the purpose of exploration, it is well settled in Pennsylvania that the lease passes a corporeal interest in the land which will support an action in ejectment at the suit of a lessor who has never been in possession.[43] The leading case on this question is *Barnsdall* v. *Bradford Gas Company*,[44] where all of the earlier decisions of the Pennsylvania court are cited and distinguished. Here

[41] *Dark* v. *Johnston*, 55 Pa. St. 164, (1867); *Hicks* v. *American Natural Gas Co.*, 207 Pa. 570, 57 Atl. 55 (1904); *Karns* v. *Tanner*, 66 Pa. St. 297 (1870).

[42] *Rynd* v. *Rynd Farm Oil Co.*, 63 Pa. St. 397, (1869); *Hicks* v. *American Nat. Gas Co.*, 207 Pa. 570, 57 Atl. 55 (1904); *Munroe* v. *Armstrong*, 96 Pa. St. 307 (1880); *Marshall* v. *Forest Oil Co.*, 198 Pa. 83, 47 Atl. 927, (1901).

[43] *Chicago Oil Co.* v. *United States Pet. Co.*, 57 Pa. St. 83, (1868); *Kitchen* v. *Smith*, 101 Pa. St. 452, (1882); *Duke* v. *Hague*, 107 Pa. St. 57, (1884); *Brown* v. *Beecher*, 120 Pa. 590, 15 Atl. 608, (1888); *Westmoreland Gas Co.* v. *DeWitt*, 130 Pa. 235, 18 Atl. 724, (1889); *Lynch* v. *Burford*, 201 Pa. 52, 50 Atl. 228, (1901); *Barnsdall* v. *Bradford Gas Co.*, 225 Pa. 338, 74 Atl. 207, (1909); *McKean* v. *Wolcott*, 254 Pa. 323, 98 Atl. 955, (1916).

[44] *Barnsdall* v. *Bradford Gas Co.*, 225 Pa. 338, 74 Atl. 207 (1909).

the granting clause was of the "demise, lease and let" type. The lessee had never been in possession and the lands were occupied by a third party who held adversely to both the lessor and the lessee. The lessee brought an action in ejectment under his lease. The court, in distinguishing this form of lease from that involved in *Kelly* v. *Keys, Funk* v. *Haldeman,* and kindred cases, held that it passed a corporeal estate which would support ejectment. It was contended also that, conceding the contract to be a lease and not a license, the plaintiff could not maintain ejectment because he had not entered into possession of the premises. On this point the court held that the rule of the common law with respect to an ordinary leasehold did not apply; that the lessee in a lease of the description here involved, by reason of the peculiar nature of the subject dealt with, could maintain ejectment, although he had never been in possession of the land.

Up to this point the Pennsylvania cases are entirely consistent. Interspersed here and there, however, we find decisions which tend to obscure the otherwise positive attitude of this court. In *Stoughton's Appeal,*[45] the lease involved vested only the right to bore for oil. A minor owned an interest in the fee, and the question presented was whether or not a lease made by the guardian without an order of the Orphan's Court was valid. The court, in defining the nature of the lease, declared it amounted to an absolute sale of all the oil within the land, and whether it be called a deed or a lease, it was in effect the grant of part of the corpus of the estate and not of a mere incorporeal right; that accordingly an order of the Orphan's Court was indispensable to the validity of the lease. In *McElwaine* v. *Brown,*[46] where the granting clause is not set forth, and where the court apparently attached no importance to this circumstance, an oil lease was held to constitute a leasehold estate, and subject to the mechanic's lien law of the state applicable to ordinary leaseholds. In *Venture Oil Company* v. *Fretts,*[47] where a lease of the same kind as that presented in the *Funk* case was involved, the novel doctrine was first announced that until oil or gas was found in paying quantities the only right possessed by the lessee was to explore, but upon the discovery of oil or gas in paying quantities the contract took effect as an oil lease. In brief, the court observes a distinction with respect to the rights created by a lease before discovery and afterward. Later this doctrine is

[45] *Appeal of Stoughton,* 88 Pa. St. 198, (1879).
[46] *McElwaine* v. *Brown,* 7 Sad. 201, 11 Atl. 453 (1887).
[47] *Venture Oil Co.* v. *Fretts,* 152 Pa. 451, 25 Atl. 732 (1893).

expanded by the declaration that upon discovery an estate in the oil and gas is vested.[48] Here again an element of confusion is observable. Some of the cases hold that the discovery of oil or gas in paying quantities vests the lessee with a title in the minerals,[49] while it is also held that the same circumstance vests the lessee with a title in the land.[50] This line of cases, beginning with *Venture Oil Co.* v. *Fretts,* is of obvious importance because the courts of the oil-producing states adopt quite generally the indefinite holdings of these cases as determining the nature of an oil lease, completely ignoring the better reasoning of the cases first treated in this discussion. Then again, in controversies between life tenants and remaindermen, and between co-tenants asserting conflicting claims to royalties under oil leases, it is held that the lease, in legal effect, is a sale of an interest in the lands.[51]

While *Venture Oil Co.* v. *Fretts* and kindred cases were decided without any direct reference to the rule laid down in *Funk* v. *Haldeman,* or the other rule finally adjudicated in *Barnsdall* v. *Bradford Gas Company,* it is possible to harmonize the doctrine of the *Venture Oil Company* case upon this theory. In the latter case and others following it the lease involved granted the right of exploration only, but entry upon the land or the finding of oil or gas, even under *Funk* v. *Haldeman* and similar cases, would vest such an estate as would support ejectment at the suit of the lessee in the event of ouster. It is evident, moreover, that the holdings in *Stoughton's Appeal* and in *Blakeley* v. *Marshall* were the necessary result of the record in those cases. Confronted as we are by a fairly uniform course of decision in Pennsylvania on the question in general, these isolated declarations respecting the nature of an oil lease should not weaken the otherwise well-settled principles of that jurisdiction. Finally, then, we reach these conclusions concerning the nature of the rights created by an oil and gas lease as laid down by the Pennsylvania court:

(1) Where the lease grants the right and privilege of exploration only, the lessee takes an incorporeal hereditament, which will

[48] *Hooks* v. *Forst,* 165 Pa. 238, 30 Atl. 846 (1895); *Chambers* v. *Smith,* 183 Pa. 122, 38 Atl. 522 (1897); *Ahrns* v. *Chartiers Valley Gas Co.,* 188 Pa. 249, 41 Atl. 739, (1898); *Colgan* v. *Forest Oil Co.,* 194 Pa. 234, 45 Atl. 119 (1899); *Wilson* v. *Philadelphia Co.,* 210 Pa. 484, 60 Atl. 149 (1904); *Burgan* v. *South Penn Oil Co.,* 243 Pa. 128, 89 Atl. 823 (1914).

[49] *Hooks* v. *Forst, supra; Burgan* v. *South Penn Oil Co., supra.*

[50] *Colgan* v. *Forest Oil Co., supra.*

[51] *Blakeley* v. *Marshall,* 174 Pa. 425, 34 Atl. 564 (1896); *Marshall* v. *Mellon,* 179 Pa. 371, 36 Atl. 201 (1897); *Jennings* v. *Bloomfield,* 199 Pa. 638, 49 Atl. 135 (1901); *McIntosh* v. *Ropp,* 233 Pa. 497, 82 Atl. 949 (1912).

not sustain an action in ejectment by a lessee who has never been in possession of the leased premises.

