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## Can Co-Lesses under an Oil and Gas Compel a Partition in Kind

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and cannot be a part of a natural stream.<sup>40</sup> While this holding also apparently amounts to judicial law making, it would seem that under the circumstances a like holding under the Wyoming Constitution would be nothing more than a liberal interpretation.

The words "other collections of still water" which appear in the Wyoming constitutional provision concerning the enumeration of certain waters as the property of the State<sup>41</sup> have not been construed. Inasmuch as these words follow the word "lakes" an argument may be put that the constitutional draftsmen intended that by the injection of these words, percolating waters<sup>42</sup> were to be included, as distinguished from waters flowing in defined subterranean streams.<sup>43</sup> The latter waters have universally been held to be appropriable on the grounds that they are underflows or subflows of a surface stream, flowing in known and defined channels.<sup>44</sup> While it has been said that all ground waters are generally in motion, flowing through the interstices of the soil as a result of geological conditions and hydrostatic forces,<sup>45</sup> nevertheless, percolating waters, particularly those collected behind impervious stratum, are relatively "still" as compared to ground waters flowing in defined subterranean streams, in much the same way that lake water is still as compared to waters of a surface stream.

From the foregoing considerations, it would seem that, given a liberal constitutional construction as distinguished from a strict construction, the act under consideration is valid.

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#### CAN CO-LESSEES UNDER AN OIL AND GAS LEASE COMPEL A PARTITION IN KIND?

In regard to the rights of parties holding undivided interests in fee simple to the surface and minerals, or minerals only, it is well settled that if there is no known oil and gas in the premises, a partition in kind may be granted to a co-tenant,<sup>1</sup> and it has been held that even though there was a possibility of the existence of oil and gas, a partition in kind may be granted where there was no evidence of injury to a co-tenant as the result of the partition.<sup>2</sup> Generally, if a partition in kind would result in an injury to one or more of the co-tenants, partition will

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40. *Ripley v. The Park Center Land and Water Company*, 40 Colo. 129, 90 Pac. 75 (1907); *Dalpez v. Nix*, 96 Colo. 540, 45 P. (2d) 176 (1935).

41. Wyo. Conts. Art. VIII, sec. 1.

42. *Hutchins*, supra Note 16, at 152 (percolating waters are waters in ground channels still undefined and unknown).

43. *Ibid* (waters flowing in known and defined underground channels having characteristics of surface watercourses).

44. *Ibid*.

45. *Id.* at 146.

1. *Henderson v. Chesley*, 273 S. W. 299 (Tex. Civ. App. 1925); *Collier v. Collier*, 184 Okla. 38, 84 P. (2d) 603 (1938); *Wolfe v. Stanford*, 179 Okla. 27, 64 P. (2d) 335 (1937); *Wight v. Ingram-Day Lumber Company*, 196 Miss. 823, 17 So. (2d) 196 (1944).

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

be disallowed and a sale of the property will be made and the proceeds will be divided in proportion to the interests of the co-tenants.<sup>3</sup>

A more difficult question is presented when a co-tenant under an oil and gas lease is seeking a partition in kind. The Texas statute<sup>4</sup> expressly allows a partition in kind by co-tenants holding oil and gas rights either in fee or under a lease. Montana<sup>5</sup> and California<sup>6</sup> statutes provide for a partition in kind of real property but make no reference to oil and gas rights, and each stipulate the partition in kind must not prejudice the rights of the co-tenants. The Colorado statute<sup>7</sup> provides for a partitioning of realty but excludes lode mines or mining claims, and mining property where the commissioners find that a partition would result in great prejudice to a co-tenant. The Wyoming statutes<sup>8</sup> provide that tenants in common, and co-parceners, of any estate of lands, tenements or hereditaments within the state, may be compelled to make or suffer partition thereof in the manner hereinafter prescribed, so long as the commissiners do not decide that a partition will impair the value of the property. This Wyoming statute contains a marked difference from the other statutes mentioned. This statute permits a partition in kind so long as the partitioning will not impair the value of the property and the Montana, Colorado, and California statutes<sup>9</sup> permit a partitioning in kind so long as the rights of the co-tenants are not thereby injured.

