# NOTES

## THE POWER OF A TRUSTEE TO EXECUTE OIL AND GAS LEASES

Oil and gas leases[1] are an anomaly in the law of property. In attempting to fit oil and gas interests into the traditional property concepts, courts have been unable to agree as to the nature of the landowner's interest in oil and gas[2] or the interest created in the lessee.[3] Add to this an express active trust[4] in which the powers of the trustee are expressed in terms of "sale" and "lease" with no mention of oil and gas as such, and a thorny legal problem is raised as to the power of the trustee to execute an oil and gas lease.

The situations that can arise are as varied as the provisions of the trust instrument which must be construed. Of course if the trust instru-

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1. The term "lease" is a misnomer. The rules of landlord-tenant do not apply to these "leases," and there is a taking of a part of the corpus of the estate not associated with the term "lease." See New Am. Oil Co. v. Troyer, 166 Ind. 402, 77 N.E. 719 (1906); Stahl v. Illinois Oil Co., 45 Ind. App. 211, 90 N.E. 632 (1910); SULLIVAN, HANDBOOK OF OIL AND GAS LAW, 69 (1955); Simonton, *The Nature of the Interest of the Grantee Under an Oil and Gas Lease,* 25 W. VA. L. REV. 295 (1918).

2. Using the analogy to solid minerals, some jurisdictions have concluded that the ownership of the surface carries with it ownership of the oil and gas in place in the nature of a determinable fee. Ownership is lost by drainage across property lines. This theory is followed in Arkansas, Kansas, Michigan, Mississippi, Montana, Ohio, Pennsylvania, Texas, and West Virginia. See SULLIVAN, *op. cit. supra* at 42, n. 17.

Other jurisdictions, using the analogy to percolating waters or animals ferae naturae, have held that the owner of the surface only has the exclusive right to drill for oil and gas and to retain as absolute owner all that is reduced to possession. This theory prevails in California, Indiana, Illinois, Kentucky, Louisiana, New York, and Oklahoma. See SULLIVAN, *op. cit. supra* at 46, n. 19.

Some cases speak of a qualified ownership in oil and gas in place. The surface owners are said to have a common property interest. See Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490 (1902); DONLEY, THE LAW OF COAL, OIL, AND GAS IN WEST VIRGINIA AND VIRGINIA, § 1 (1951).

However, for the purposes of this note it is unnecessary to distinguish between these theories of ownership, for all jurisdictions have reached the same practical results. See Summers, *The Modern Theory and Practical Application of Statutes for Conservation of Oil and Gas,* 13 TUL. L. REV. 1, 7 (1935).

3. The interest of the lessee has been called a determinable fee, profit a' pendre, incorporeal hereditament, license, license coupled with an interest, and estate in land. See SULLIVAN, *op. cit. supra,* at 87.

The most exact description of the lessee's interest is a profit a' pendre. The lessee is permitted to go upon the land of another and extract something of value therefrom. See Simonton, *supra* note 1.

Generally, the nature of the lessee's interest is the same no matter what form of granting clause is used. See 2 AMERICAN LAW OF PROPERTY, *Oil and Gas* § 10.26 (1952); Blake, *The Oil and Gas Lease,* 13 So. CALIF. L. REV. 304 (1940).

4. This inquiry includes private and charitable trusts, but is not concerned with passive or implied trusts.

ment gives the trustee express authority to execute oil and gas leases, there is no doubt as to his power.[5] In this situation the trustee may lease the entire plot for oil and gas, or a part thereof.[6]

The real problem arises when the settlor has made no provision concerning oil and gas, and the court or the trustee must decide if there is authority to execute an oil and gas lease. This problem is especially important for the trustee, cestui que trust, and the prospective lessee.[7]

## I. THE CASES

Relatively few cases have arisen in which the power of the trustee to execute oil and gas leases has been directly challenged. Most litigation has concerned the disposition of the royalty from the oil and gas developments between the life beneficiaries and the remaindermen. In deciding these cases the courts base their reasoning on the common law rules concerning life tenant-remainderman. The open mine doctrine is especially relevant.[8] In attempting to find if this doctrine is applicable to the case at bar, the courts must consider the power of the trustee and the intention of the settlor. If they conclude from all the surrounding circumstances that the primary intention of the settlor was to provide for the life beneficiary, and that he intended that the mines be opened under the powers given, the courts will hold that the mines were open in contemplation of law when the trust was established.[9] The life beneficiary will then be entitled to all the royalty as income. But if this intention is not found, the courts will treat the royalty as proceeds from a sale of trust property and order it preserved for the remaindermen as part of the corpus of the trust.[10] This reasoning has so influenced the courts when they have come to consider the authority of the trustee to execute an oil and gas lease, that it seems expedient to discuss trusts

5. Daly v. Beckett, [1857] 24 Beav. 114, 53 Eng. Rep. 301.

6. Fry v. McCormick, 170 Kan. 741, 228 P.2d 727 (1951).

7. The trustee may be reluctant to entail the risk of exceeding his authority and becoming liable to the beneficiaries. The beneficiaries want to develop the property most profitably, and may be afraid of drainage by nearby wells if no lease is given. This drainage is damnum absque injuria. See 2 AMERICAN LAW OF PROPERTY, *Oil and Gas* § 10.5 (1952). The lessee does not want to expend money and effort in attempting to develop the property unless he is sure of the validity of his lease. See Blake, *Power of a Trustee to Lease for Oil and Gas,* 22 So. CALIF. L. REV. 115, 118 (1949).