(2) Even under a lease of this description, where the lessee enters and produces oil, he obtains a vested estate in the nature of a leasehold for mining purposes, or, as otherwise expressed, a vested estate in the oil and gas.

(3) Where the lease demises, leases and lets the land for the purpose of mining for oil and gas, a corporeal estate in the land itself passes of such dignity as to support an action in ejectment at the suit of the lessor, even where he has never taken possession of the land.

The California court, without citing the Pennsylvania cases drawing the same distinction, finds a difference in the legal effect of a "grant, demise and let" lease and the other forms. In *Brookshire Oil Co.* v. *Casmalia Oil Co.*,[52] where a lease granting the mere right to explore was involved, the court followed *Venture Oil Co.* v. *Fretts* and kindred cases, and announced this rule:

> "The title is inchoate and for purposes of exploration only until oil is found. If oil is found, then the right to produce becomes a vested right."

In *Chandler* v. *Hart*,[53] where a "grant, demise and let" lease was presented, the court, without citing the Pennsylvania cases to the same effect, distinguished the *Brookshire* and *Payne* cases, and held that a "grant, demise and let" lease vested the lessee with a present interest and estate in the land for the term and purposes specified. This is now the established rule in California.[54] In *Allen* v. *Guaranty Oil Company* it is held that a "grant, demise and let" lease implies a covenant for quiet possession.[55]

Texas also finds a distinction in the legal effect of the several granting clauses, but upon a theory entirely different from that

[52] *Brookshire Oil Co.* v. *Casmalia Oil Co.*, 155 Cal. 211, 103 Pac. 927 (1909). In *Payne* v. *Neuval*, 155 Cal. 46, 99 Pac. 476 (1909), it is held that a lease granting the minerals, with a right to produce, is not a grant of land nor a lease, but a grant of a right in the nature of an incorporeal hereditament.

[53] *Chandler* v. *Hart*, 161 Cal. 405, 119 Pac. 516 (1911).

[54] *Kline* v. *Guaranty Oil Co.*, 167 Cal. 476, 140 Pac. 1 (1914); *Commins* v. *Guaranty Oil Co.*, 29 Cal. App. 139, 154 Pac. 882 (1916); *Allen* v. *Guaranty Oil Co.*, 176 Cal. 421, 168 Pac. 884 (1917); *Smith* v. *United Crude Oil Co.*, 179 Cal. 570, 178 Pac. 141, (1919). In *Graciosa Oil Co.* v. *Santa Barbara County*, 155 Cal. 140, 99 Pac. 483 (1909), where the right to operate was granted, it was held that this did not pass such an interest in the oil and gas as to subject the interest of the lessee to taxation as real estate.

[55] *Allen* v. *Guaranty Oil Co.*, *supra*.

adopted in Pennsylvania and California. In examining the Texas cases it is also important to remember that the leases there dealt with are of the second type, that is, the oil and gas as such are granted, with the right of entry for exploration. When the question first arose in that jurisdiction both the Civil Court of Appeals and the Supreme Court of the State, upon a writ of error in the same cause,[56] held that the lease did not pass an interest in the lands, although the oil and gas was conveyed by the granting clause. The instrument there considered was denominated an option, but the reading of the opinions clearly discloses that this holding was largely influenced by the character of the drilling clause which gave the lessee the option to drill or pay. The rule in the *Teel* case was squarely followed in two later cases decided by the Court of Appeals where the granting clause was of the same description as that set forth in the *Teel* case.[57] Writs of error were refused by the Supreme Court in both of these cases, and under the practice of that state this action practically amounted to an affirmance of these holdings by the Supreme Court. We are now brought to *Texas Co.* v. *Daugherty*,[58] which in effect overruled the cases already examined. The lease before the court here was identical in terms with the lease involved in *Witherspoon* v. *Staley*.[59] It not only purported to grant the oil and gas, with the privilege of exploration, but it contained this interpretative clause:

> "This grant is not intended as a mere franchise, but is intended as a conveyance of the property above described (the oil and gas) for the purposes herein mentioned, and it is so understood by both parties."

The precise issue of law presented was whether a group of leases of this type passed such an interest in lands as to subject the interest to taxation as real property under the statutes of the state. The court first distinguished the granting clause shown by the record from the other two clauses. It was said that the clause there involved was not a mere demise of the premises for the purpose of drilling, nor was it the grant of the right to prospect. It was then declared that this particular granting clause vested the lessee with such an interest in the lands covered by the lease as would sub-

[56] *National Oil & Pipe Line Co.* v. *Teel*, 95 Tex. 586, 67 S. W. 545, 68 S. W. 979 (1902).

[57] *O'Neil* v. *Sun Co.*, 58 Tex. C. App. 167, 123 S. W. 172 (1909); *Witherspoon* v. *Staley*, 156 S. W. (Tex., 1913) 557.

[58] *Texas Co.* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717 (1915).

[59] *Witherspoon* v. *Staley*, 156 S. W. (Tex., 1913) 557.

ject that interest to taxation as real property. In opposition to this view it was strongly argued by the lessee that the court was bound by the holding in the *Teel* case and by its refusal of writs of error in *O'Neil* v. *Sun Company* and *Witherspoon* v. *Staley*. Thereupon the court in its opinion sought to distinguish the cases. The reasons for the distinction are by no means satisfying, and the impression is left that the *Daugherty* case simply overrules the former holdings of that court on the questions there presented. In any event, it is now the settled rule in Texas that a lease of the type alluded to here vests the lessee with an interest in the lands covered by the lease.[60] This court has never been called upon to determine the legal effect of the other two granting clauses. When that court, however, in *Texas Company* v. *Daugherty*, predicated its decision very largely on the distinction between the several classes of grants, the inference follows that, should the question be presented, it might be held in that jurisdiction that neither of the other clauses would vest the lessee with an interest in the lands.

The granting clause in the leases generally used in Ohio is somewhat peculiar. It combines the elements of both the second and third classes under the division suggested here. The typical clause used in that jurisdiction is in this language:

> "Have granted, demised and let all the petroleum and gas in or under that certain tract of land, and also all the said tract of land, for the purposes and with the exclusive right of drilling and operating upon said premises for petroleum and gas."

In defining the nature of a lease of this type, the Ohio court says:

> "This is more than a license. It is a lease of the land, oil and gas for a limited time and purpose, with a right of possession to the extent reasonably required for such purpose."[61]

This conclusion is reached on principle and without citation of authority, and is uniformly followed by that court.[62] Such is the

[60] *Pierce-Fordyce Oil Assn.* v. *Woodrum*, 188 S. W. (Tex., 1916) 245; *Munsey* v. *Marnett Oil Co.*, 199 S. W. (Tex., 1917) 687; *McEntire* v. *Thomason*, 210 S. W. (Tex., 1919) 563; *Key* v. *Big Sandy Oil & Development Co.*, 212 S. W. (Tex., 1919) 300.

[61] *Woodland Oil Co.* v. *Crawford*, 55 Ohio St. 161, 44 N. E. 1093 (1896).

[62] *Harris* v. *Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. 502 (1897); *Brown* v. *Fowler*, 65 Ohio St. 507, 63 N. E. 76 (1902); *Central Oil & Nat. Gas Co.* v. *Eckert*, 70 Ohio St. 127, 71 N. E. 281 (1904); *Allegheny Oil Co.* v. *Snyder*, 106 Fed. 764 (1900). But see: *Detlor* v. *Holland*, 57 Ohio St. 492, 49 N. E. 690 (1898).

rule also in this jurisdiction where the oil and gas as such are not granted, but where the land is granted, demised and let for the purpose of operating for oil and gas,[63] it being here held that the instrument is more than a mere license, and that it is the land which is granted, demised and let for the limited purpose and period mentioned in the lease.

