The Arkansas Law of Oil and Gas: Chapter I & II

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THE ARKANSAS LAW OF OIL AND GAS*

Susan Webber Wright**

Following are the first two chapters of a short treatise on the Arkansas law of oil and gas. Additional chapters on Conveyances, Leases, and Pooling and Unitization will follow in later issues of the U.A.L.R. Law Journal. This treatise is not intended as an in-depth analysis, but rather as a description of the current state of the law which, the author hopes, will be helpful to those not regularly engaged in the oil and gas law practice.

CHAPTER I

NATURE OF OIL AND GAS INTERESTS

This chapter is an introduction to the law of oil and gas and examines the basic types of oil and gas interests and how they differ from each other. An understanding of these differences, though elementary to the oil and gas practitioner, is crucial to an understanding of what follows in the chapters on deeds and leases. The chapter includes a discussion on adverse possession of oil and gas interests in Arkansas. Also included is Arkansas authority on the rule of capture and remedies for the mineral owner in those situations in which the rule of capture does not apply.

All oil and gas interests are interests in real property and are con-

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veyed, devised and inherited like other interests in real property. The basic interests in oil and gas are the leasehold, mineral, and royalty interests, which differ from each other in significant respects.

**Leasehold Interests**

The leasehold interest is conveyed to the lessee in the oil and gas lease. Most Arkansas cases addressing the question have characterized this interest as being in the nature of an easement. According to these decisions, the lessee does not acquire any title to the minerals by virtue of the lease alone. Title passes only when the oil and gas are reduced to the lessee's possession. However, in the 1982 decision of *Hillard v. Stephens*, the Arkansas Supreme Court held that a "gas lease constitutes a present sale of all of the gas in place at the time such lease is executed," but cited no authority for this holding. If the court intended to change the Arkansas law on this point, it did not say so.

If the lessee's interest is an easement, it is incorporeal and can be lost by abandonment. Arkansas cases have so held. The Arkansas Supreme Court has also held that a leasehold interest is not partitionable, presumably because it is incorporeal. The *Hillard* decision might have changed the Arkansas law so that a lease is now a conveyance of the minerals themselves. If so, Arkansas now follows the Texas view that a lease is a conveyance of defeasible fee title to the minerals. Because

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2. See, e.g., Pasteur v. Niswanger, 226 Ark. 486, 488, 290 S.W.2d 852, 853 (1956); Osborn v. Arkansas Territorial Oil & Gas Co., 103 Ark. 175, 180, 146 S.W. 122, 124 (1912).


4. 276 Ark. at 550, 637 S.W.2d at 583.


6. Pasteur v. Niswanger, 226 Ark. 486, 290 S.W.2d 852 (1956). The court explained: "Owners of leasehold working interests are not co-tenants of the owners of the fee or surface of the land. Their interests are of a different kind. Their interests are also of a different kind to the interests of the owners of mineral rights where severed from the land." Id. at 488-89, 290 S.W.2d at 853. Associate Justice Darrell Hickman wrote a casenote on this decision when he was a student; see Note, *Oil and Gas — Partition — Interest of Lessee*, 11 Ark. L. Rev. 186 (1957), which points out that some Arkansas decisions have recognized the lessee's interest as corporeal for some purposes and concludes that this interest should be partitionable under the general partition statute, Ark. Stat. Ann. § 34-1801 (1947) amended by Ark. Stat. Ann. § 34-1801 (Supp. 1985).

7. See, e.g., Sheffield v. Hogg, 124 Tex. 290, 77 S.W.2d 1021 (1934); Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923). According to one authority,
Mineral Interests

In Arkansas the mineral interest may be severed by grant or reservation from the surface and become a separate estate. A severed mineral interest is corporeal and, like a fee interest in the surface, cannot be abandoned by its owner. Unlike a leasehold, a mineral estate held in undivided ownership is partitionable under the Arkansas statutes, and partition is available to any undivided owner, no matter how small the fractional interest. The owner of the mineral estate has the right to develop the minerals (the development right) and the right to lease the minerals (the executive right). This owner also has the power to convey an interest in the minerals to others. For example, he can convey an undivided interest in the minerals, or he can convey a royalty interest. It is even possible to convey an interest in minerals with a reservation of the executive right.

The owner of the mineral estate has an easement of reasonable use of the surface for the purpose of developing the minerals. The extent

Texas, Mississippi, and New Mexico are the only jurisdictions that regard the lease as creating a corporeal interest. R. HEMINGWAY, THE LAW OF OIL AND GAS, § 5.6, at 218-19, n.32 (2d ed. 1983).

9. See, e.g., Schnitt v. McKellar, 244 Ark. 377, 386-87, 427 S.W.2d 202, 208 (1968); Huffman v. Henderson Co., 184 Ark. 278, 285, 42 S.W.2d 221, 224 (1931).
11. ARK. STAT. ANN. §§ 53-401 to -409 (1971 & Supp. 1985). This presumably does not apply to tenancies by the entirety, which are not partitionable in Arkansas except when the parties are divorced. ARK. STAT. ANN. § 34-1801 (Supp. 1985).
12. E.g., Schnitt v. McKellar, 244 Ark. 377, 390, 427 S.W.2d 202, 210 (1968) (citing Overton v. Porterfield, 206 Ark. 784, 177 S.W.2d 735 (1944)).
13. There is a split of authority on whether one who owns no interest in the minerals can own the executive rights. See, e.g., Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (1941) (executive right in one who has no mineral ownership violates rule against perpetuities) and Stone v. Texoma Production Co., 336 P.2d 1099 (Okla. 1959) (one who owns only a royalty may own the executive right).
of this easement is the same as the right of a lessee to the reasonable use of the surface and is discussed in the chapter on mineral leases.