8. The open mine doctrine operates as an exception to the rule that a life tenant may not grant oil and gas leases, and that if a lease is executed with the acquiescence of the remaindermen, the life tenant gets only the income from the royalty, not the royalty itself. If the mine was open when the life estate began, the life tenant may work the mine and keep the royalty as income. See Woodward, *The Open Mine Doctrine in Oil and Gas Cases,* 35 TEX. L. REV. 538 (1957).

9. See note 8 *supra.*

10. See Heyl v. Northern Trust Co., 312 Ill. App. 207, 38 N.E.2d 374 (1941); Blakely v. Marshall, 174 Pa. 425, 34 Atl. 564 (1896).

containing remaindermen who are not the present income beneficiaries separately from charitable trusts and those in which the remaindermen and income beneficiaries are the same persons.[11]

A. *Trusts Containing Life Beneficiaries and Remaindermen*

If the trustee is given power to lease and manage the property, but no authority to sell, he has no power to execute an oil and gas lease if there has been no prior development which would warrant the application of the open mine doctrine.[12] It is reasonable to suppose that the settlor intended to authorize ordinary farming leases, not unusual leases or leases of unopened mines.[13] There are dicta in several coal cases to the effect that if the land were coal land, and valueless except for mining, the intention must have been to authorize leases of the coal.[14] However, in the case of oil and gas there are no such surface characteristics that would mark the land as oil land.

If there has been prior oil and gas development on the property, the trustee is authorized to renew a lease previously made by the settlor.[15] In this case, the settlor may have intended to include oil and gas leases in the general authority to lease, since he was aware of its development.

The courts have looked to the effect of oil and gas exploitation, and have concluded that it is a taking of a portion of the realty. Consequently, they have equated it with "sale," and have found no authority to execute an oil and gas lease without a power of sale. However, it does not follow that a trustee with a power of sale may always execute such a lease. The power of sale may or may not be coupled with management responsibilities and other powers. It may be limited by subsequent provisions. These arrangements give rise to different legal consequences.

The case law is not definitely settled on the question of whether a trustee with a power of sale but with no management powers may ex-

11. This classification should not be relevant if the purpose is to discover the intention of the settlor. It seems to represent an unnecessary concern to preserve the interests of the remaindermen. These rights could be protected adequately by requiring the trustee to preserve a part, or all, of the royalty for the remaindermen. See 2 SCOTT, TRUSTS § 189.7 (1939). Statutes have dealt with this problem. *E.g.* CAL. CIV. CODE § 730.11; FLA. STAT. § 690.10 (1955).

12. Smith v. Womack, 231 S.W. 840 (Tex. Civ. App. 1921) (title to lease unmarketable); Ohio Oil Co. v. Daughtee, 240 Ill. 361, 88 N.E. 818 (1909); Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995 (1904). *But see* Wallis v. Barker, [1903] 88 L.T.R. (n.s.) 685 (Ch.) (power to lease any portion of the estate includes a power to lease for coal).

13. See Ohio Oil Co. v. Daughtee, 240 Ill. 361, 88 N.E. 818 (1909).

14. Appeal of Wentz, 106 Pa. 300 (1884); McClintock v. Dana, 106 Pa. 386 (1884). *But see* Clegg v. Rowland, [1866] L.R. 2 Eq. 160.

15. First Nat'l Bank v. Magnolia Petroleum Co., 144 Kan. 645, 62 P.2d 891 (1936).

ecute an oil and gas lease.[16] It has been held that a person with a power of attorney to sell realty is not thereby authorized to grant oil and gas leases.[17] In a case involving a trust, no power to execute an oil and gas lease was found where the trustees were directed to convert the property into cash as speedily as possible.[18] This result seems to be in accordance with the intention of the settlor that the trustee sell the property and either pay the proceeds to the beneficiaries or retain them for further trust purposes. When the settlor authorizes a sale in this situation, he does not intend that the trustee go into the oil and gas business.

If the power of sale is coupled with some management responsibilities, it seems that the trustee may execute an oil and gas lease.[19] In these cases, the courts may have been influenced by the danger that nearby wells might drain the oil and gas across property lines, leaving the trust estate depleted and remediless.[20] However, in two of the cases it was not shown that there were other developments in the vicinity.[21] The court's theory is that an oil and gas lease vests in the lessee an interest in land less than a fee simple. Since the trustee is authorized to sell the whole interest, he may also convey a lesser interest. This same reasoning might be applied to cases where there is a power of sale without management powers. However, the courts have not done so, perhaps not considering it justifiable to take such liberty with the settlor's words unless he has bestowed at least management responsibilities upon the trustee.

The power of the trustee to execute oil and gas leases is again narrowed when the power of sale is accompanied by a restriction or prohibition as to an encumbrance or lease.[22] The analogy between an oil and gas lease and a sale has not been drawn in these cases. Rather, the authority to execute an oil and gas lease has been deemed restricted by

16. See Avis v. First Nat'l Bank, 141 Tex. 489, 174 S.W.2d 255 (1943) (question expressly reserved).

17. Bean v. Bean, 79 S.W.2d 652 (Tex. Civ. App. 1935) (powers of attorney are strictly construed).

18. See Drinkhouse v. Birch Ranch and Oil Co., 97 Cal. App.2d 923, 219 P.2d 45 (1950) (independent ground for decision). This case did not involve the life beneficiary-remainderman situation.

19. Ilari v. Ewing, 314 Ky. 182, 234 S.W.2d 293 (1950); Boulvare v. Sinclair Prairie Oil Co., 219 S.W.2d 536 (Tex. Civ. App. 1949); Oliver v. Culpepper, 209 Ark. 326, 190 S.W.2d 457 (1945); Franklin v. Margay Oil Co., 194 Okla. 519, 153 P.2d 486 (1944); Heffelfinger v. Scott, 142 Kan. 395, 47 P.2d 66 (1935) (charitable trust). *But see* Re Bruner's Will, 363 Pa. 552, 70 Atl.2d 222 (1950) (dicta).

