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## Oil and Gas - Leases - Validity When Executed by Life Tenant and Remaindermen at Different Times

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**OIL AND GAS—LEASES—VALIDITY WHEN EXECUTED BY LIFE TENANT AND REMAINDERMEN AT DIFFERENT TIMES**—In 1952 plaintiffs acquired an oil and gas lease from the life tenant which they assigned two years later, reserving an overriding 1/16 royalty interest. Subject to plaintiffs' royalty rights this lease was eventually acquired by the defendant. In 1954, the remaindermen executed an oil and gas lease to defendant's wife who assigned a 7/8 working interest to eight persons, and reserved a 1/8 working interest which she later assigned to defendant, subject to a 1/16 overriding royalty interest in herself. Action was brought by plaintiffs against defendant, his wife and her eight assignees for a declaration of rights of the parties in oil being produced on land covered by the leases. The trial court concluded that title to the leases had merged and vested a valid oil and gas lease in the defendants who were working the property. On appeal, *held*, reversed. The life tenant's lease to plaintiffs was invalid when executed and was not validated by subsequent events. There was no merger of titles which could validate the lease because the entire interests were never joined in one person or a separate entity. *Rowe v. Bird*, (Ky. 1957) 304 S.W. (2d) 775.

This decision applies the apparently uniform rule that neither a life tenant nor remainderman, acting alone, can convey a present right to take oil and gas.<sup>1</sup> This rule has developed through application of the common law doctrine of waste. Minerals while in the ground constitute part of the realty and cannot be extracted by a life tenant. Since the life tenant cannot himself develop the land for oil and gas, he cannot create a greater right in others by lease. Similarly the remainderman has no right to immediate possession of the land and thus no power to violate the life tenant's right to possession by leasing present interests to others. The court in the principal case acknowledges the invalidity of leases separately executed by the life tenants and remaindermen but appears to recognize that they can be validated by subsequent events. If it is admitted, however, that an ultimate merger of title will cure pre-existing defects, the question arises why the court concludes that a partial merger would not have the same effect. The trend of authority indicates a general policy to free petroleum-bearing land for development absent persuasive reasons to the contrary.<sup>2</sup> It is arguable that since one defendant received all of the life tenant's interest subject to a 1/8 royalty and 1/8 of the defendant's wife's remainder interest, there could be a partial merger.<sup>3</sup>

<sup>1</sup> 2 SUMMERS, OIL AND GAS §§223, 224 (1938).

<sup>2</sup> Warren, "Policy Limitations on Oil and Gas Leasing," 3 U.C.L.A. L. Rev. 474 at 474, 506 (1956).

<sup>3</sup> See *Bosley v. Burk*, 154 Md. 27, 139 A. 543 (1927), where a purchaser of the life estate in the whole property, and later an undivided 1/3 interest in remainder, through merger, became owner of an undivided 1/3 in fee simple. See also *McIntosh v. Ropp*, 233 Pa. 497, 82 A. 949 (1912), where a lease by a life tenant was later ratified by one of two

Under this view, it might be argued that the defendant, having a valid lease on an undivided 1/8 interest in the fee, would have a right to extract minerals from the property despite the outstanding remainder interests.<sup>4</sup> It is therefore necessary to determine if the court, by denying relief, acted in conformity with the trend toward free development. The problem is to maximize protection of individual property interests of the life tenant and remainderman while promoting petroleum utilization. When a life tenant and remainderman execute a lease jointly,<sup>5</sup> ratify the other's independent lease,<sup>6</sup> or accept the benefits created by the other's independently executed lease,<sup>7</sup> each has consented to an invasion of his property rights.<sup>8</sup> This same reasoning would seem to apply where the rights of both parties subsequently come to rest in one person or entity.<sup>9</sup> But in the present case, allowing partial merger would enable the defendant to exploit the property, having only to account to the outstanding 7/8 remainder interests. At the same time, the lessees of the outstanding 7/8 remainder interest could not work the land, for to do so would violate the defendant's interest in the life estate. It would seem, therefore, that the basic objection to allowing a life tenant to give an oil and gas lease still obtains, and the outstanding remainder interests would not be adequately protected by allowing the defendant to proceed as he wished in this case.

remaindermen. The court concluded the non-ratifying remainderman's rights are to be worked out on the basis of a lease by a co-tenant without the consent of the other co-tenant.