The Illinois holdings manifest the same lack of precision in the statement of the rule which characterizes the decisions generally on this point. It is held that a lease granting the oil and gas does not vest the lessee with an estate in the oil and gas until it is actually found.[64] In *Gillespie* v. *Fulton Oil & Gas Co.*,[65] where the exact character of the granting clause was not given, it is said that the lessee merely acquires the right of exploration with the right to produce if oil is found. But in *Bruner* v. *Hicks*,[66] where the lease was for a term of ten years and as long thereafter as oil or gas should be found, it was held that the lease vested a freehold interest upon the novel theory that the term created by the lease might last for an indefinite period of time. This holding is consistently followed in subsequent decisions.[67] The Supreme Court of the United States, in *Smith* v. *Guffey*,[68] after reviewing the Illinois cases, observes that it is settled by the decisions of the Supreme Court of Illinois that an oil and gas lease passes to the lessee a present vested right, that is, a freehold interest in the premises. It is also held in this jurisdiction that an oil and gas lease is a conveyance of such character that it passes an interest in a statutory homestead.[69]

In Kentucky, the exact type of the lease not appearing in the record, it was held that the lease vested the lessee with a title to the oil and gas in plase so that this interest was subject to taxation.[70] An oil and gas lease is a contract for the transfer and sale of an interest in lands, and is required to be in writing under the statutes

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[63] *Harris* v. *Ohio Oil Co., supra.*

[64] *Poe* v. *Ullery*, 233 Ill. 56, 84 N. E. 46 (1908); *Watford Oil & Gas Co.* v. *Shipman*, 233 Ill. 9, 84 N. E. 53 (1908); *Gillespie* v. *Fulton Oil & Gas Co.*, 239 Ill. 326, 88 N. E. 192 (1909).

[65] *Gillespie* v. *Fulton Oil & Gas Co., supra.*

[66] *Bruner* v. *Hicks*, 230 Ill. 536, 82 N. E. 888 (1907).

[67] *Poe* v. *Ullery, supra; Bruner* v. *Hicks, supra; Daughetee* v. *Ohio Oil Co.*, 263 Ill. 518, 105 N. E. 308 (1914). *Contra*: *State* v. *South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688 (1896).

[68] *Smith* v. *Guffey*, 237 U S. 101 (1915).

[69] *Bruner* v. *Hicks*, 230 Ill. 536, 82 N. E. 888 (1907); *Poe* v. *Ullery*, 233 Ill. 56, 84 N. E. 46 (1908).

[70] *Wolf County* v. *Beckett*, 127 Ky. 252, 105 S. W. 447 (1907); *Mt. Sterling Oil Co.* v. *Ratliff*, 127 Ky. 1, 104 S. W. 993 (1907); *Raydure* v. *Board of Supervisors*, 183 Ky. 84, 209 S. W. 19 (1919).

of frauds.[71] In *Kennedy* v. *Hicks*,[72] where a "grant, demise and let" lease was involved, the court, under the authority of *Barnsdall* v. *Bradford Gas Company*, held that a corporeal estate passed. It is here decided that the lease conveyed to the lessee the title to the oil and gas. An especially illuminating case originating in Kentucky is *Lindley* v. *Raydure*.[73] The lease presented was characterized by a "grant, demise and let" clause, and was for a term of ten years and as long thereafter as oil and gas should be found. The court said:

> "That an estate in the surface of the land of some character vests in the lessee immediately upon the execution of the instrument I do not understand to be questioned anywhere. Possibly there is some question as to the exact nature of the estate which vests, but otherwise there is none. On the face of things, it would seem that at least an estate in possession vests, *i. e.*, an estate for ten years, in which to explore for oil and gas, but that no estate to produce the oil and gas then vests. So far, the estate is an estate upon condition precedent, the condition being the discovery of oil or gas, and does not vest until the happening of such condition."

The court then quoted that portion of *Oil Company* v. *Fretts* which finds frequent repetition in the decisions, and thereupon made the following comment:

> "Substantially similar statements will be found in other cases involving oil and gas leases. It may create the impression that there is nothing vested until oil or gas is found. Such, however, is not the case, and no such thought was intended to be conveyed. What is inchoate until oil or gas is found is the right to produce oil and gas, and the right to the oil and gas itself, which remains inchoate until produced. The right to explore, therefore, is not at any time inchoate. It is vested and will be protected from the time of the execution of the instrument."

While the Louisiana court holds that an oil and gas lease does not pass title to the oil and gas in place, but only the right to explore, it is also held in that jurisdiction that a contract of this description

[71] *Beckett-Iseman Oil Co.* v. *Backer*, 165 Ky. 818, 178 S. W. 1084 (1915).

[72] *Kennedy* v. *Hicks*, 180 Ky. 562, 203 S. W. 318 (1918).

[73] *Lindley* v. *Raydure*, 239 Fed. 928 (1917). Affirmed: *Raydure* v. *Lindley*, 249 Fed. 675 (1918).

partakes of the nature of a sale as well as a lease.[74] But in a late case this court holds that oil and gas contracts should be treated as leases under the laws of Louisiana.[75]

The Oklahoma cases on this question reflect the difficulty which the courts in the more recent oil-producing states always experience in reaching a sound and exact conclusion upon many of the important propositions peculiar to the subject. In establishing a precedent on this point the Oklahoma court was confronted by the confused and conflicting state of decision which is evidenced by our discussion under this head. Moreover, the bench and bar of the State were wholly untrained in the law of oil and gas. In this situation it was inevitable that the early decisions of the Oklahoma court would be founded on certain isolated cases rather than upon a close observance of the true distinction in all the cases bearing upon the question. It was early decided that an oil and gas lease was an alienation of lands within the meaning of certain acts of Congress which placed restrictions upon the sale of Indian lands.[76] In *Kolachney* v. *Galbreath*,[77] a "grant, demise and let" lease was involved. The court held that the lease did not vest the lessee with any title to the oil or gas nor in the land, but created an incorporeal hereditament only. It was also decided that a grant of this nature would not sustain an action in ejectment by a lessee who had never assumed possession of the leased premises. Among the cases cited to support this holding were *Kelly* v. *Keys*,[78] *Payne* v. *Neuval*[79] and *Detlor* v. *Holland*.[80] It is true that the cases so cited supported this principle, but not as applied to the character of lease presented in this case. If the court has grasped the true posture of the cases in Pennsylvania, California and Ohio, these particular decisions would not have been cited to support the rule here declared. For a time the Supreme Court of Oklahoma steadfastly adhered to the doctrine of *Kolachney* v. *Galbreath*.[81] An oil and gas lease is a chattel

[74] *Rives* v. *Gulf Refining Co.*, 133 La. 178, 62 So. 623 (1913); *Cooke* v. *Gulf Refining Co.*, 135 La. 609, 65 So. 758 (1914); *Gulf Refining Co.* v. *Hayne*, 138 La. 555, 70 So. 509 (1915).

[75] *Spence* v. *Lucas*, 138 La. 763, 70 So. 796 (1915).