20. See Franklin v. Margay Oil Co., 194 Okla. 519, 153 P.2d 486 (1944); Heffelfinger v. Scott, 142 Kan. 395, 47 P.2d 66 (1935).

21. See Ilari v. Ewing, 314 Ky. 182, 234 S.W.2d 293 (1950); Oliver v. Culpepper, 209 Ark. 326, 190 S.W.2d 457 (1945).

22. See Woelk v. Woelk, 174 Kan. 136, 254 P.2d 297 (1953) (life tenant with power of sale, but no power to mortgage or encumber); Adams v. Cook, 15 Cal.2d 353, 121 P.2d 484 (1940) (lease permitted only subject to sale of property).

these provisions.[23] For example, the Kansas court eventually based its decision that an outstanding oil and gas lease was an encumbrance upon a case which had held that an outstanding agricultural lease was an encumbrance.[24] Also failing to draw the analogy to "sale," the California court thought it necessary to use its power of equitable deviation to permit the trustee to execute an oil and gas lease not subject to the restriction in the trust instrument pertaining to "lease."[25]

The intention of the settlor in authorizing a sale in these cases probably was not to authorize oil and gas development. But it seems that in like manner it cannot be said that in forbidding an encumbrance or lease, the settlor necessarily intended to forbid the execution of an oil and gas lease.[26] Nevertheless, courts have been leery of expanding the authority of the trustee when the settlor has explicitly limited it in any way. In this situation an oil and gas lease is a "lease."

A trustee with power to sell, lease and generally manage the trust property seems to have sufficient authority to execute an oil and gas lease.[27] In these cases the courts' primary concern again may be the necessity of protecting the trust estate from drainage by nearby wells and permitting optimum development for the beneficiaries, rather than the technical direction of the settlor.[28] If there is no danger of drainage, and the court is concerned with construing the instrument according to the settlor's expressed intention, there may be difficulty even in this situation. Thus, in *Avis v. First Nat'l Bank,*[29] the court originally held that "in the absence of language authorizing such trustee to make mineral leases, he is not authorized to grant the right to take the gas and oil from the property where no wells were open . . . at the time of the creation of the trust."[30] On motion for rehearing this opinion was withdrawn and another substituted,[31] which held that the trustee had the power to execute an oil and gas lease under this instrument.[32] The court

23. See note 22 *supra.*

24. See Woelk v. Woelk, 174 Kan. 136, 254 P.2d 297 (1953), *citing* Haggert v. Wheeler, 116 Kan. 702, 229 Pac. 357 (1924). The latter case cites Clark v. Fisher, 54 Kan. 403, 38 Pac. 493 (1894) (an outstanding agricultural lease is an encumbrance).

25. Adams v. Cook, 15 Cal.2d 353, 121 P.2d 484 (1940).

26. Oil and gas development is not necessarily inconsistent with a direction that the trustee manage the estate personally or permit the cestui to occupy the premises.

27. Avis v. First Nat'l Bank, 141 Tex. 489, 174 S.W.2d 255 (1943); Layman v. Hodnett, 205 Ark. 367, 168 S.W.2d 819 (1943).

28. See Laymen v. Hodnett, 205 Ark. 367, 168 S.W.2d 819 (1943).

29. 141 Tex. 489, 174 S.W.2d 255 (1943).

30. See Atwood v. Kleberg, 135 F.2d 452, 453 (5th Cir. 1943).

31. No citation has been found to the original opinion. Perhaps it is not reported. The quoted passage was taken from Atwood v. Kleberg, *supra,* note 30, which was decided before the opinion was withdrawn.

32. Avis v. First Nat'l Bank, 141 Tex. 489, 174 S.W.2d 255 (1943).

declared that the words in a will are to be construed according to usage sanctioned by judicial decisions. It then cited cases which had declared that an oil and gas lease was the same as a sale of real estate. Since this had been sanctioned judicial usage when the will was executed, the testator had the right to rely on the repeated declarations of the court that the power of sale included the power to execute an oil and gas lease. The court noted that the substantive rights of the life beneficiary and remaindermen would be preserved. The royalty would go to the remaindermen, and the interest on the royalty to the life beneficiary. It was also pointed out that this was not a bare power of sale, but other powers were given to the trustee.

This case seems to indicate that if the court has a strong policy to discover the intention of the settlor at the time the trust was established, and takes a narrow view of the powers conferred, it will experience difficulty in finding a power to execute an oil and gas lease without express authorization.[33] This approach seems unsatisfactory for oil and gas. If the settlor expressly granted these broad powers, it is reasonable to assume that he wished the trustee to have plenary authority to control the trust estate. His primary intention may not be found in the expressly delegated powers, but rather in his concern that the property be managed most effectively and profitably for the benefit of the cestui que trust. In adopting a narrow interpretation of these powers, the courts may be depriving the trustee of authority to fully develop the potential of the property because of an oversight by the settlor.

If the trust instrument gives no express powers to sell or lease the property, a cautious trustee will not execute an oil and gas lease without a court order declaring it to be within the powers of the trust instrument or granting an equitable deviation. If the management powers of the trustee are very general, this power should be held included in the trust instrument without a deviation.[34] In any event in these cases, a court of equity has inherent power to appoint a trustee to execute an oil and gas lease binding even contingent remaindermen if convinced of the necessity of preventing depletion of the trust estate.[35] It can give this power to the present trustee of the estate.[36]

33. The trustee in the Avis case had "full, ample, complete and absolute power to manage, control, sell, and dispose of the property, rent, and make leases thereon." Avis v. First Nat'l Bank, *supra,* note 32.