Royalty Interests

A royalty interest entitles its owner to a share of the minerals produced. Although a royalty is generally reserved by the lessor in a mineral lease, it is also possible for a mineral owner to convey a royalty to another party, which would entitle that party to a share in the minerals should minerals ever be produced. A royalty in Arkansas is real property until the minerals are produced, at which time it is personalty.18

The owner of a royalty interest ordinarily does not have any right to go upon the surface to explore and develop minerals or to lease the minerals. The term "non-participating royalty"16 refers to a royalty interest that does not share in bonus and delay rentals, which are other proceeds received by the lessor pursuant to a lease.17

Adverse Possession

If there has been no severance of the minerals from the surface, adverse possession of the surface is also adverse possession of the minerals, even if minerals have not been produced.18 The adverse claimant of a severed mineral interest must open and operate mines for the statutory period in order to gain title by adverse possession.19 The applicable limitations statutes are the same as for adverse possession of other real property interests,20 and the adverse claimant’s activities must be open and notorious.21 Leasing the minerals, without any drilling or

16. For a brief general description of the litigated issues surrounding the nonparticipating royalty, see H. Williams & C. Meyers, Manual of Oil and Gas Terms, at 555-56 (6th ed. 1984).
17. The proceeds of a lease are described in the chapter on mineral leases. If the mineral ownership is divided between life tenants and remainder interests, special rules govern entitlement to lease proceeds. These rules are discussed in the chapter on multiple ownership.
18. E.g., Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968). There are no Arkansas cases directly in point, but this principle can be inferred from the decisions in Buckner v. Wright, 218 Ark. 448, 236 S.W.2d 720 (1951) and Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390 (1929).
21. See, e.g., McWilliams v. Excelsior Coal Co., 298 F. 884 (8th Cir. 1924); Adams v. Bruder, 275 Ark. 19, 627 S.W.2d 12 (1982); Brizzolara v. Powell, 214 Ark. 870, 218 S.W.2d 728
mining activity, does not constitute adverse possession.  

In a 1985 Arkansas Supreme Court case the successor to an adverse claimant of the surface claimed that adverse possession extended to the mineral estate as well because the deed severing an undivided one-half interest in the minerals remained unrecorded until after the limitations title had been perfected. The court held that the unrecorded deed, which had been executed and delivered prior to the onset of the adverse possession, was effective against the adverse possessor and his grantee.

An interesting question arises when there has been adverse possession of one mineral and the claimant contends that he has thereby acquired adverse title to all of the minerals. Mineral producing jurisdictions are in conflict on this issue. In the 1982 case of *Hurst v. Rice*, the holder of a void tax title to the minerals claimed that she was the owner of the coal by adverse possession because she had been receiving gas royalties for fifteen years pursuant to an earlier court decree that she was the owner of the oil and gas. The Arkansas Supreme Court held that “[s]uch a claim from gas production goes to the gas only and the drilling and production of a gas is not adverse to the mining or stripping of coal, a solid mineral.” The court carefully limited its holding, stating that it was not deciding that drilling and producing gas could never be adverse to the mining of a solid mineral, or that the mining of one mineral could never be adverse to other minerals.

Another question concerning adverse possession of a mineral interest arises when the adverse claimant enters at a time when title to the

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(1949); Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390 (1923).

22. See Adams v. Bruder, 275 Ark. 19, 627 S.W.2d 12 (1982). The rule might be inferred from the holding in Laney v. Monsanto Chemical Co., 233 Ark. 645, 348 S.W.2d 826 (1961), in which the prior owner’s lessee was deemed not to be in constructive possession of all minerals in a lease when production was only from part of the leasehold.

23. Taylor v. Scott, 285 Ark. 102, 104, 685 S.W.2d 160, 161 (1985). The court reasoned that the adverse possessor does not rely upon the record and that the recording statute is designed to protect subsequent purchasers from the same grantor, not trespassers. *Id.*


25. 278 Ark. 94, 643 S.W.2d 563 (1982).

26. *Id.* at 99, 643 S.W.2d at 565.

27. *Id.* In a “non-ownership” jurisdiction where the owner of the minerals has only an easement and does not own the minerals “in place,” it is conceivable that the adverse possession of one mineral by mining would be adverse to others as well on grounds that the mining operation itself would obstruct the mining of other minerals. Because the owner has only an easement, effective obstruction of the easement for the statutory period should suffice. See Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968). For a view that actual mining of the minerals should be required to perfect an adverse title in a “non-ownership” jurisdiction, see R. HEMINGWAY, supra note 7, § 3.5(A).
minerals and surface is in the same owner but the minerals are severed before the limitation title ripens. In this event the adverse possessor takes title to the minerals as well as to the surface. 28 This result can be explained by the relation back of the limitation title to when the adverse possessor first entered, when the title was unified.

Sometimes adverse possession is not actual but constructive, based upon payment of taxes and color of title, as provided in the Arkansas statutes. 29 In one Arkansas case, Burbridge v. Rosen, 30 an adverse claimant with color of title paid taxes on an unimproved and unenclosed tract for seven years, then conveyed the surface and reserved the minerals in the eighth year. The court held that title to the minerals was in the claimant because of payment of taxes under color of title and because of the reservation. 31 Years later another claimant with color of title paid taxes on the land for sixteen years but did not acquire title to the minerals because of the prior severance. This case illustrates that constructive possession can operate like actual adverse possession: if title is severed at the time the adverse possession of the surface begins, the adverse possession does not extend to the minerals. If title is unified when adverse possession begins, however, the adverse possession of the surface extends to the mineral estate as well, which can be later severed.

Burbridge does not address the question whether one who has color of title to the minerals only may take constructive adverse possession through payment of taxes for seven years on unenclosed and unimproved land. The court subsequently held that the statute is not available for perfecting title to minerals only, as its reference to unenclosed land indicates no legislative intent that it could be applied to a mineral interest "[s]ince minerals within the earth are not susceptible of inclosure." 32

Because of well-spacing rules and unitization, it might be impossible for an adverse claimant to engage in on-premises mining activities. Thus the question arises whether one can claim title by adverse possession by entering into a voluntary pooling agreement for the production

28. See, e.g., Ates v. Yellow Pine Land Co., 310 So. 2d 772 (Fla. Dist. Ct. App. 1975). There are no Arkansas cases on this point. See R. Hemingway, supra note 7, § 3.4 (C), at 146.
31. Id. at 503, 400 S.W.2d at 504.
32. Brizzolara v. Powell, 214 Ark. 870, 872, 218 S.W.2d 728, 729 (1949). See also Jones v. Brown, 211 Ark. 164, 199 S.W.2d 973 (1947) (adverse possession by payment of taxes did not include a mineral interest severed between the time of first and last tax payments).
of oil and gas. In the Arkansas decision of Brizzolara v. Powell, the court rejected the contention that this was adverse possession, noting that the claimant did nothing to put the owner on notice. The court continued:

And the fact that a well drilled on adjacent land may withdraw gas from the depths of his own property can hardly require a reasonable man to investigate the possibility that an interloper may have joined in a pooling agreement purporting to include all land drained by the well.