<sup>4</sup> A possible analogy may be found in the view of a majority of the courts that a co-tenant has a right to develop the land despite objection of the other co-tenants, having to account to his co-tenants for their share of the total production minus the costs of production. Williams, "The Effect of Concurrent Interests on Oil and Gas Transactions," 34 TEX. L. REV. 519 at 520 (1956); KULP, OIL AND GAS RIGHTS §10.19 (1954). Moreover, Kentucky seems to adopt a more liberal rule than the majority. The non-developing co-tenant may recover only a reasonable royalty from the developing co-tenant or his lessee on any oil or gas produced before the filing of his suit. The non-developing co-tenant's recovery is the same as under the majority rule for any oil produced after filing of the suit against the developing co-tenant or his lessee. Gillispie v. Blanton, 214 Ky. 49, 282 S.W. 1061 (1926); New Domain Oil & Gas Co. v. McKinney, 188 Ky. 183, 221 S.W. 245 (1920).

<sup>5</sup> Meredith v. Meredith, 193 Ky. 192, 235 S.W. 757 (1921), cited in the principal case at 778; 2 THORNTON, OIL AND GAS §430 (1932; Supp. 1956); 2 SUMMERS, OIL AND GAS §224 (1938).

<sup>6</sup> Burden v. Gypsy Oil Co., 141 Kan. 147, 40 P. (2d) 463 (1935). Cf. Yost v. Ratliff, (Ky. 1951) 246 S.W. (2d) 447.

<sup>7</sup> 2 SUMMERS, OIL AND GAS §223 (1938).

<sup>8</sup> Consent is a bar to an action of trespass brought by a life tenant. PROSSER, TORTS §18 (1955). Compare with Williams, "The Effect of Various Conditions of Ownership on Oil and Gas Transactions," 5 UTAH L. REV. 1 at 3 (1956), that the lease merely effects a transfer to the lessee of the veto power of the grantor on development by the other.

<sup>9</sup> It seems that whether this is viewed as consent by the lessor, or as an estoppel of the lessor, it would not alter the result. See dictum at p. 778 of principal case. In both instances the party should be entitled to develop for oil and gas when he obtains both the life tenant's and remainderman's respective interests.

Moreover, allowance of a partial merger would increase the already difficult problems of an accounting.<sup>10</sup> The court, in addition to determining the rights of holders of present, future, and royalty interests, would have to value the interests of those lessees in whom there was no partial merger, as opposed to the interests of the lessee in whom there was a valid partial merger. In the light of these difficulties, insistence by this court on merger in one person or single entity, though perhaps an impediment to development of resources, seems justifiable as a means of protecting the property rights of both life tenant and remaindermen. If it is felt the policy of petroleum development is more important than protection of particular property interests, the solution would seem ultimately to rest with the legislature and not the courts.<sup>11</sup>

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<sup>10</sup> When a life tenant and the owner of the future interest join in a lease and fail to make an agreement on the method of dividing lease proceeds, the apportionment of these proceeds has been the subject of considerable litigation. See generally Williams, "The Effect of Various Conditions of Ownership on Oil and Gas Transactions," 5 UTAH L. REV. 1 at 4-5 (1956); KULP, OIL AND GAS RIGHTS §10.18 (1954).

<sup>11</sup> Some legislative progress has already been made in this direction in some states by allowing land subject to contingent future interests to be leased, through court proceedings, by life tenants. E.g., Ky. Rev. Stat. (1953) §§353.300 to 353.380; Okla. Stat. (1941) tit. 60, §§71 to 73.