34. See Martin v. Eshick, — Miss. —, 90 So.2d 635, *judg. corrected,* — Miss. —, 92 So.2d 244 (1957) (question reserved). *But see* Stokely v. State, 149 Miss. 435, 115 So. 563 (1928).

35. See Pedroja v. Pedroja, 153 Kan. 82, 102 P.2d 1012 (1940); Robinson v. Barett, 143 Kan. 68, 45 P.2d 587 (1935).

36. Robinson v. Barett, 143 Kan. 68, 45 P.2d 587 (1935).

If the trust instrument not only lacks express powers, but also positively forbids a sale or lease, it seems that there can be no inference of a power to execute an oil and gas lease without an equitable deviation.[37] To obtain a deviation it is necessary to prove that the corpus is subject to depletion and that this exigency was not foreseen by the settlor.[38] Thus, the property cannot be developed for oil and gas until there are other wells in the vicinity which threaten to drain the minerals from the trust property.

However, even in these cases, where the trustee is forbidden to sell or lease the trust property by express language or by implication, it cannot definitely be said that the settlor wished to forbid oil and gas development. An oil and gas lease would not necessarily be inconsistent with these provisions. The only valid conclusion to be drawn is that the settlor either did not consider oil and gas at all or thought it inapplicable to the property in question. In any event, the previous decisions of the courts do not permit them to draw an inference of a power to execute an oil and gas lease in these cases.

B. *Charitable Trusts and Private Trusts Where Income Beneficiaries are also the Remaindermen*

The courts seem more willing to find a power to execute an oil and gas lease if the trust is charitable or if the income beneficiaries and remaindermen are the same persons. In these cases the power has been found in the implied authority to lease,[39] the power to obtain a loan and mortgage,[40] and from the word "use."[41]

The more liberal attitude of the courts in dealing with these trusts is seen in *Atwood v. Kleberg*.[42] The trustee had full power to sell, lease, mortgage, and do all acts not inconsistent with the provisions of the will. The court was faced with the original decision in *Avis v. First Nat'l Bank*[43] that the power to lease and convey did not include the power to

37. No cases have been found on this point, but the conclusion seems inescapable from the decisions in cases where a sale is permitted, but a lease or encumbrance is prohibited. See note 22 *supra*.

38. A court of equity possesses inherent power to order a sale of the trust property even if this was expressly forbidden by the settlor. This power can only be used when unforeseen circumstances require it to preserve the trust corpus and the primary purpose of the trust. See 65 C.J., *Trusts*, § 612 n. 99 (1933).

39. Heffelfinger v. Scott, 142 Kan. 395, 47 P.2d 66 (1935).

40. Atwood v. Kleberg, 133 F.2d 69 (5th Cir. 1943), *modified on rehearing*, 135 F.2d 452 (5th Cir. 1943).

41. Stokely v. State, 149 Miss. 435, 115 So.563 (1928) (dissent).

42. 133 F.2d 69 (5th Cir. 1943), *modified on rehearing*, 135 F.2d 452 (5th Cir. 1943).

43. See Atwood v. Kleberg, 135 F.2d 452, 453 (5th Cir. 1943).

execute an oil and gas lease. Nevertheless, the lease executed by the trustee was held valid. On re-hearing the court based its decision on the fact that the lease was executed incident to obtaining a loan and mortgage, and was thus necessary to preserve the trust estate.[44] The courts have distinguished other holdings by the fact that the rights of no other persons are involved in these cases.[45]

C. *Summation of the Cases*

There are only a few direct holdings on the power of a trustee to execute an oil and gas lease. The conclusion to be drawn from these authorities and from dicta in several other cases is that without a power of sale no oil and gas lease may be executed by the trustee. Even if the power of sale is given, there is no authority to lease for oil and gas if there are negative limitations as to leases or encumbrances or if there is a bare power of sale. A court of equity may authorize such leases if there is a danger of depletion of the trust estate unforeseen by the settlor. In the case of charitable trusts and trusts in which the remaindermen and income beneficiaries are the same persons, one might expect a more liberal attitude in favor of the trustee's power.

The law in this area is sparse and uncertain at best. Since oil and gas leases are sui generis, it is difficult to determine the intention of the settlor without specific direction. Statutes in several states have attempted to alleviate this problem.

## II. Legislation

Statutes providing a method whereby executors, administrators, guardians, and committees may execute oil and gas leases upon the land in their charge have been rather widely adopted.[46] There are also statutory provisions authorizing the leasing of federal,[47] state,[48] county,[49] and

44. Atwood v. Kleberg, *supra* note 43.

45. See Heffelfinger v. Scott, 142 Kan. 395, 49 P.2d 66 (1935); Stokely v. State, 149 Miss. 435, 115 So. 563 (1928) (dissent).