[76] *Eldred* v. *Okmulgee Loan & Trust Co.*, 22 Okla. 742, 98 Pac. 929 (1908); *Sharp* v. *Lancaster*, 23 Okla. 349, 100 Pac. 578 (1909); *Barnes* v. *Stonebraker*, 28 Okla. 75, 113 Pac. 903 (1909); *Hoyt* v. *Fixico*, 175 Pac. (Okla., 1918) 517; *Parker* v. *Riley*, 243 Fed. 42 (1917).

[77] *Kolachney* v. *Galbreath*, 26 Okla. 772, 110 Pac. 902 (1910).

[78] *Kelly* v. *Keys*, 213 Pa. 295, 62 Atl. 911 (1906).

[79] *Payne* v. *Neuval*, 155 Cal. 46, 99 Pac. 476 (1909).

[80] *Detlor* v. *Holland*, 57 Ohio St. 492, 49 N. E. 690 (1898).

[81] *Frank Oil Co.* v. *Belleview Gas Co.*, 29 Okla. 719, 119 Pac. 260 (1911); *Duff* v. *Keaton*, 33 Okla. 92, 124 Pac. 291 (1912); *Deming Investment Co.* v. *Lanham*, 36 Okla.

real as distinguished from real property.[82] In *Kelly* v. *Harris*,[83] the lease granted and sold all of the oil and gas, with the right to explore. This was held to constitute an incorporeal hereditament. Controlled by these cases, and regardless of the fact that the leases involved were of the "grant, demise and let" type, the Federal Court for this jurisdiction sustained the rule.[84] A "grant, demise and let" lease was held to constitute a mere option terminable at the election of the lessor upon any rental paying date.[85] Inasmuch as the lease created an incorporeal hereditament only, the grant was not within the champerty laws of the state.[86] The interest vested by an oil lease is such that if granted in the homestead the wife must join therein.[87] At this stage a relaxation from the earlier rule had its inception. It was then decided that while strictly speaking an oil and gas mining lease does not convey an estate in the realty prior to the development of the leased premises, it operates to pass the immediate and exclusive right of possession of the land for the purposes named in the lease.[88] Then, under the authority of *Lindley* v. *Raydure*,[89] it was said:

> "The lease herein involved was not wholly executory and unperformed. So far as the lessors were concerned the lease was wholly executed, and by its terms there was granted to the lessee an estate in possession which vested immediately on its execution and delivery, under which lessees had the right, according to the terms of the lease, for a period of five years, to make exploration on the leased premises."[90]

The court having receded from the early cases to this extent, it was but a step to the position that an oil and gas lease vested the lessee with an interest in land. Therefore, where a "grant, demise and let" lease was involved, and after a review of all of the Okla-

773, 130 Pac. 260 (1913); *In re Indian Ty. Illuminating Co.*, 43 Okla. 307, 142 Pac. 997 (1914); *Tupeker* v. *Deaner*, 46 Okla. 328, 148 Pac. 853 (1915); *Mitchell* v. *Probst*, 52 Okla. 10, 152 Pac. 597 (1915); *Kelly* v. *Harris*, 162 Pac. (Okla., 1916) 219; *Brennan* v. *Hunter*, 172 Pac. (Okla., 1918) 49.

[82] *Tupeker* v. *Deaner, supra; Duff* v. *Keaton, supra.*

[83] *Kelly* v. *Harris, supra.*

[84] *Barnsdall* v. *Owen*, 200 Fed. 519 (1912); *Priddy* v. *Thompson*, 204 Fed. 955 (1913); *Kemmerer* v. *Midland Oil Co.*, 229 Fed. 872 (1915); *Etchen* v. *Cheney*, 235 Fed. 104 (1916).

[85] *Brown* v. *Wilson*, 58 Okla. 392, 160 Pac. 94 (1916).

[86] *Etchen* v. *Cheney, supra.*

[87] *Carter Oil Co.* v. *Popp*, 174 Pac. (Okla., 1918) 747.

[88] *Hoyt* v. *Fixico*, 175 Pac. (Okla., 1918) 517.

[89] *Lindlay* v. *Raydure*, 239 Fed. 928 (1917).

[90] *Northwestern Oil Co.* v. *Branine*, 175 Pac. (Okla., 1918) 533.

homa cases touching the question, this court fell into accord with the majority rule, and held that the lease granted to the lessee a present vested interest in the land.[91] This is now the rule of the Federal Court in this jurisdiction.[92]

The cases heretofore examined treat an oil and gas lease as vesting the lessee with an interest in land upon one theory or another. We are now brought to the consideration of those decisions which either hold an oil and gas lease to create an incorporeal hereditament only, or which follow the doctrine of *Oil Company* v. *Fretts,* without due allowance for the true rule prevailing in Pennsylvania. As already stated, the lease used in Indiana grants the oil and gas, with the right of exploration. The doctrine is well established in this jurisdiction that such leases do not vest the lessee with a title to the oil and gas in place, but that title to the minerals vests only upon production, and then to the extent of the oil appropriated.[93] It was first held that an oil and gas lease constitutes a leasehold interest.[94] Under this doctrine a lease was held to import a covenant for quiet enjoyment.[95] Under the authority of *Funk* v. *Haldeman* it was then held that a lease was a grant of an incorporeal hereditament.[96] The later cases hold that these contracts are not leases within the meaning of the law of landlord and tenant.[97] A lease granting the oil and gas, with an "unless" drilling clause, was held to create an option in the lessee to explore, and not a leasehold.[98] While these expressions are found in the Indiana cases, the exact rule in this jurisdiction seems to be based on *Oil Company* v. *Fretts,* the rule being that the lessee has no title to the minerals or to the land until the discovery of oil or gas in paying quantities.[99] The

[91] *Rich* v. *Doneghey,* 177 Pac. (Okla., 1918) 87.

[92] *Shaffer* v. *Marks,* 241 Fed. 139 (1917); *Aggers* v. *Shaffer,* 256 Fed. 648 (1919). But see also: *Brunson* v. *Carter Oil Co.,* 259 Fed. 656 (1919), where a "grant, demise and let" lease with an "unless" drilling clause is held to create an option vesting no rights *in rem; Washburn* v. *Gillespie,* 261 Fed. 41 (1919).

[93] *New American Oil & Mining Co.* v. *Troyer,* 166 Ind. 402, 77 N. E. 739 (1906); *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190 (1900); *Heller* v. *Dailey,* 28 Ind. App. 555, 63 N. E. 490 (1902); *Kahle* v. *Crown Oil Co.,* 180 Ind. 131, 100 N. E. 681 (1913); *Rupel* v. *Ohio Oil Co.,* 176 Ind. 4, 95 N. E. 225 (1911).

[94] *Chandler* v. *Pittsburgh Glass Co.,* 20 Ind. App. 165, 50 N. E. 400 (1898); *Shenk* v. *Stahl,* 35 Ind. App. 493, 74 N. E. 538 (1905).

[95] *Shenk* v. *Stahl, supra.*

[96] *Heller* v. *Dailey,* 28 Ind. App. 555, 63 N. E. 490 (1902); *Monaghan* v. *Mount,* 36 Ind. App. 188, 74 N. E. 579 (1905); *Campbell* v. *Smith,* 180 Ind. 159, 101 N. E. 89 (1913).

[97] *New American Oil & Mining Co.* v. *Troyer, supra; Dill* v. *Fraze,* 169 Ind. 53, 79 N. E. 971 (1907); *Stahl* v. *Illinois Oil Co.,* 45 Ind. App. 211, 90 N. E. 632 (1910).