The court said that the result might be different if the property were placed in a drilling unit by the Arkansas Oil and Gas Commission upon a finding that the well on adjacent land would drain it. There have been no Arkansas cases in which the adverse claimant was joined in a drilling unit established by the Oil and Gas Commission. Because all record owners must receive notice of the establishment of the unit, it is unlikely that this problem will arise.

As noted above, a royalty interest is real property in the nature of a right to receive a portion of the minerals upon production. But the royalty is personalty once the minerals are produced. Two Arkansas Supreme Court cases have addressed the question whether one can obtain a royalty interest through adverse possession by receiving the royalty payment for the requisite number of years. In the first of these cases, Warmack v. Henry H. Cross Co., the owner of 1/16 of a 1/6 royalty was erroneously paid 1/6 of 1/6 from 1935 to 1959. When the payor company discovered its error in 1959, it discontinued payments and the owner alleged adverse possession, laches, and estoppel. Noting that the claimant did nothing to give notice that he was claiming adversely to other royalty owners, the court found that he had obtained nothing by adverse possession. Likewise, he had no grounds to allege laches or estoppel against other royalty owners when there was no evidence that the others knew of the claimant's interest or knew of the erroneous payments by the oil company. The second case on this issue, Palmer
v. Lide, also involved a claim to continue receiving royalty payments originally paid in error. Citing Warmack, the court held that there was no adverse possession by receipt of these payments and no estoppel or laches to bar the true owners from claiming future payments. The result in both decisions is undoubtedly correct because neither case involved a claim that met the requisite characteristics of adverse possession — an open and notorious claim with notice to the true owner for the statutory period. However it is possible that royalty payments, as personalty, could be the object of adverse possession if the necessary elements are present.

The Rule of Capture

The rule of capture, which applies in all jurisdictions despite the theory of ownership of oil and gas, has been defined as: "[t]he legal rule of non-liability for (1) causing oil or gas to migrate across property lines and (2) producing oil or gas that was originally in place under the land of another, so long as the producing well does not trespass." In an "ownership-in-place" jurisdiction, such as Arkansas, the result of the rule is to permit one to reduce to possession and ownership minerals that initially belonged to a neighbor. Arkansas defined the rule of capture in a 1912 case, Osborn v. Arkansas Territorial Oil and Gas Co.

Petroleum, gas and oil are substances of a peculiar character. They belong to the owner of land, and are part of it so long as they are part of it or in it or subject to his control; but when they escape and go into other land or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil and gas extending under his neighbor's field, so that it comes into his well, it becomes his property.

Of course, the adjoining owner has correlative rights to the oil and gas in the common pool, and thus the rule of capture coexists with the

42. 263 Ark. 731, 567 S.W.2d 295 (1978).
43. Id. at 734, 567 S.W.2d at 296. The royalty owners who should have received the payments had signed division orders in which they agreed that their share was less than it was. Therefore, they could not have properly sought retroactive relief, as the court pointed out.
45. 1 H. Williams & C. Meyers, supra note 24, § 204.4, at 55.
46. H. Williams & C. Meyers, supra note 16, at 782.
47. 103 Ark. 175, 146 S.W. 122 (1912).
48. Id. at 180, 146 S.W. at 124 (quoting Brown v. Spilman, 155 U.S. 665, 669-70 (1895)).
notion that oil and gas are owned in place. If the rule were allowed to operate without governmental regulations, each landowner could drill as many oil or gas wells as he could afford and could produce as rapidly as possible in order to drain the common pool before others did so. Now that oil and gas producing states regulate production through pooling, unitization, and well-spacing, the rule of capture does not operate as it would otherwise. In fact, unregulated application of the rule leads to economic waste and waste of natural resources. Therefore, state regulation of production in Arkansas is for "the protection of public and private interests . . . by prohibiting waste and compelling ratable production." Other producing states regulate production for similar purposes.

The most significant Arkansas cases on the rule of capture involved brine production when Arkansas had no statutory provisions permitting unitization for brine. In Budd v. Ethyl Corp. the Ethyl Corporation was engaged in a recycling operation in Columbia County in which brine was removed from the ground through "output" wells, valuable bromides were extracted, and the tail (or debrominated) brine was returned to the earth through "input" wells. The input wells were in a circle on a leasehold of approximately 16,000 acres, and the output wells were inside the circle. The injecting of tail brine into the input wells forced the valuable brine toward the output wells. The appellant Budd owned an undivided mineral interest in 240 acres outside the circle but adjacent to the Ethyl leasehold. He also owned an undivided one-tenth mineral leasehold to forty acres inside the circle. Ethyl Corporation owned the remaining leasehold interest and the fee to this forty acres. Budd filed suit, claiming that Ethyl should account to him for his share of the extracted minerals from each tract.