46. *E.g.*, Ala. Code tit. 21, §§ 48-54 (1940); Ark. Stat. §§ 57-321-323 (1947); Cal. Prob. Code §§ 1538.5, 840; Colo. Rev. Stat. Ann. § 152-10-21 (1953); Fla. Stat. § 745.02 (1955); Idaho Code Ann. § 15-905 (1948); Ill. Rev. Stat. c. 3, § 375a (1955); Ind. Ann. Stat. §§ 31-401-405 (Burns 1949); Kan. Gen. Stat. Ann. §§ 59-1807, 59-2301-2304 (1949); Ky. Rev. Stat. §§ 387.150, 187.250 (1942); La. Rev. Stat. §§ 9-1491-93 (1952); Miss. Code Ann. §§ 415, 605 (1942); N. M. Stat. Ann. § 32-1-20 (1953); N. D. Rev. Code §§ 38-1001-1011 (1943); Ohio Rev. Code Ann. § 2111.26 (Page 1954); Okla. Stat. Ann. tit. 58, §§ 924-927 (1951); S.D. Code § 35.1822 (1939); Tex Rev. Civ. Stat. arts. 4192, 3554 (1948); W. Va. Code Ann. § 3583 (1949).

47. 41 Stat. 437 (1920), 30 U.S.C.A. §§ 181-192 (Supp. 1956).

48. *E.g.*, Ind. Ann. Stat. §§ 46-1602-1624 (Burns 1952).

49. *E.g.*, Ind. Ann. Stat. §§ 26-643-645 (Burns Supp. 1957).

city and township lands[50] for oil and gas. There seems to be an increasing tendency to pass legislation concerning the power of a trustee to execute oil and gas leases.[51] Two statutory methods have been adopted.

The first method, represented primarily by the Texas[52] and Oklahoma[53] trust acts, consists in a declaration that a trustee of an express trust has authority to execute an oil and gas lease in the absence of contrary or limiting provisions in the trust instrument or a subsequent restraining order or decree of a court of competent jurisdiction. There is also a provision for the disposition of the royalties between the life beneficiary and the remaindermen if no contrary intention is shown by the settlor in the trust instrument.[54]

A more general approach to this same method is seen in the Florida trust act.[55] The language in this statute is similar to that in the English trustee act.[56] The trustee is deemed to have the power to sell and lease the trust property in the absence of contrary or limiting provisions in the trust instrument. This includes the authority to dispose of the property "whether the division be horizontal, vertical, or made in any other way," and to lease "all rights and privileges above or below the surface of such property. . . ."[57]

The effectiveness of these statutes depends to a large extent upon the interpretation that will be given them by the courts. If they are interpreted as raising a presumption of a power to lease for oil and gas, which can only be rebutted by clear evidence to the contrary, these statutes will go a long way toward clearing up this area of law. However, if the courts interpret clauses prohibiting a sale, lease or encumbrance as "contrary or limiting" provisions, little change will occur in the present state of the law. The only area affected would be that in which no express limitation was placed on the powers of the trustee. The former position seems to be more in accordance with the primary intention of the settlor that the property be used most productively for the benefit of the cestui que trust. The trustee would have more freedom of action in using his

50. *E.g.*, IND. ANN. STAT. §§ 48-515-516 (Burns Supp. 1957).
51. See note 62 *infra*.
52. TEX. REV. CIV. STAT. art. 7425b-25 (1948).
53. OKLA. STAT. ANN. tit. 60, § 175.24c (1951).
54. The Texas act provides that 27½% of the gross proceeds (but not to exceed 50% of the net) is principal and the balance is income. See note 52 *supra*. The Oklahoma act provides that the percent deductible for depletion under the federal tax laws is principal, the balance is income. See note 53 *supra*. At the present time the amount deductible for depletion under the federal tax law is 27½% of gross proceeds (but not to exceed 50% of the net). For criticism of percentage depletion, see Freeman, *Percentage Depletion For Oil—A Policy Issue*, 30 IND. L. J. 399 (1955).
55. FLA. STAT. § 691.03 (1955).
56. Trustee Act, 1925, 15 GEO. 5, c. 19, § 12(2).
57. See note 55 *supra*.

discretion without the expense and delay of court proceedings. The settlor could still make any provision for the development or non-development of oil and gas that he chose. Nevertheless, if he inadvertently failed to provide for it, or did not think oil and gas relevant to the property in question, his directives as to other matters would not be interpreted as an intention that no oil and gas development take place.

If these statutes were interpreted as raising a presumption of an authority to lease for oil and gas, it would be necessary to protect the cestui que trust and remaindermen from an unfair allocation of the royalty between income and principal by the trustee. This could be accomplished by enforcing the statutory division of the royalty unless the settlor expressly made a contrary disposition.[58] One major objection to the leasing of trust lands for oil and gas would be removed by this interpretation; namely, that the corpus would be depleted for the remaindermen. Both the life beneficiary and the remaindermen would share in the proceeds from oil and gas development. The interests of both would be protected in a manner analagous to the amortization of other wasting assets.[59]

The Texas Court of Civil Appeals recently interpreted the income-principal provisions of the Texas Trust Act. It held that the statute supplements, rather than supplants, the desires of the settlor. The statutory provisions for the disposition of royalty control only in the absence of a contrary intention. The court found a contrary intention from a direction to the trustee to collect "all rent, royalties, bonuses, payments, claims, settlements in compromise, all income of any nature," and to pay the "income" to the life beneficiary. All the royalty was ordered paid to the life beneficiary as income. The trustee had express authority to execute an oil and gas lease, and some wells were open when the trust was established.[60] This interpretation does not give maximum effect to the statutory provision. No express direction was required to overcome the statutory division. Rather a contrary intention sufficient to make the statute inapplicable was found by implication.

The second statutory method whereby trustees of express trusts may be authorized to execute oil and gas leases is by petition to a local court.[61] In several of these states the class of "trustee" has been added to the

58. See note 54 *supra.*

59. Generally, when a trust estate includes wasting assets, the trustee is under a duty either to sell the property, or to set aside part of the receipts as an amortization fund to preserve the corpus of the trust. Scott argues that even without a statute, this principle should be applied to oil and gas developments on trust estates, rather than the open mine doctrine. See 2 SCOTT, TRUSTS § 239.3 (1939).