[98] *Risch* v. *Burch,* 175 Ind. 621, 95 N. E. 123 (1911).

[99] *Diamond Plate Glass Co.* v. *Curless,* 22 Ind. App. 346, 52 N. E. 782 (1899); *Gadbury* v. *Ohio Nat. Gas Co.,* 162 Ind. 9, 67 N. E. 259 (1903); *Carr* v. *Huntington Light &*

title vested by production is an interest in the land for the purpose of production.[100]

While the recent West Virginia cases relating to oil and gas law evidence a clear understanding of the subject upon questions in general, there is a decided lack of certainty and precision in the holdings of this court on the proposition now being considered. The first important announcement on this point is in *State* v. *South Penn Oil Company*.[101] A "grant, demise and let" lease was involved. The court, under the primary authority of *Oil Company* v. *Fretts*, held that before the discovery of oil or gas in paying quantities the lessee took no estate either in the land or minerals, but that upon finding oil or gas the contract took effect as a lease. In further support of this holding the court cited the two different lines of authority in Pennsylvania, that is, *Funk* v. *Haldeman* and kindred cases holding that an incorporeal right attached under the type of lease there involved, and *Brown* v. *Beecher* and *Duke* v. *Hague*, which were to the effect that a "grant, demise and let" lease vested the lessee with a corporeal estate which would support an action in ejectment. The court utterly failed to recognize the distinction between the two lines of authority. The rule is settled in West Virginia, however, that an oil and gas lease of whatever character does not vest the lessee with a title to the land or minerals until discovery.[102] As to the character of title vested by discovery the decisions are not in agreement. It is held that the finding of oil or gas vests the lessee with the right to produce the oil and gas.[103] It is also held that upon this occurrence the lessee acquires a vested title to the oil and gas in place.[104] In *Eastern Oil Co.* v. *Coulehan* the lease granted all of the oil and gas, with the right to explore. In commenting on the character of the instrument it was stated that a grant of this type was construed as a lease by the Ohio court, but that in West Vir-

Fuel Co., 33 Ind. App. 1, 70 N. E. 552 (1904); *Ramage* v. *Wilson*, 45 Ind. App. 599, 88 N. E. 862 (1909); *Johnson* v. *Sidey*, 59 Ind. App. 678, 109 N. E. 934 (1915); *Rembarger* v. *Losch*, 118 N. E. 831 (1918).

[100] *Rembarger* v. *Losch, supra; Carr* v. *Huntington Light & Fuel Co., supra; Ramage* v. *Wilson, supra.*

[101] *State* v. *South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688 (1896).

[102] *Crawford* v. *Ritchey*, 43 W. Va. 252, 27 S. E. 220 (1897); *Steelsmith* v. *Gartlan*, 45 W. Va. 27, 29 S. E. 978 (1898); *Carter* v. *Tyler County Court*, 45 W. Va. 806, 32 S. E. 216 (1899); *Ammons* v. *South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004 (1900); *Parish Fork Oil Co.* v. *Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655 (1902); *Core* v. *New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128 (1903); *Toothman* v. *Courtney*, 62 W. Va. 167, 58 S. E. 915 (1907); *Eastern Oil Co.* v. *Coulehan*, 65 W. Va. 531, 64 S. E. 836 (1909); *Harris* v. *Michael*, 70 W. Va. 356, 73 S. E. 934 (1912).

[103] *Crawford* v. *Ritchey, supra; Harris* v. *Michael, supra.*

[104] *Core* v. *New York Petroleum Co., supra; State* v. *South Penn Oil Co., supra.*

ginia and Pennsylvania it was treated as a mere license, vesting no estate. A "grant, demise and let" lease creates an incorporeal hereditament,[105] but carries with it an implied covenant for quiet possession for the purposes of the lease.[106] Where a lease granted all of the oil and gas, with the right of exploration, it was held that this did not pass a title to the oil and gas in place,[107] nor will such a lease support an action in ejectment where the lessee had never taken possession,[108] but an oil and gas lease is a leasehold under the mechanic's lien law of the state.[109] Interspersed with these holdings and under the authority of *Stoughton's Appeal* and *Blakeley* v. *Marshall,* decided by the Supreme Court of Pennsylvania, it is held that an oil and gas lease in legal effect was a grant of a part of the corpus of the estate, that is, the oil and gas.[110] These cases, however, involve leases covering the lands of minors or incompetents, or conflicting claims to royalties under leases. It was probably necessary to attribute this effect to the leases under consideration as a predicate for the decision of the particular issues there presented. Such is the view of these cases in the dissenting opinion in *Updegraff* v. *Blue Creek Coal Company.* The court was confronted by the apparent conflict between the cases just alluded to and the other holdings in West Virginia, in *Campbell* v. *Lynch,*[111] where it is said: "Though there are several judicial declarations that such a lease constitutes a virtual sale of the oil and gas, there are, perhaps, just as many, or more, to the effect that it does not pass any title, legal or equitable, to the oil and gas in place. All agree that after discovery of the minerals it vests a conditional estate in the lessee; but it is not title to the minerals in place. It is an incorporeal right to mine, the exercise of which may exhaust the minerals. This right, of course, is beyond the control of the lessor as long as the conditions upon which it

[105] *Ford* v. *Ball,* 76 W. Va. 663, 86 S. E. 562 (1915); *Campbell* v. *Lynch,* 81 W. Va. 374, 94 S. E. 739 (1917).

[106] *Headley* v. *Hoopengarner,* 60 W. Va. 626, 55 S. E. 744 (1906).

[107] *Toothman* v. *Courtney,* 62 W. Va. 167, 58 S. E. 915 (1907).

[108] *Carnegie Nat. Gas Co.* v. *South Penn Oil Co.,* 56 W. Va. 402, 49 S. E. 548 (1904).

[109] *Showalter* v. *Lowndes,* 56 W. Va. 462, 49 S. E. 448 (1904).

[110] *Wilson* v. *Youst,* 43 W. Va. 826, 28 S. E. 781 (1897); *South Penn Oil Co.* v. *McIntyre,* 44 W. Va. 296, 28 S. E. 922 (1898); *Lawson* v. *Kirchner,* 50 W. Va. 344, 40 S. E. 344 (1901); *Haskell* v. *Sutton,* 53 W. Va. 206, 44 S. E. 533 (1903); *Jamison Coal Co.* v. *Carnegie Nat. Gas Co.,* 77 W. Va. 30, 87 S. E. 451 (1915); *Updegraff* v. *Blue Creek Coal Co.,* 74 W. Va. 316, 81 S. E. 1050 (1914).