The court held that the rule of capture applied to the drainage of brine from Budd's tract outside the leasehold. As to the tract on the leasehold in which Budd held an undivided one-tenth of the leasehold interest, the court held that Budd had no right to an accounting because, as a lessee, he was entitled to produce brine just as Ethyl produced it. The court reasoned that Budd's interest in the minerals was inchoate because a lessee has an easement, not ownership of minerals

49. See Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948).
52. 251 Ark. 639, 474 S.W.2d 411 (1971).
53. Id. at 641, 474 S.W.2d at 413.
54. Id. at 642, 474 S.W.2d at 413.
in place.\textsuperscript{55}\n
The next decision on the rule of capture as applied to brine production was a federal case, \textit{Young v. Ethyl Corp.},\textsuperscript{56} which involved the same recycling operation as that in \textit{Budd}. Young's land was inside the circle of input wells, and brine underlying the surface of his land was forced into the output wells by Ethyl's recycling process. Young had refused to lease to Ethyl and sought an injunction, damages, or an accounting for the minerals displaced from his property by Ethyl. The lower court dismissed his complaint on grounds that the rule of capture applied to Ethyl's operations,\textsuperscript{57} citing the Arkansas Supreme Court decision in \textit{Budd}. The Eighth Circuit Court of Appeals reversed, finding that the \textit{Budd} decision did not address the issue at hand because it did not involve a plaintiff who owned a fee simple interest within the circle of injection wells. (Budd only had a leasehold interest within the circle; he owned a mineral interest outside the recycling operations.) The court found that Arkansas would not apply the rule of capture to the recycling operation. It reasoned that the rule of capture traditionally applied to drainage of fugacious minerals from a common pool, not to the production of minerals which are forced by artificial means from the land of one owner into the well of another. The court concluded that Ethyl's actions constituted a trespass to Young's property and remanded the case.\textsuperscript{58} It is difficult to ascertain whether the court based its decision on the premise that salt water, or brine, is not fugacious, or on the fact that the brine was forced to the production wells, not merely drained by them from the common pool: "We believe that it would be unwise to extend the rule to situations in which non-fugacious minerals are forced from beneath a landowner's property."\textsuperscript{59}\n
Assuming the decision is based upon the premise that brine is not fugacious, the holding is limited to brine and the rule of capture might still apply to recovery of oil and gas through secondary recovery operations. But if the holding is based on the fact that the minerals were forced into production wells, then the rule of capture should not apply to secondary recovery of oil and gas. The latter interpretation is more likely accurate. First, despite what the court indicates, brine is non-fugacious only in the sense that it is not a liquid or gaseous hydrocarbon such as oil or gas. Brine is water, which can be extracted and cap-
tured from a common pool. Second, the court notes that the rule of capture, formulated at a time when measuring drainage was scientifically impossible, should not apply as an absolutism today.\(^6\) In their treatise, Williams and Meyers indicate that the *Young* decision applies to oil and gas as well as to brine, for they cite it along with cases from other jurisdictions as taking a position contrary to the so-called "negative rule of capture," which would permit production through secondary recovery operations without liability for displacing minerals underlying the land of others.\(^6\)

*Budd* and *Young* did not end the litigation over Ethyl's recycling operations in Columbia County. In *Jameson v. Ethyl Corp.*\(^6\) the Arkansas Supreme Court held that the rule of capture did not shield Ethyl Corporation's activities, citing the *Young* decision as persuasive. Jameson, like Young, was unable to reach an agreement to lease to Ethyl and owned land surrounded by Ethyl's leasehold. Ethyl claimed that the rule of capture permitted it to displace and recover minerals underlying the Jameson tract, while Jameson alleged that Ethyl's activities constituted a trespass or nuisance.

The court in *Jameson* found that the language of the 1912 decision in *Osborn*,\(^6\) which adopted the rule of capture in Arkansas, does not "envision processes such as those used by Ethyl in the situation now under consideration."\(^6\) Thus, it appears that the Arkansas Supreme Court probably has rejected application of the rule of capture to secondary recovery of oil and gas as well as to brine.

While rejecting Ethyl's position that the rule of capture applies, the court also rejected Jameson's contention that Ethyl's activities constituted a trespass or a nuisance. The court gave well-considered reasons based upon public policy:

A determination that a trespass or nuisance occurs through secondary recovery processes within a recovery area would tend to promote waste of such natural resources and extend unwarranted bargaining power to minority landowners. On the other hand, a determination that the rule of capture should be expanded to cover the present situation could unnecessarily extend the license of mineral extraction companies to appropriate minerals which might be induced to be moved from other properties through such processes and, in any event, fur-

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\(^6\) *Id.*

\(^6\) 1 H. WILLIAMS & C. MEYERS, *supra* note 24, § 204.5, at 60.5.

\(^6\) 271 Ark. 621, 609 S.W.2d 346 (1980).

\(^6\) *Osborn v. Arkansas Territorial Oil & Gas Corp.*, 103 Ark. 175, 146 S.W. 122 (1912).

\(^6\) 271 Ark. at 627, 609 S.W.2d at 350.
ther extend the bargaining power of such entities to reduce royalty payments to landowners who are financially unable to “go and do likewise” as suggested by Ethyl. 65

The court held that good-faith production of minerals from a common pool through secondary recovery processes should be permitted to maximize recovery from the pool. However, such good faith recovery should be conditioned upon the extracting party’s payment of compensation to the owner whose land is depleted “for the minerals extracted in excess of natural depletion, if any, at the time of taking and for any special damages which may have been caused to the depleted property.” 66 The case was remanded to equity.

By rejecting the rule of capture for production from secondary recovery operations, Arkansas has joined most other jurisdictions that have addressed the issue. 67 As pointed out in Young and Jameson, the rule of capture has been criticized in recent times for requiring a result unfair to those whose mineral losses are capable of some measurement. The result in Jameson is fair to all concerned: it gives the landowner a remedy against the producer but does not give him the power to thwart production by injunction or by excessive compensation for the minerals taken in excess of natural depletion.

Another situation in which the rule of capture should not apply is when oil and gas are wasted as a result of negligent operations on adjoining land. A famous Texas case, Elliff v. Texon Drilling Co., 68 held that an adjoining landowner was liable for negligent operation of a well which caused the well to blow out and valuable hydrocarbons to escape from beneath the plaintiff’s land. The court reasoned that the rule of capture protects “reasonable and legitimate drainage from the common pool,” 69 and does not extend to “the negligent waste or destruction of the oil and gas.” 70 Arkansas would probably follow this case, as the

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65. Id. at 628-29, 609 S.W.2d at 351.
66. Id. at 629, 609 S.W.2d at 351.
68. 146 Tex. 575, 210 S.W.2d 558 (1948); Note, Rule of Capture Held Not to Limit Recovery for Negligent Destruction of Gas from Common Pool, 62 HARV. L. REV. 146 (1948); see also Comment, Liability in Texas for Wrongful Drainage of Oil and Gas, 27 TEX. L. REV. 349 (1949).
69. 146 Tex. at 582, 210 S.W.2d at 562.
70. Id.
Arkansas Supreme Court has indicated that it will not follow the rule of capture absolutely without regard to policy considerations.71 Other jurisdictions have followed Elliff by refusing to apply the rule of capture to negligent or wasteful activities.72

Mineral Owners' Remedies for Loss of Oil and Gas

If the rule of capture does not protect the taking of another's oil and gas, the appropriate remedy can be in trespass, nuisance, conversion, or an accounting, depending upon the circumstances and the jurisdiction.73 Furthermore, good faith or lack thereof can affect the measure of damages. Another consideration in measuring damages is whether it would be feasible for the injured party to mine the minerals himself.