60. St. Mark's Episcopal Church v. Lowry, 271 S.W.2d 681 (Tex. Civ. App. 1954).

61. See notes 62 and 64 *infra.*

statutes which permit leases by the executors, administrators, and guardians.[62] The procedure generally begins with a petition to the county, circuit, or probate court stating the advantages to the trust estate of granting such a lease. Then, after a hearing, publication, and competitive bidding, the court may order the trustee to grant the lease. The transaction is subject to the approval and supervision of the court. The maximum time allowed for the duration of the lease is usually set by the statutes. No provision has been included in these statutes for the division of the royalty between income and principal.[63]

Other states limit this second type of statutory relief to trusts which contain contingent remaindermen. These statutes also provide a method whereby oil and gas leases may be executed upon lands subject to any kind of contingent future interest. A trustee is appointed to execute the oil and gas lease binding even the contingent remaindermen. The statute may provide that the royalty be dealt with according to the discretion of the court or that it be invested by the trustee and only the interest paid to the life beneficiary.[64]

This method seems to be more definite in its application. It does not depend upon the absence of a contrary or limiting provision in the trust instrument. Authority to grant an oil and gas lease may be given by the court whenever it appears to be advantageous or expedient to the trust estate.[65] Thus, it is not necessary to show that the property is subject to drainage by nearby wells as is the case in obtaining an equitable deviation. However, the statutes which limit the relief to trusts which contain contingent remaindermen are too narrow in their application. For example, the life beneficiaries or remaindermen in a particular trust may be infants. They would thus have vested interests, making the statute inapplicable to their trust. However, they would still not be *sui juris* and could not join in executing a valid lease not subject to subsequent attack. Uncertainty would continue in these situations.

This second method entails expense and delay. A trustee should have more latitude in using his individual discretion than executors, administrators, or guardians. These latter are merely probate fiduciaries or court appointed agents. The management and discretionary powers

62. MICH. COMP. LAWS § 709.5 (1948) (a fiduciary); NEB. REV. STAT. §§ 57-210-212.01 (Supp. 1955) (trustee); VA. CODE ANN. §§ 8-675,689.4 (1950) (trustee of any other estate); W. VA. CODE ANN. § 3583 (1949) (trustee of any estate); WYO. COMP. STAT. ANN. §§ 8-203-205 (1945) (trustee of probate estate).

63. See note 62 *supra*.

64. *E.g.*, KY. REV. STAT. §§ 353.300-380 (1944); N.D. REV. CODE § 38-1012 (Supp. 1953).

65. See note 64 *supra*.

of a trustee have been expanding in recent years, and it seems strange that he must be controlled by the courts in this situation.[66]

Arkansas, by statute, expressly authorizes trustees of eleemosynary institutions to execute oil and gas leases by a majority vote unless otherwise provided in the charter, constitution, or by-laws of the institution.[67] The absence of a like provision for trustees of private trusts may be a negative admission of the concern to preserve the rights of remaindermen in a private trust.

The difficulty with any legislation in this area is the general rule that a trustee has only those powers conferred upon him by the settlor. It has been held that courts, and even the legislature, cannot enlarge the powers of a trustee under a trust instrument.[68] Thus, if the settlor has not authorized oil and gas development expressly or by permissible implication, legislative enactments may be powerless to enlarge this power unless there is danger of depletion. The best and most certain method to facilitate oil and gas development is by careful draftsmanship of the trust instrument.

## III. DRAFTSMANSHIP

Every attorney who draws up a trust instrument should consider this problem. Express provision should be made granting the trustee authority to execute oil and gas leases and other related agreements such as unitization and pooling contracts.[69] The division of royalty between income and principal should also be provided for, leaving it to the discretion of the trustee or making an express percentage disposition. If express authority is given to execute oil and gas leases, and no provision is made for the disposition of the royalty, it seems that the courts will apply the open mine doctrine and award the entire royalty to the life beneficiary as income.[70]

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66. See Stephenson, *Expanding Power of Trustees,* 25 FORDHAM L. REV. 50 (1957).

67. ARK. STAT. § 53-301 (1947).

68. "[C]ourts in the exercise of equity powers may not enlarge, modify or defeat the terms of the trust, saving and excepting only in cases where it shall appear that that is necessary to preserve the corpus of the trust." In re Caswell's Will, 197 Wis. 327, 222 N.W. 235, 237 (1928). See also Upham v. Plankerton, 152 Wis. 275, 140 N.W. 5 (1912).

69. Pooling is the uniting of small, separately owned tracts for the purpose of integrating the minimum acreage necessary for a drilling unit.

Unitization is the consolidation of all the interests in an oil and gas pool for the purpose of operating the reservoir as a single producing mechanism. See SULLIVAN, HANDBOOK OF OIL AND GAS LAW, 308 (1955).

70. See St. Mark's Episcopal Church v. Lowry, 271 S.W.2d 681 (Tex. Civ. App. 1954); Eley's Appeal, 103 Pa. 300 (1883); Daly v. Beckett [1857] 24 Beav. 114, 53 Eng. Rep. 301.