The Supreme Court of Texas<sup>10</sup> has held that an oil and gas lease creates a determinable fee in the oil and gas in the lessee. A later decision by the same court recognizes this as an interest in real estate that is logically the subject of partition.<sup>11</sup> Another Texas case<sup>12</sup> allowed a partition in kind by a co-lessee without referring to the original lease to determine, if by agreement, the lessee could make a partial assignment, though, by the statements of the court, the lessor was considered as a necessary party to the action since a partition would affect his rights.

The Kansas courts have uniformly held<sup>13</sup> that an oil and gas lease conveys only an exclusive right to enter upon the land and extract the oil and gas; this right is personality and subject only to the personal property laws as to a partition at equity.

An Oklahoma decision<sup>14</sup> held that an oil and gas lease could be partitioned

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3. *Morely v. Smith*, 93 W. Va. 682, 118 S. E. 135 (1923); *Stern v. Great Southern Land Company*, 148 Miss. 649, 114 So. 739 (1927); *Wolfe v. Stanford*, 179 Okla. 27, 64 P. (2d) 335 (1937).
  4. Tex. Rev. Stat. 1936, Art. 6082 provides, "Any joint owner or claimant of any real estate or of any interest therein or of any mineral, coal, petroleum, or gas lands, whether held in fee or by lease or otherwise may compel a partition thereof between the other joint owners or claimants."
  5. Rev. Code of Mont. 1935, sec. 9516.
  6. Code of Civ. Proc. of Cal. 1941, sec. 752.
  7. Colo. Stat. Ann. 1935, C. 122, sec. 1.
  8. Wyo. Comp. Stat. 1945 secs. 3-6901, 6909.
  9. See notes 5, 6, and 7 supra.
  10. *Stephens County v. Mid-Kansas Oil and Gas Company*, 113 Tex. 160, 254 S. W. 290 (1923).
  11. *Stanolind Oil and Gas Company v. Simpson-Fell Oil Company*, 136 Tex. 158, 125 S. W. (2d) 263 (1939).
  12. *Texas Company v. Cain*, 177 S. W. (2d) 251 (Tex. Civ. App. 1944).
  13. *Beardsley v. Kansas Natural Gas Company*, 78 Kan. 571, 96 Pac. 859 (1908); *Holland v. Shaffer*, 162 Kan. 474, 178 P. (2d) 235 (1947).
  14. *Sweeney v. Bay Oil and Gas Company*, 192 Okla. 28, 133 P. (2d) 538 (1943).

at equity even though the statutes didn't so provide, and the partition in kind was allowed even though the land was a producing area. This court expressly stated that the rights of the lessor were not involved.

The Wyoming Supreme Court has not handed down a decision determining whether or not a co-lessee under an oil and gas lease can compel a partition in kind. In *Boatman et al v. Andre*<sup>15</sup> an oil and gas lease was held to create a profit a pendre in the lessee and as such was an incorporeal hereditament and an interest in real property. The Wyoming statute<sup>16</sup> states that the interest must be "an estate in lands, tenements or hereditaments." Obviously "estate", as used here, means an "interest" in lands, tenements or hereditaments. Certainly, an oil and gas lease would constitute an "interest in a hereditament". To substantiate this view, there is an Ohio case<sup>17</sup> cited under the law of origin of the statute<sup>18</sup> and the case held that partition was remedial and must be liberally construed, and that the plaintiff's undivided one half interest in the oil and gas lease was an interest in land and sufficient to compel partition either under this statute or at equity.

In all of the cases<sup>19</sup> previously cited which determine the co-lessee's right to partition, none of the courts made a reference to the original lease to determine whether or not it would allow the lessees to assign a divided part of the lease, and in only two of the cases<sup>20</sup> did the court discuss the necessity of the lessor as a party to the action.

In determining the court's rights to effect a partition in kind in the lack of a provision in the lease, a parallel analogy between the court's rights and the rights of the lessees might be drawn.