Arkansas cases involving the wrongful removal of hard minerals are helpful in ascertaining the remedies for the wrongful removal of oil and gas. In Ward v. Spadra Coal Co.,74 coal lessees on one tract of land took coal from an adjacent tract, which was leased to the Spadra Coal Company. The latter sued for the willful and intentional mining of the coal, naming as defendants the lessees who actually mined the coal and their lessors. The court found that the defendants had trespassed in good faith, that the plaintiff could waive the tort and sue for the value of the coal taken, and that the appropriate measure of damages would be the "value of the ore in place in the mine."75 In determining the value in place, the court considered the royalty usually paid in the locality for mining coal and awarded the plaintiff damages based upon that royalty, plus interest.

A close reading of the Spadra Coal opinion shows that the court awarded damages based upon a good faith trespass, but indicated that it was awarding damages for conversion. This raises the question whether damages for trespass and conversion are the same for the wrongful taking of another's minerals. Later cases discussed herein are helpful in answering this question in the affirmative.

Another decision involving the wrongful taking of a hard mineral is National Lead Co. v. Magnet Cove Barium Corp.,76 a well-reasoned

73. See 1 H. WILLIAMS & C. MEYMERS, supra note 24, § 204.5.
74. 168 Ark. 853, 272 S.W. 353 (1925).
75. Id. at 857, 272 S.W. at 354.
opinion written by the late Judge Miller. The plaintiff, National Lead, alleged that the defendant, an adjoining lessee, had intentionally and willfully taken barite ore from the plaintiff's land. The defendant admitted taking some of the plaintiff's ore, but denied that the taking was willful. In addition to damages for the ore removed from its land, the plaintiff sought damages for "disturbed" ore left in the ground that was not recoverable as a result of the defendant's mining activities. The court found that the defendant's mining personnel were negligent in their activities which led to the trespass to the plaintiff's property, but that the negligence did not amount to an intentional, willful trespass. In accordance with Spadra Coal and other Arkansas decisions, the court reasoned that damages for nonwillful trespass are based upon the value of the ore in place. The damages extended not only to the coal converted by the defendant for its own use, but also to the "disturbed" ore, which the plaintiff could not remove safely or at a reasonable cost.

The National Lead opinion recognizes two guidelines for determining the in-place value of minerals. One, the royalty value was applied by the Arkansas Supreme Court in Spadra Coal. The second is the value of the minerals after production less the production costs. Judge Miller determined that the latter measure of damages was appropriate in National Lead because the plaintiff was a lessee in the business of mining:

As to a landowner who has not the opportunity nor the equipment to develop minerals, the amount for which he can lease them, or royalty value, is the generally accepted measure of damages as to him for an innocent trespass and conversion of minerals. However, as to the mineral lessee with the desire, ability and facilities to mine and develop minerals, the royalty value does not adequately compensate him for being deprived of the opportunity to exercise his mining rights . . . . By this approach the plaintiff minerals lessee is put in the place it would have been had it not been deprived of the opportunity of mining its ore, while at the same time depriving the trespasser of any profit from its wrongdoing, yet inflicting no punishment on the trespasser by the allowance of its expenses or costs in removing and developing the ore.

78. See National Lead Co. v. Magnet Cove Barium Corp., 231 F. Supp. 208, 217-28 (W.D. Ark. 1964). Decisions from other jurisdictions have at times focused on the reasonableness of production costs, as only reasonable costs are deductible by the good faith trespasser; see, e.g., Champlin Ref. Co. v. Aladdin Petroleum Corp., 205 Okla. 524, 528, 238 P.2d 827, 830 (1951).
Judge Miller's reasoning is certainly correct. As he points out, compensatory damages are awarded to make the plaintiff whole.\textsuperscript{80} A plaintiff incapable of producing the minerals can be made whole by an award based upon royalty. But a plaintiff in the business of mining can be made whole by awarding that plaintiff the value of produced minerals less the reasonable costs of production. By awarding damages for the "disturbed" ore Judge Miller carried out the purpose of compensating the injured party for the trespass. Limiting damages only to the ore taken by the defendant would not have made the plaintiff whole.

In \textit{Young v. Ethyl Corp.},\textsuperscript{81} the facts of which are discussed above, the Eighth Circuit remanded the case to the district court to grant relief on the grounds of trespass. The district court found that Ethyl had acted in good faith and awarded Young 169.1/15,040ths of the net profits, for Young owned 169.1 acres of the 15,040-acre recycling operation. This award was $1,119,922.24.\textsuperscript{82} On the second appeal, the Eighth Circuit affirmed the lower court's finding that the trespass was in good faith, but held that the damages award was excessive.\textsuperscript{83} The court reasoned that Young was not in a position to produce the brine and extract the minerals himself and that no other lessee would undertake such an operation on Young's relatively small tract.\textsuperscript{84} Although the court cited \textit{National Lead}, it remanded the case to determine whether the good faith measure of damages should be based upon royalty or upon the value of the minerals produced less the costs of production.\textsuperscript{85} Had the court followed Judge Miller's reasoning in \textit{National Lead}, it would have awarded damages based upon royalty, for Young was in no position to exploit the minerals himself.

The final decision involving Ethyl's recycling operations in Columbia County was \textit{Jameson v. Ethyl Corp.},\textsuperscript{86} which followed \textit{Young} in 1964.