Authority should be conferred for oil and gas leasing even if no present development is taking place in the vicinity, or is even foreseen. Oil and gas may be found anywhere; and, before the termination of the trust, it might be essential to have such a provision.[71] Careful draftsmanship could prevent this problem from arising.[72]

## IV. INDIANA LAW

Although Indiana has been an oil producing state since about 1890, its production is not significant nationally. At present, production is limited to the Southwestern part of the state, but there is a possibility of a greatly expanded operation in the near future.[73]

The owner of the surface in Indiana does not own the oil and gas in place, but has the exclusive right to drill for oil and gas and reduce it to possession and consequent absolute ownership.[74] Indiana courts have also talked of qualified ownership, but this was said to consist in the exclusive right to drill.[75] This theory was first enunciated in the 1890's in conjunction with litigation attacking the constitutionality of Indiana's gas conservation statutes as a taking of property without due process of law.[76] The Indiana Supreme Court had previously quoted from a Pennsylvania case which espoused the ownership in place theory, but did not openly adopt that view.[77]

The interest of the lessee in an oil and gas lease has been classified

71. See Knight, *Oil Interests in Trusts and Estates,* 32 TRUST BULL. 18 (1953); Graham, *Administration of Mineral Interests in Trust Accounts,* 33 TRUST BULL. 26 (1954).

72. For a sample provision, see Blake, *Power of a Trustee to Lease for Oil and Gas,* 22 So. CALIF. L. REV. 115, 128 (1949).

73. Indiana has had two distinct oil booms. The first was at the turn of the century in east-central Indiana, and the second in the southwestern part of the state in the last two decades. Oil is the state's second most valuable mineral with a total product in 1953 of $37½ million. Tests are being made to reach lower Ordovician and the entire Cambrian strata, which underly the whole state and are the same age and of the same characteristics as the productive limestones of Texas, Oklahoma, and New Mexico. IND. UNIV. BUR. OF BUS. RES., INDIANA'S ECONOMIC RESOURCES AND POTENTIAL, Sec. IV., "Material Resource Base," 61-66 (1955).

74. See New Am. Oil and Mining Co. v. Troyer, 166 Ind. 402, 77 N.E. 719 (1906); Halbert v. Hendrix, 121 Ind. App. 43, 95 N.E.2d 221 (1950); Monon Coal Co. v. Riggs, 115 Ind. App. 236, 56 N.E.2d 672 (1944); Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490 (1902).

75. Fairbanks v. Warrum, 56 Ind. App. 337, 104 N.E. 983 (1913); Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490 (1902).

76. See State v. Ohio Oil Co., 150 Ind. 21, 49 N.E. 809 (1898), *aff'd,* 177 U.S. 190 (1900); Townsend v. State, 147 Ind. 624, 47 N.E. 19 (1897).

77. See People's Gas Co. v. Tyner, 131 Ind. 277, 31 N.E. 59 (1892). *Cf.* BRIGGS, TITLE TO OIL AND GAS IN INDIANA, 19 (unpublished thesis in Indiana Law School Library 1921).

as an incorporeal hereditament,[78] although other designations have been made.[79] It is definitely not a lease in the ordinary sense.[80] Oil and gas leases create an interest in land, thus placing them within the statute of frauds.[81] A 1951 Indiana statute lists rights transferred to the lessee of an oil and gas lease in addition to other rights naturally flowing from such an instrument at law.[82]

Indiana has no cases concerning the power of a trustee to execute an oil and gas lease in the absence of express authority in the trust instrument. In the life tenant-remainderman situation Indiana courts have decreed that an oil and gas lease by the life tenant amounts to waste against the remaindermen.[83] The open mine doctrine has been applied to a case where an oil well was drilled after the establishment of a life tenancy, but under a lease previously executed by the testator.[84]

The Indiana Supreme Court expressed an antagonistic attitude toward oil production in 1898, which undoubtedly would not be repeated today.[85] In 1905, the appellate court was not swayed by the argument that gas was being drained by nearby wells and would be gone in a few years, and refused to permit a life tenant to execute an oil and gas lease on the property.[86] More recently, the appellate court has recognized that oil and gas leases are in a class by themselves,[87] and has held that oil and gas are not conveyed by a deed of "all the coal and fireclay and minerals

78. Callihan v. Bander, 117 Ind. App. 467, 73 N.E.2d 360 (1947); Heeter v. Hardy, 118 Ind. App. 256, 76 N.E.2d 590 (1947); Monon Coal Co. v. Riggs, 115 Ind. App. 236, 56 N.E.2d 672 (1944); Shark v. Stahl, 35 Ind. App. 493, 74 N.E. 538 (1905).

79. See New Am. Oil and Mining Co. v. Troyer, 162 Ind. 402, 77 N.E. 719 (1906) (contract); Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N.E. 149 (1904) (more than a license, but not a tenancy from year to year); Stahl v. Illinois Oil Co., 45 Ind. App. 211, 90 N.E. 632 (1910) (covenant).

80. Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N.E. 149 (1904).

81. Callihan v. Bander, 117 Ind. App. 467, 73 N.E.2d 360 (1947).

82. These are the right to go upon the land to test for oil and gas, and the right to drill a well whether or not the owner of the remaining rights consents. The lessee is accountable to the owner of the surface for damage to crops, but he can construct the necessary equipment for drilling. See IND. ANN. STAT. §§ 46-1801-1806 (Burns 1952). The original bill purported to repeal contrary statutes and the common law to the extent that it was inconsistent with this bill. IND. GEN. ASSEMBLY, 1951, H. B. 283. This section was deleted by amendment in the senate. See IND. GEN. ASSEMBLY, 1951 SENATE J., 779.

83. See Rupel v. Ohio Oil Co., 176 Ind. 4, 95 N.E. 225 (1911); Richmond Natural Gas Co. v. Davenport, 37 Ind. App. 25, 76 N.E. 525 (1905).

84. See Andrews v. Andrews, 31 Ind. App. 189, 67 N.E. 461 (1903); Fairbanks v. Warrum, 56 Ind. App. 337, 104 N.E. 903 (1913) (dicta).