[111] *Campbell* v. *Lynch,* 81 W. Va. 374, 94 S. E. 739 (1917). See also: *South Penn Oil Co.* v. *Snodgrass,* 71 W. Va. 438, 76 S. E. 961 (1913); *Headley* v. *Hoopengarner,* 60 W. Va. 626, 55 S. E. 744 (1906). In *Harvey Coal Co.* v. *Dillon,* 59 W. Va. 605, 53 S. E. 928 (1905). the court clearly states the limitation of the doctrine of *Wilson* v. *Youst, supra,* and kindred cases.

depends are complied with." This, no doubt, states the ultimate rule in West Virginia, which is to the effect that the lessee acquires no interest or estate in the land or the oil or gas until discovery; that thereupon he acquires a vested estate. This estate is thus described in one of the most recent decisions by that court: "After discovery of minerals he has a conditional estate for years, in the nature of a tenancy of the surface. The relation of landlord and tenant then attaches."[112]

The rule is well settled in Kansas that an oil and gas lease creates an incorporeal hereditament or license, this being true regardless of the character of the lease presented. The lessee acquires no interest or estate in either the land or the oil and gas.[113] Where the lease granted the oil and gas with the right to explore therefor, no title to the oil or gas in place passed.[114] In opposition to the rule in Pennsylvania and West Virginia it is here held that a lease for oil and gas mining purposes does not constitute a leasehold within the mechanic's lien statute.[115] This doctrine applies although oil has been discovered;[116] but an oil and gas lease or an assignment thereof is a grant of such character that it is within the statute of frauds.[117] It also constitutes an alienation within the homestead statute.[118] Where a lease with an "unless" drilling clause was involved the court described the instrument as an option.[119] It remains only to examine certain isolated decisions on this question. Arkansas, Colorado, Alabama and Virginia follow the doctrine of *Oil Company*

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[112] *Carper* v. *United Fuel Co.*, 78 W. Va. 436, 89 S. E. 12 (1916). See also: *South Penn Oil Co.* v. *Snodgrass, supra.*

[113] *Dickey* v. *Coffeyville Brick Co.*, 69 Kan. 106, 76 Pac. 398 (1904); *Rawlings* v. *Armel*, 70 Kan. 778, 79 Pac. 683 (1905); *Kansas Nat. Gas Co.* v. *Board of Comm'rs.*, 75 Kan. 335, 89 Pac. 750 (1907); *Eastern Ohio Oil Co.* v. *McEvoy*, 75 Kan. 515, 89 Pac. 1048 (1907); *Martin* v. *Crude Oil Co.*, 77 Kan. 851, 92 Pac. 1119 (1907); *Phillips* v. *Springfield Crude Oil Co.*, 76 Kan. 783, 92 Pac. 1119 (1907); *Beardsley* v. *Kansas Nat Gas Co.*, 78 Kan. 571, 96 Pac. 859 (1908); *Robinson* v. *Smalley*, 102 Kan. 842, 171 Pac. 1155 (1918); *White* v. *Green*, 103 Kan. 405, 173 Pac. 974 (1918); *Huston* v. *Cox*, 103 Kan. 73, 172 Pac. 992 (1918).

[114] *Finch* v. *Beyer*, 94 Kan. 525, 146 Pac. 1141 (1915); *Hover* v. *McNeill*, 102 Kan. 492, 175 Pac. 150 (1918).

But see: *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801 (1905), where it is held that the lease was a grant *in praesenti* of all the oil and gas, with the right to explore therefor, and if found, to appropriate them.

[115] *Eastern Oil Co.* v. *McEvoy, supra; Phillips* v. *Springfield Crude Oil Co., supra; Martin* v. *Springfield Crude Oil Co., supra.*

[116] *Phillips* v. *Springfield Crude Oil Co., supra; Martin* v. *Springfield Crude Oil Co., supra.*

[117] *White* v. *Green supra; Robinson* v. *Smalley, supra.*

[118] *Palmer* v. *Parish*, 61 Kan. 311, 59 Pac. 640 (1900); *Thompson* v. *Milliken*, 93 Kan. 72, 143 Pac. 430 (1914).

[119] *O'Neal* v. *Risinger*, 77 Kan. 63, 93 Pac. 340 (1908).

v. *Fretts*.[120] New York holds that a "grant, demise and let" lease creates an incorporeal hereditament, citing *Funk* v. *Haldeman* and other Pennsylvania cases to the same effect, the court failing to observe the distinction between the two forms of leases.[121] Missouri holds that a "grant, demise and let" lease with an "unless" drilling clause creates an option.[122] Wyoming, without determining the exact nature of the grant, held that an oil and gas lease was within the statute of frauds,[123] while the Supreme Court of Washington, describing the lease as one creating an incorporeal hereditament, held that an oil and gas lease is not within the statute of frauds.[124]

The exact nature of the rights created by an oil and gas lease must be determined from a critical examination of the cases just considered and upon principle. Before centering our attention upon this inquiry, however, the vast importance of the proposition in its relation to other questions arising in the law of oil and gas must be definitely understood. Broadly speaking, the law of oil and gas is characterized by four principles which are deeply embedded in the decisions. First, the common law rule that a grant must be construed most strictly against the grantor and in favor of the grantee has given way to the rule that the express or implied obligations of the lessee to develop the leased premises must be strictly construed against the lessee and in favor of the lessor. Second, implied covenants or conditions are read into these leases which bind the lessee to a higher degree of diligence in the development and operation of the property than is the case under a lease of solid minerals. Third, equity favors rather than abhors the forfeiture of an oil and gas lease upon default by the lessee. Fourth, the common law rule that there can be no abndonment of a vested estate in less time than the period prescribed by the statute of limitations has no application in this jurisprudence. These doctrines in their tendency are destructive of the security and stability of the lessee's title, and had their origin largely in the novel conception that until discovery the lessee's title was inchoate only. Therefore, from a strictly practical standpoint the gist of our inquiry is this: Does the lessee acquire a vested property right for the purposes of the lease immediately upon its execution and delivery, or is the title then taken by

[120] *Osborn* v. *Arkansas Territorial Gas Co.*, 103 Ark. 175, 146 S. W. 122 (1912); *Florence Oil & Refining Co.* v. *Orman*, 19 Colo. App. 79, 73 Pac. 628 (1903); *Rechard* v. *Cowley*, 80 So. (Ala., 1918) 419; *Richlands Oil Co.* v. *Morriss*, 108 Va. 288, 61 S. E. 762 (1908).

[121] *Wagner* v. *Mallory*, 169 N. Y. 501, 62 N. E. 584 (1902).

[122] *Morton* v. *Drosten*, 185 S. W. (Mo., 1916) 733.

[123] *Montana Oil Co.* v. *Gibson*, 19 Wyo. 1, 113 Pac. 784 (1911).

[124] *Walla Walla Oil, etc. Co.* v. *Vallentine*, 103 Wash. 359, 174 Pac. 980 (1918).

the lessee inchoate or executory merely until actual discovery of oil or gas? The decisions are at variance on this exact point, which circumstance is largely due to the failure on the part of some of the courts to recognize the elementary distinction between a property right and a contractual right. This fundamental error is aptly illustrated by a single line of cases. Owing to the utter impossibility of proving the damages sustained by a lessee where a lessor denies his title the only adequate remedy available to the lessee is an action to protect or enforce his right of property under his lease. Ordinarily there are two conditions which bring a lessee into court to protect or enforce his rights under this lease. First, where the lessor resists the possession of the lessee either arbitrarily or upon the ground of an alleged forfeiture, or where, for the same reasons, the lessor has granted a second lease to a third party who has gone into possession, commenced operations, and who resists the possession of the first lessee. Obviously one of two remedies only are available, first, ejectment at the suit of the first lessee to recover possession of the leased premises for the purpose of the lease, or secondly, an action in equity for an injunction restraining the lessor from interfering with the lessee's possession and operations, or in case a second lessee is in possession, to restrain the operations of that lessee and to further enjoin him from interfering with the possession and work of development of the first lessee. In these circumstances if the lease is of the "grant, demise or let" type, it is held in Pennsylvania that the lessee may maintain ejectment. Such also appears to be the tendency of the Kentucky courts at this time.[125] But in every other jurisdiction the lessee must resort to a court of equity to protect his property right under his lease. When the case assumes this attitude some of the courts have fallen into a most serious error. Starting with the conception that the lessee possesses a purely inchoate right, it logically follows that the lessee is seeking the negative specific enforcement of an executory contract. Thus viewed, the surrender clause of the lease or its equivalent the "unless" clause, either one or the other of which is an inevitable incident of an oil and gas lease, proves to be an insuperable bar to any relief in equity because there is no mutuality of remedy between the parties. That is, by reason of the lessee's option to surrender, the lessor would not be entitled to a decree for specific enforcement against the lessee, the lessee having the right to avoid the decree by exercising his right of surrender. On this principle it was held in several jurisdictions that the lessee was not entitled to relief in