\textsuperscript{80} \textit{Id.} at 221.
\textsuperscript{81} 521 F.2d 771 (8th Cir. 1975).
\textsuperscript{82} The district court's opinion is not reported. \textit{See Young v. Ethyl Corp.}, 581 F.2d 715 (8th Cir. 1978).
\textsuperscript{83} Good faith was found from the permission of the Arkansas Oil and Gas Commission for the recycling operations and from the advice from Arkansas and Texas attorneys that the rule of capture would apply to the recycling activities. The opinion points out that the district court's computation of damages far exceeded what would be due from a bad faith trespasser. 581 F.2d. at 718.
\textsuperscript{84} \textit{Id.} at 717.
\textsuperscript{85} This measure was referred to in the second \textit{Young} opinion in the Eighth Circuit as "the value of the salt water at the wellhead, less the cost of bringing it to the wellhead." \textit{Young v. Ethyl Corp.}, 581 F.2d 715, 719 (8th Cir. 1978).
\textsuperscript{86} 271 Ark. 621, 609 S.W.2d 346 (1980); \textit{see supra} note 62 and accompanying text.
refusing to apply the rule of capture. The Arkansas Supreme Court remanded the case to the lower court for a determination of damages based upon the value of the minerals taken from the plaintiff's land in excess of natural depletion. Presumably, the court was ordering the defendant to account for the "in-place" value, but the court was silent concerning the method by which the chancellor should compute the damages. Whether the court would approve damages based upon royalty, upon the value of the minerals produced less the costs of production, or upon some other formula, is unclear. The court said that it would permit the defendant's activities as long as they were carried out in good faith.\textsuperscript{87} In other words, the plaintiff could not seek an injunction. Injunction is a traditional equitable remedy for trespass and nuisance, and this fact might explain why the court held that trespass and nuisance were not applicable in the case of good faith secondary recovery. It is highly unlikely that the court meant to exclude from the lower court's discretion a measure of damages based upon good faith trespass.

The measure of damages for bad faith trespass is the value of the minerals produced with deduction of expenses of production.\textsuperscript{88} This measure of damages is punitive and not limited to making the plaintiff whole.\textsuperscript{89} Its harshness might be the reason the Arkansas decisions indicate a reluctance to find bad faith in questionable situations. For example, in \textit{McGraw v. Berry}\textsuperscript{90} the Arkansas Supreme Court found that the defendants' trespass was in good faith not only as to coal removed from the plaintiff's property before suit was filed and before the defendants knew of the plaintiff's claim, but also for coal removed after the filing of suit. Perhaps the court would have found bad faith had the defendants entered and mined the coal with knowledge of the plaintiff's claim.\textsuperscript{91} Other examples of good faith trespass in which the defendants were not completely innocent are \textit{Ward v. Spadra Coal Co.}\textsuperscript{92} and Na-

\textsuperscript{87} Id. at 629, 609 S.W.2d at 349.
\textsuperscript{90} 170 Ark. 426, 280 S.W. 383 (1926).
\textsuperscript{91} In Texas a defendant who enters and develops the minerals with knowledge of the plaintiff's claim is not a good faith trespasser. \textit{E.g.}, Houston Prod. Co. \textit{v. Mecom Oil Co.}, 62 S.W.2d 75 (Tex. Com. App. 1933).
\textsuperscript{92} 168 Ark. 853, 272 S.W. 353 (1925).
tional Lead Co. v. Magnet Cove Barium Corp. In both cases the defendant was aware that its mining activity was close to the boundary of the plaintiff's property. In Spadra Coal the record indicated that the defendants might have felt justified in taking the plaintiff's coal because it would not have been practicable for the plaintiff to mine it. In National Lead the court found that the defendant did not exercise reasonable care in ascertaining the boundary with the plaintiff's property.

Although some of the foregoing examples involved hard minerals, there is no reason why a different rule should apply to oil and gas. The reluctance of Arkansas courts to find bad faith has particular merit for oil and gas, which are subject to drainage. Certainly a landowner would prefer a cause of action against a good faith trespasser to a permanent, noncompensable loss of oil and gas due to drainage by a neighboring well drawing from the common pool. By the same token, a mineral producer accused of trespassing might continue operations if he knew that he would be liable only for the "good faith" measure of damages if he were found to be trespassing. That same producer might discontinue operations altogether if he knew that the harsh or "bad faith" measure of damages would be awarded against him. Meanwhile, the producer might lose his lease for lack of production. Therefore, courts should not find trespassers to be in bad faith except in the most extreme circumstances.

Any discussion of trespass to oil and gas might be incomplete without reference to subsurface trespass by directional, or "slant" wells. If such trespass is by accident or excusable mistake, the trespasser should be liable for a "good faith" measure of damages and perhaps should be enjoined. However, drilling technology is so far advanced that "the plea of good faith in drilling a trespassing directional well will rarely be favorably received in court today." Difficult problems can arise concerning how a landowner might determine whether a well is bottomed on his land and whether the statute of limitations should run from the time of the trespass or from the time the owner discovered or reasonably should have discovered it. There are no Arkansas cases on these issues. Well-spacing and forced integration make the directional well trespass a rather unlikely occurrence. Experiences in other jurisdictions are interesting.

94. 1 H. WILLIAMS & C. MEYERS, supra note 24, § 227, at 396.4.
95. See, e.g., R. HEMINGWAY, supra note 7, § 4.2; Morrow, Subsurface Trespass by Deviated Well, 1 Hous. L. Rev. 21 (1963); Note, What is the Proper Remedy in the Slant-Hole Suit?, 18 Sw. L.J. 486 (1964).
Damages for Loss of Speculative Value and for Geophysical Trespass

An issue that has generated considerable interest to oil and gas scholars is whether damages for loss of speculative value should be awarded against a trespasser who has drilled a dry hole. There are no Arkansas decisions on this issue and other jurisdictions have not been in accord with each other. The plaintiff in such a case can allege that the defendant's trespass resulted in the plaintiff's inability to lease the minerals at the prevailing market rate in the area. However, the fact that the plaintiff's property has no oil or gas indicates that the plaintiff has suffered no injury to the mineral estate. Because of the speculative nature of the oil and gas industry, allowing damages for loss of speculative value seems the more just approach. In one federal district court case in Arkansas, the plaintiff was estopped from claiming damages for loss of speculative value.