85. "We had petroleum oil for more than a third of a century before its discovery in this state, imported from other states, and we could continue to do so if the production of oil should cease in this state." State v. Ohio Oil Co., 150 Ind. 21, 46, 49 N.E. 809, 817 (1898).

86. See Richmond Natural Gas Co. v. Davenport, 37 Ind. App. 25, 76 N.E. 525 (1905).

87. See Heeter v. Hardy, 118 Ind. App. 256, 76 N.E.2d 590 (1947).

underlying the surface."[88] The decision in the latter case was based on the theory that since there could be no ownership of oil and gas in place, there could be no conveyance of it in fee simple. This may have led to the 1951 statute, which declares that "interests in oil and gas may be created . . . in fee."[89]

In the field of trusts, the Indiana Appellate Court has said that the power of sale "can only be exercised in conformity with the requirements of the instrument by which the trust is created and in furtherance of the ends to be attained by the creation of the trust."[90] It held that the power to sell did not authorize a trustee to barter or exchange the property for other property. There have been other general statements to the effect that the intention of the settlor is controlling, and that the trustee has only those powers given him in the trust instrument.[91] It has been held that the primary purpose and intention of the settlor may be to provide for the life beneficiary.[92] If the court is willing to act upon this statement, it may find a power to execute an oil and gas lease more easily than if it limits the settlor's intention strictly to the powers given.

There has been no language in the Indiana cases equating an oil and gas lease with a sale of the property. Thus, it might be difficult to convince the court that the settlor intended to give the trustee authority to execute an oil and gas lease by a grant of the power of sale. On the other hand, the court may choose to follow the jurisdictions which have held that a power of sale coupled with at least management responsibilities includes a power to execute an oil and gas lease. Indiana has no precedent which would conflict with the latter position.

In 1948, an Indiana court for the first time ordered the sale of trust property despite the settlor's express prohibition.[93] A general power of equitable deviation to preserve the trust purpose was declared by the court apart from the Indiana statute on this subject.[94] It seems that the court should also use this power to order an oil and gas lease in the proper circumstances. But the force of this decision as precedent is weakened by the fact that the case concerned a charitable trust.

88. Monon Coal Co. v. Riggs, 117 Ind. App. 236, 56 N.E.2d 672 (1944).
89. IND. ANN. STAT. § 46-1803 (Burns 1952).
90. Holsapple v. Shrontz, 65 Ind. App. 390, 399, 117 N.E. 547, 550 (1917).
91. Robison v. Elston Bank & Trust Co., 113 Ind. App. 633, 48 N.E.2d 181 (1943); Koehler v. Koehler, 75 Ind. App. 510, 121 N.E. 450 (1919).
92. Robison v. Elston Bank & Trust Co., *supra* note 91.
93. Foust, Att'y Gen. v. William E. English Foundation, 114 Ind. App. 484, 80 N.E.2d 303 (1948). See Recent Cases, 24 IND. L. J. 464 (1949).
94. The statute permits the court to order a sale of the trust property at the complaint of the trustee or cestui que trust if it is shown that either (1) the real estate is liable to waste or depreciation, (2) taxes exceed income, or (3) the sale would benefit the trust and cestui que trust. IND. ANN. STAT. §§ 56-621-626 (Burns 1951).

Indiana has statutory provisions for the leasing of land for oil and gas by executors, administrators, and guardians pursuant to a court order.[95] There is also a statutory method whereby state,[96] county,[97] and city and township lands[98] may be leased for oil and gas. But no statute deals with the power of a trustee to execute an oil and gas lease. The trust act says simply that a sale, conveyance, or other act by a trustee in contravention of a trust shall be void.[99]

Legislation in this area would seem to be desirable because of the uncertainty of the law and the widespread lack of provisions in trust instruments expressly empowering trustees to grant oil and gas leases.[100] A statute modelled after the Texas and Oklahoma provisions[101] would be most propitious for express trusts. If properly drafted, the statute could be a substitute for careful draftsmanship of the trust instrument. It should include a presumption of an authority to execute an oil and gas lease upon all or a part of the trust lands in the absence of a contrary provision in the trust instrument. A section providing for the division of the royalty between income and principal would be essential. The lease should bind contingent remaindermen and be valid even though it extends beyond the termination of the trust. The trustee should also be permitted to enter pooling and unitization contracts and to execute agreements to amend, modify, or extend the oil and gas lease.

## THE INDIANA UNIFORM GIFTS TO MINORS ACT

### I. INTRODUCTION

A simple and inexpensive statutory method of making gifts of securities or money to minors was enacted by the Indiana General Assembly during the 1957 legislative session.[1] The impetus for passage of this statute, cited as the Indiana Uniform Gifts to Minors Act,[2] originated with a Model Bill drafted by the New York Stock Exchange in 1955 to

95. IND. ANN. STAT. §§ 31-401-405 (Burns 1949).
96. IND. ANN. STAT. §§ 46-1602-1624 (Burns 1952).
97. IND. ANN. STAT. §§ 26-643-645 (Burns Supp. 1957).
98. IND. ANN. STAT. §§ 48-515-516 (Burns Supp. 1957).
99. IND. ANN. STAT. § 56-605 (Burns 1951).
100. See Blake, *Power of a Trustee to Lease for Oil and Gas*, 22 So. CALIF. L. REV. 115 (1949).
101. See notes 52 and 53 *supra*.
1. Ind. Acts 1957, c. 247, §§ 1-11, at 564-72.
2. IND. ANN. STAT. § 31-810 (Burns Supp. 1957).