[125] *Beatty Oil & Gas Co.* v. *Blanton*, 245 Fed. 979 (1917).

equity for the enforcement or protection of his rights under the lease.[126] Inasmuch as it was held in the same jurisdictions that the lessee could not maintain ejectment he was, for all practical purposes, left remediless, the remedy at law for damages being wholly inadequate. All these cases either directly or indirectly were founded on *Marble Company* v. *Ripley*,[127] where the sole matter presented was the specific enforcement of an executory contract as distinguished from an action for the protection of a vested property right. It required a specific decision by the Supreme Court of the United States to arrest this destructive doctrine.[128] In the *Guffey* case the original lessee held title to an oil and gas lease containing a surrender clause. The lessor granted a second lease, the lessee thereunder going into possession and commencing operations. The first lessee brought his action in equity to restrain the second lessee from developing the property and from interfering with the possession and development thereof by the first lessee. The defense urged was that the surrender clause in plaintiff's lease evidenced a contract of such character that it could not be specifically enforced against the lessee by the lessor, and such was the decision of the Circuit Court of Appeals of the Seventh Circuit.[129] The case, however, went to the Supreme Court of the United States upon a writ of certiorari, the cause being reversed on this point, the court saying: "It next is insisted that according to the general principles and rules of equity administered in the Federal courts the surrender clause constitutes an insuperable obstacle to granting the relief sought, the argument being that, as the complainants have a reserve option to surrender the lease at any time, it cannot be specifically enforced against them, and therefore cannot be similarly enforced in their favor. The rule intended to be invoked has to do with the specific enforcement of executory contracts, is restrained by many exceptions, and has been the subject of divergent opinions on the part of jurists and text-writers. Without considering it in other aspects we think it is without present application. *Rightly understood this is not a suit for specific performance.* Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in

[126] *Federal Oil Co.* v. *Western Oil Co.*, 112 Fed. 373 (1902); *Federal Oil Co.* v. *Western Oil Co.*, 121 Fed. 674 (1902); *Smith* v. *Guffey*, 202 Fed. 106 (1912); *Watford Oil & Gas Co.* v. *Shipman*, 233 Ill. 9, 84 N. E. 53 (1908); *Kolachney* v. *Galbreath*, 26 Okla 772, 110 Pac. 902 (1910); *Hill Oil & Gas Co.* v. *White*, 157 Pac. (Okla., 1915) 710; *Warner* v. *Page*, 59 Okla. 259, 159 Pac. 264 (1916); *Advance Oil Co.* v. *Hunt*, 116 N. E. (Ind., 1917) 340.

[127] *Marble Co.* v. *Ripley*, 77 U. S. 339 (1870).

[128] *Guffey* v. *Smith*, 237 U. S. 101.

[129] *Smith* v. *Guffey*, 202 Fed. 106.

a lease already given, but to protect a *present vested leasehold* amounting to a freehold interest from continuing and irreparable injury calculated to accomplish its practical destruction. The complaint is not that *performance of some promised act* is being withheld or refused, but that complainant's *vested freehold right* is being wrongfully violated and impaired in a way which calls for preventive relief. In this respect the case is not materially different from what it would be if the complainants were claiming under an absolute conveyance rather than a lease." It is here apparent that the Supreme Court of the United States clearly recognized that the subject-matter dealt with was a property right as distinguished from a mere contractual right. The later decisions are in harmony with the principle so announced.[130] In the *Shaffer* case it is distinctly held that the suit was for the protection of a property right and not for the enforcement of any executory contractual provisions of the lease. Notwithstanding this posture of the cases we find the Appellate Court of Indiana in a recent case following the earlier rule on this question.[131]

With the importance of the question thus emphasized it becomes necessary for us to determine, both upon principle and authority, whether or not the lessee's initial right to explore constitutes a vested property right, or whether the right of the lessee before discovery is inchoate only. If the former concept can be upheld we are not so greatly concerned with the technical character of the lessee's interest or estate before discovery. Otherwise stated, if the lessee obtains a vested property right by virtue of the execution and delivery of his lease, two consequences logically follow. In the first place the situation of the lessee is such that he may protect his vested property right by an action in ejectment in a proper case, and if ejectment will not lie, by an appropriate action in equity. Secondly, the latitude for the rather promiscuous application of those principles which are destructive of the lessee's title before discovery will be greatly and very properly circumscribed. Before entering upon a critical examination of the cases in general it becomes necessary to set aside a line of decisions which have resulted in more or less confusion on this question. We have already alluded to several holdings which are to the effect that an oil and gas lease which contains an "unless" drilling clause constitutes a mere option. This error persists in several very recent cases. While the Supreme

[130] *Shaffer* v. *Marks*, 241 Fed. 139 (1917); *Aggers* v. *Shaffer*, 256 Fed. 648 (1919); *Washburn* v. *Gillespie*, 261 Fed. 41 (1920).

[131] *Advance Oil Co.* v. *Hunt* 116 N. E. (Ind., 1917) 340.

Court of Oklahoma in some of its early holdings refers to a lease of this description as an option, the later cases hold that the lessee takes a vested property interest. Notwithstanding this, we find the Federal court for the same jurisdiction where a "grant, demise and let" lease with an "unless" drilling clause was involved, holding that the lease creates no rights *in rem,* but rights *in personam* only.[132] Then again, although the Court of Appeals of Kentucky has held that a "grant, demise and let" lease vests the lessees with a corporeal estate,[133] the Circuit Court of Appeals for the Sixth Circuit in a case originating in Kentucky where the granting clause was of the same type with an "unless" rental provision, holds that the lease was an executory contract, the drilling and rental clause constituting a condition precedent to the vesting of title.[134] These cases and other decisions of similar import are predicated upon this fundamental error. It is here assumed that an oil and gas lease takes its character from the "drill or pay" clause, while both upon principle and authority the rule is directly to the contrary. In some juisdictions the granting clause determines the nature of the rights created by an oil and gas lease, while other courts hold that the lease takes its character from the underlying purpose and intention of the grant. Under either line of authority there is no warrant for the conclusion that the drilling clause in the "unless" form establishes the nature of the grant. The sole function of this clause is to fix the time within which the lessee must drill, or in lieu thereof pay the prescribed rental, the lease terminating ipso facto upon the lessee's failure to drill or pay. Otherwise stated, the lease takes its character as a vested property right either by virtue of the technical form of the granting clause or by virtue of the underlying purpose of the instrument, the so-called optional drilling clause having the effect of a condition subsequent for the breach of which an estate already vested is afterwards divested. Recurring now to the main question as to whether the lessee's interest before discovery is vested or inchoate, the cases take this posture.