Despite the interest generated by this issue, Professors Williams, Maxwell, and Meyers have suggested that the problem might have no "lasting importance" because there are very few decisions on point.

A relatively new area of liability is for trespass through the use of geophysical surveys to determine the potential for oil and gas. If the trespasser has entered upon the plaintiff's land and has conducted tests without the plaintiff's permission, the plaintiff should at least be entitled to the value of the right wrongfully exercised by the trespasser. If the survey reveals that the plaintiff's property has no recoverable oil and gas, the plaintiff may be able to prove damage to speculative value. Arkansas has had no appellate court decisions on liability for this type of trespass.

96. See, e.g., Green, What Protection Has a Landowner Against a Trespass which Merely Destroys the Speculative Value of His Property?, 4 Tex. L. Rev. 215 (1926); Qualls, Damages for Dry Hole Trespass, 40 N.D.L. Rev. 65 (1964).


100. See generally 1 H. Williams & C. Meyers, supra note 24, § 230.

101. Texas does not permit the owner this remedy, but has permitted the plaintiff to waive the tort and sue in assumpsit for the value of the use and occupation of his land. Phillips Petroleum Co. v. Cowden, 241 F.2d 586, 591 (5th Cir. 1957).
CHAPTER II
MULTIPLE OWNERSHIP OF OIL AND GAS INTERESTS

This chapter concerns the ownership of oil and gas interests by multiple parties in cotenancy, or undivided ownership. It also concerns the ownership of such interests by life tenants and remaindermen, including ownership by dower and curtesy. Finally, there is a short section on the defeasible fee. Some of the problems arising from divided ownership stem from the interpretation of deeds to mineral interests, and these issues are addressed in the chapter on deeds.

Undivided Ownership

a. Mineral Development or Lease by a Cotenant

Any mineral interest, including a leasehold interest, can be held in cotenancy; that is, tenancy-in-common, joint tenancy with right of survivorship, or tenancy by the entirety.¹ One of the most frequent questions arising from such ownership is the effect of one cotenant’s execution of a mineral lease. Such a lease of an undivided interest does not bind the other cotenants’ interests.² However, if the other cotenants wish, they can ratify the lease if it covers the mineral interests they own. In almost all leases, the lessor purports to lease 100% of the minerals, even if both parties know that the lessor owns only an undivided interest.³ Thus, in most instances the nonleasing cotenants may ratify.⁴ However, they might wish to forego this opportunity for the chance of leasing their interests on more favorable terms.

There is a split of authority in the United States on whether a mineral cotenant or his lessee commits waste when either produces

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¹ There are very few cases involving tenancy by the entirety. However, there is one case from Arkansas, Tyler v. Boucher, 225 Ark. 806, 285 S.W.2d 524 (1956), in which the Arkansas Supreme Court held that a husband’s conveyance of a mineral interest held by the entirety did not destroy the right of survivorship in the wife, who did not join in the conveyance.


³ The reason for this is to permit the doctrine of after-acquired title (or estoppel by deed) to inure to the benefit of the lessee in the event the lessor subsequently acquires title to a mineral interest greater than he owned at the time the lease was executed. See McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341, 304 S.W.2d 267 (1957).

⁴ An interesting question could arise concerning the period of time a cotenant should have to decide whether to ratify. Ratification should not be allowed when it can work an unfair disadvantage to the other party. Restatement (Second) of Agency § 82, comment d (1958).
minerals without the consent of the other mineral cotenants. The majority rule is that such production is not waste and that the producing cotenant or his lessee must account to the nonproducing cotenants their proportionate shares of production less the reasonable costs of production. There are a few cases in which the nonproducing tenant has been awarded damages based upon the royalty he would have received had he signed a lease. These two methods are the same as the damage formulas for good faith trespass, but a cotenant is not a trespasser to other cotenants unless he has excluded them. However, it seems unfair to award the nonleasing cotenant only royalty when royalty is what he would receive had he signed a lease. It appears more equitable to give the nonleasing tenant what is his: his portion of the minerals less the reasonable costs of production.

A minority of jurisdictions hold that production by a mineral cotenant or his lessee is waste. In some cases the nonleasing cotenant has even been able to enjoin production. Because of the fugacious nature of oil and gas, an injunction may not be in the best interest of any of the cotenants, particularly when there is a possibility of drainage. This approach should not be favored except in circumstances when the operating tenant or his lessee has excluded the other cotenants from developing the minerals.

Arkansas followed the majority rule in a 1986 case, Fife v. Thompson. Thompson leased all the interests except Fife's one-eighth interest in a twenty-acre tract. Thompson completed a producing well and filed suit to impress a lien on Fife's one-eighth interest for the costs

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5. This rule was applied in Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924). States adopting this approach include Alabama, California, Kansas, Kentucky, Missouri, Montana, Oklahoma, and Texas. See 1 E. Kuntz, Oil and Gas § 5.3 (1962); 2 H. Williams & C. Meyers, Oil and Gas Law § 504.1 (1985).

6. See, e.g., Petroleum Exploration Corp. v. Hensley, 284 S.W.2d 828 (Ky. 1955) (allowing the royalty measure for production obtained prior to the filing of suit); McIntosh v. Ropp, 233 Pa. 497, 82 A. 949 (1912).

7. Chapter I notes 74-79 and accompanying text.

8. These jurisdictions include Illinois, Louisiana, Michigan and West Virginia. See 1 E. Kuntz, supra note 5, at § 5.4; 2 H. Williams & C. Meyers, supra note 5, at § 504.2.


10. If the nonleasing cotenant is responsible for drainage from the property, Louisiana will not enjoin production. United Gas Pub. Serv. Co. v. Arkansas-Louisiana Pipe Line Co., 176 La. 1024, 147 So. 66 (1933).