In absence of a provision in the lease, a lessee can assign the entire lease.<sup>21</sup> An apparent majority of the courts hold<sup>22</sup> that where the lease allowed an assignment in whole or in part by the lessee, a partial assignment creates a separate set of implied covenants for each lease. The portion retained by the original lessee is also subject to a separate set of implied covenants.<sup>23</sup>

When these results obtained by courts in other jurisdictions are considered, it is necessary to refer to the distinctive provision of the Wyoming statute<sup>24</sup> and the legislative basis for its enactment before any possible conclusion can be drawn as to the right of a co-lessee to compel a partitioning in kind in this jurisdiction. The statute was enacted in the Session Laws of 1886, ch. 60, sec. 614 by the Territorial Legislature. Apparently, the act, at this date, was intended to apply to ranch land. A considerable amount of pasturage was needed and one large

15. 44 Wyo. 352, 12 P. (2d) 370 (1932).

16. Wyo. Comp. Stat. 1945 sec. 3-6901.

17. *Black v. Sylvania Producing Company*, 105 Ohio St. 346, 137 N. E. 904 (1922).

18. See note 16 supra.

19. See notes 9, 10, 11, 12, 13, and 14 supra.

20. See notes 11 and 14 supra.

21. *Chandler v. Hart*, 161 Cal. 405, 119 Pac. 516 (1911); *Watts v. England*, 168 Ark. 213, 269 S. W. 585 (1925).

22. *Harrell v. United Carbon Co.*, 52 F. (2d) 790 (C. C. A. 5th 1931); *American Wholesale Corp. v. F. & S. Oil and Gas Co.*, 242 Ky. 356, 46 S. W. (2d) 498 (1932); *Harris v. Morris Plan Co.*, 144 Kan. 501, 61 P. (2d) 901 (1936).

23. *Mistletoe Oil and Gas Co. v. Revelle*, 117 Okla. 144, 245 Pac. 620 (1926).

24. See note 8 supra.

ranch was very likely to be of more value than that same ranch partitioned into smaller tracts.

A difficult and more complex problem is presented with regard to property which may be of value for oil and gas purposes. In the absence of a provision permitting a partial assignment, what is the effect of an attempted partial assignment of a divided interest by a co-lessee? For example: A lessor executes an oil and gas lease on an entire tract of land to two co-lessees and refuses to lease only a portion of the tract. Immediately upon making tests, it appears to the lessees that only a part of the tract is promising; desiring to delay drilling and preferring to escape payment of delay rentals upon the other portion, a lessee assigns that divided portion to another who surrenders his lease.

Condonation of this practice would have two undesirable results: 1. A lessor, contrary to the intention of the parties at the execution of the lease, could be deprived of delay rentals from an oil and gas lease on a part of his land. 2. The lessees, after the conveyance of the divided interests, would be obligated under two separate sets of implied covenants, that is, to drill an exploratory well, drill offsets, pursue diligent and proper operation, and the covenant of further development. Whether the partitioning results from an assignment of a divided interest by a co-lessee or from a judicial decree, it appears that either will likely impair the value of the lessee's or lessor's interests.

The logical answer to the problem would appear to be that, in absence of a provision, an attempted assignment of a divided interest in an oil and gas lease, does not divide the lease but creates only a sub-lease.

Since the lessees by their acts, in absence of provision, should not be permitted to partition a lease, can and should a court grant a partition with complete disregard for the existing rights and liabilities of the lessor even though the lessor is a party to the action? Similarly, should a court grant a partition without considering carefully whether or not a co-lessee's interest in the lease will be thereby impaired? A partition in kind by the court, in the absence of a provision allowing division, would have the same objections as permitting a co-lessee to make an assignment of a divided interest in the lease.

In conclusion, it is submitted that a Wyoming court should follow *Black et al v. Sylvania Producing Company*<sup>25</sup> if the two following requisites were present: 1. The value of the property would not be reduced by the partition. 2. The lease to the co-lessees provided them with the right to make a partial assignment of the lease. If either were absent, it would appear that the partition should be disallowed.

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#### RECOVERY OF ENGAGEMENT GIFTS AND THE HEART BALM ACTS

The development of the law on the subject of recovery by a donor of the engagement ring and other engagements gifts, in the event of a breaking-off of the engagement, has been, generally speaking, rational and in accordance with

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25. See note 17 supra.