The courts of Ohio, Illinois, Louisiana and Oklahoma observe no distinction in the form of the granting clause, and unite in the holding that a present interest in the land for the purposes of the lease is vested thereby. Pennsylvania, California and Kentucky hold that a "grant, demise and let" lease vests the lessee with a corporeal estate in the lands for the purposes of the lease. Both Pennsylvania

[132] *Brunson* v. *Carter Oil Co.,* 259 Fed. 656 (1919).
[133] *Kennedy* v. *Hicks,* 180 Ky. 562, 203 S. W. 318 (1918).
[134] *Hopkins* v. *Ziegler,* 259 Fed. 43 (1919).

and California distinguish a lease of this type from the other forms, holding that the other forms pass an incorporeal hereditament only. But the Supreme Court of Pennsylvania, in a later case, criticizes this distinction, indicating that if the court had not been bound by the principle of stare decisis that could would hold any form of lease to vest a corporeal estate.[135] The Court of Appeals of Kentucky has not been called upon to consider the exact character of the interest which passes under the other two forms of leases. Under the later cases in Texas it is held that a lease granting the oil and gas passes a present title to the minerals in place, and therefore constitutes an interest in the real estate. Kansas without distinguishing between the several forms of leases consistently adheres to the rule that a lease creates an incorporeal hereditament. Wherever it is held that an oil and gas lease creates an incorporeal hereditament the decision is controlled by *Funk* v. *Haldeman*,[136] already within the condemnation of the Supreme Court of Pennsylvania as indicated above. A close examination of *Funk* v. *Haldeman* discloses that the court found difficulty in classifying an oil lease as one creating an incorporeal interest, and did so upon the theory that the lessee possessed a right in the nature of a *profit a prendre*, therefore an incorporeal right. Other courts adopt this classification,[137] but the owner of a *profit a prendre* is vested with an interest or estate in the lands.[138] Considering these decisions in their entirety they support the rule that upon the execution and delivery of an oil and gas lease the lessee is immediately vested with either a corporeal or an incorporeal interest or estate in the premises for the purposes of the lease.

Setting aside the several isolated decisions of those jurisdictions which by reason of the limited extent of oil development therein are rarely concerned with this branch of the law, the only cases which stand in square opposition to the rule announced above are those of West Virginia and Indiana. The prevailing rule in these states is that until discovery the lessee possesses no interest or estate either in the minerals or the lands, his title being wholly inchoate. But even here the right to explore rises to such dignity that the court in

[135] *Hicks* v. *American Natural Gas Co.*, 207 Pa. 570, 57 Atl. 55 (1904).

[136] *Funk* v. *Haldeman*, 53 Pa. St. 229 (1866).

[137] *Phillips* v. *Springfield Crude Oil Co.*, 76 Kan. 783, 92 Pac. 1119 (1907); *Rich* v. *Doneghey*, 177 Pac. (Okla., 1918) 86.

[138] *Post* v. *Pearsall*, 22 Wend. 425 (1839); *Goodrich* v. *Burbank*, 12 Allen. 459; *Grubb* v. *Guilford*, 4 Watts 223 (1835); *Johnstown Iron Co.* v. *Cambria Iron Co.*, 32 Pa. St. 241 (1858); *Boatman* v. *Lasley*, 23 Ohio St. 614 (1873); *Pierce* v. *Keator*, 70 N. Y. 419 (1877); *Black* v. *Elkhorn Mining Co.*, 49 Fed. 549; *Heller* v. *Daley*, 28 Ind. App. 555, 63 N. E. 490 (1902).

a proceeding in equity will protect the lessee against the invasion of this right by the lessor or a subsequent lessee.[139] The holding that the lessee's right to explore is inchoate finds its way into so many decisions and is so frequently the ground for cancellation of leases that this question merits close attention. The rule is founded on a decision of the Supreme Court of Pennsylvania.[140] Here the lessee took a number of oil leases the term of which was twenty years. It was provided that a well should be drilled on one of the farms and if oil were found in paying quantities, on any one of the farms operations were to be begun on the farm next adjoining, operations to be continued until all the farms were tested to success or abandonment. The lessee drilled a dry hole, and did nothing further for seven years. The lessor sought the cancellation of this lease on the ground of abandonment. The court, in decreeing cancellation of the lease for that reason, said: "A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations unless there is specific proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract." In considering this holding in a very recent case it is said: "Substantially similar statements will be found in other cases involving oil and gas leases. It may create the impression that there is nothing vested until oil or gas is found. Such, however, is not the case, and no such thought was intended to be conveyed. What is inchoate until oil or gas is found is the right to produce oil and gas and the right to the oil and gas itself which remains inchoate until produced. The right to explore, therefore, is at no time inchoate. It is vested, and will be protected from the time of the execution of the instrument."[141] In this case it is further said: "That an estate in the surface of the land of some character vests in the lessee immediately upon the execution of the instrument I do not understand to be questioned anywhere. Possibly there is some question as to the exact nature of the estate which vests, but otherwise there is none. * * * It is sufficient for

[139] *McGraw Oil Co.* v. *Kennedy*, 65 W. Va. 595, 64 S. E. 1027 (1909); *Hefner* v. *Light Co.*, 77 W. Va. 217, 87 S. E. 206 (1915).

[140] *Venture Oil Co.* v. *Fretts*, 152 Pa. 451, 25 Atl. 732 (1893).

[141] *Lindley* v. *Raydure*, 239 Fed. 928 (1917).

the purpose thereof that an estate in possession to explore for oil and gas does vest immediately upon the execution of the instrument, and that an estate in the future to produce oil and gas will vest on its discovery, whatever limitations or qualifications either may be subject to." The doctrine of the *Fretts* case finds constant reiteration in the West Virginia decisions, and to a less extent in the Indiana cases, but ordinarily the rule is confined to that class of cases where the lessor claims that the lessee has abandoned the lease before discovery, and cancellation is sought on that ground. Inasmuch as a vested estate cannot be divested short of the period prescribed by the statute of limitations, it was deemed necessary to hold that the lessee's title before discovery is inchoate or executory.[142] This is the true limitation of the West Virginia and Indiana cases on this question.

Finally, then, the great weight of authority supports the proposition that the lessee takes a present vested property right for the purposes of the lease immediately upon the execution and delivery of the instrument, the authorities differing only in the technical definition of the interest or estate so acquired. On principle, the distinction observed by the courts of Pennsylvania, California and Texas cannot be sustained. As already stated, the owner of the fee has the same title to the oil and gas in place which characterizes the ownership of solid minerals in like circumstances, but by his lease, regardless of the form of the granting clause, he does not intend to convey the oil and gas in place or any interest therein, nor does he intend to vest the lessee with the dual right observed by the court in *Lindley* v. *Raydure*. On the other hand, by a lease of this description the lessee is vested with a present property right in the leased premises, namely, to search for oil and gas under the conditions of the lease, and to appropriate them as personal property if found, yielding the lessor the stipulated royalty. This is a right to take a profit from the lands of another, and within the common law classification may be regarded as a *profit a prendre*.

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(To be continued)

[142] *Tennessee Oil Co.* v. *Brown*, 131 Fed. 696 (1904); *Rawlings* v. *Armel*, 70 Kan. 778, 79 Pac. 683 (1905); *Steelsmith* v. *Gartlan*, 45 W. Va. 27, 29 S. E. 978 (1898); *South Penn Oil Co.* v. *Snodgrass*, 71 W. Va. 438, 76 S. E. 961 (1913); *Kelly* v. *Harris*, 162 Pac. (Okla., 1916) 219; *Grubb* v. *McAfee*, 212 S. W. (Tex., 1919) 464.