11. 288 Ark. 620, 708 S.W.2d 611 (1986). The court noted that it had "embraced" the rule in Ashland Oil and Ref. Co. v. Bond, 222 Ark. 696, 263 S.W.2d 74 (1953). Other Arkansas cases in which the majority rule was recognized include Jones v. Franks Petroleum, 273 Ark. 161, 617 S.W.2d 369 (1981) and Budd v. Ethyl Corp., 251 Ark. 639, 474 S.W.2d 411 (1971), reh'g denied Jan. 24, 1972.
of drilling and operating the well. Fife counterclaimed for one-eighth of the value of the minerals produced plus punitive damages on grounds that Thompson was a willful trespasser. The supreme court ruled that the chancellor was correct in characterizing Thompson's status as "tantamount to cotenancy" and held for Thompson, citing the majority rule and noting that if a cotenant were able to bar production, others could drain the oil and gas from the common pool.

The rights among lessees of cotenants do not parallel the rights among cotenants. As pointed out in the previous chapter, the court held in Budd v. Ethyl Corp. that a mineral lessee of an undivided interest has no cause of action against the lessee of another undivided interest for developing the minerals because each lessee has the same right to develop the minerals. Of course, this reasoning recognizes that the interest of a lessee is an easement and that title to the minerals does not pass until the minerals are produced.

Because of the statute allowing forced integration, it is unlikely that the problems of undivided ownership will arise frequently. However, the problems arise occasionally, as in Fife, in situations involving production from zones to which no field rules apply because their development began before the current statutes were adopted. The Arkansas legislature has adopted statutes designed for this situation. Act 220 of 1937 allows a mineral cotenant or a lessee of a mineral cotenant to petition the chancery court to appoint a receiver authorized to negotiate and execute a mineral lease subject to the approval of the court. A lease executed by a receiver appointed pursuant to this act was held to be void because of improper notice to the interested parties in Davis v. Schimmel. The constitutionality of the Act itself was not the issue in that case or in any other reported decision. The Act would probably be upheld even though its effect is to force a lease upon unwilling owners of undivided mineral interests. Courts have upheld statutes providing for compulsory pooling and unitization, which are arguably more ex-

12. Thompson could not integrate Fife's interest into a drilling unit because the production was from the Smackover Lime, a source of oil that was discovered and being developed prior to January 1, 1937. See Ark. Stat. Ann. § 37-106 (1971). The court notes this at 288 Ark. 621, 708 S.W.2d 612, n.1.
13. 620 Ark. at 621, 708 S.W.2d at 611-12.
15. Id. at 642, 474 S.W.2d at 413.
18. 252 Ark. 1201, 482 S.W.2d 785 (1972).
19. See, e.g., Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85 (1952), suggestion of error overruled, 214 Miss. 857, 59 So. 2d 844 (1952); Wood Oil Co. v. Corporation Commission,
treme and violative of vested rights than this receivership procedure.

b. Partition

The Arkansas Statutes specifically allow the owner of a mineral interest to bring an action for partition. As mentioned in Chapter I, these provisions are not applicable to leasehold interests because a leasehold is in the nature of an easement. This action for partition is available when there is no actual production of oil or gas and no outstanding lease.

In any partition action the possibility arises that the partition might result in hardship as to one or more of the cotenants. A few cases from other jurisdictions have indicated that partition of a mineral interest is a matter for judicial discretion in instances when the partition may be inequitable. Such an inequity might result if one party is financially unable to purchase at the partition sale and there is approaching development of oil and gas. In Overton v. Porterfield the Arkansas Supreme Court said that the mineral partition statute "does not impose the imperative duty on the court to order a sale in every case whether a petition is filed by one or more cotenants . . . ." In Schnitt v. McKellar the court noted this point as "dicta" in Overton and refused to decide whether partition is a matter for judicial discretion because the defendants did not plead or prove that the partition would constitute fraud or oppression as to them. Therefore, the Arkansas Supreme Court has never held that a court may exercise discretion in granting a petition for partition of a mineral interest. It is clear that under the general partition statutes partition is an absolute right.

Partition of a mineral interest under the mineral partition statutes should be an absolute right despite the dicta in Overton. The legislature

21. Pasteur v. Niswanger, 226 Ark. 486, 290 S.W.2d 852 (1956). Admittedly, the statutes are somewhat confusing on this point because § 53-401 specifically refers to the “sale and partition of the entire oil and gas leasehold interest . . . .”
23. See, e.g., Strait v. Fuller, 184 Kan. 120, 334 P.2d 385 (1959); Henson v. Bryant, 330 P.2d 591 (Okla. 1958); Wolfe v. Stanford, 179 Okla. 27, 64 P.2d 335 (1937).
24. 206 Ark. 784, 177 S.W.2d 735 (1944).
25. Id. at 789, 177 S.W.2d at 737.
27. Id. at 390-91, 427 S.W.2d at 210.
arguably intended that partition be an absolute right, as the statute does not indicate that partition is a matter for judicial discretion. Perhaps more significant is the fact that the legislature apparently appreciated the risk of inequitable consequences of partition, for the statute permits the court to appoint a receiver for the purpose of leasing the minerals in the event the court believes that the parties' interests would be "more fully protected and the value of the various interests of the parties increased . . . ."^30 Thus it appears that the court has no discretion in whether or not to grant partition but does have discretionary authority to appoint a receiver for leasing the minerals.

There are no Arkansas cases on partition of a royalty interest. Such an interest should not be partitionable because it is incorporeal.^31 As a practical matter, the issue is unlikely to arise because the payor divides a royalty into separate payments for each of the co-owners.

Life Estates and Remainder Interests

A mineral interest held by a life tenant and remaindermen presents a number of problems, including who must sign a lease and who is entitled to the lease bonus, rentals, and royalty. In some situations Arkansas statutes provide the answers. In others, Arkansas looks to common law.

a. Leases of Conventional Life Estates and Remainder Interests

A mineral lessee should obtain leases from both the life tenant and the remainderman in the case of a conventional life estate.^32 A lessee of the life tenant who has no lease from the remainderman could be sued for waste by the remainderman in the event the lessee developed the minerals.^33 In two old Arkansas cases this problem has been before the court. In Cherokee Construction Co. v. Harris,^34 which involved a widow's coal lease to her homestead lands, and in Lee v. Straughan,^35 which involved a widow's oil and gas lease of her dower interest, the

^31. There is authority to the effect that the owner of the working interest cannot partition against an overriding royalty owner. Mulsow v. Gerber Energy Corp, 237 Kan. 58, 697 P.2d 1269 (1985); De Mik v. Cargill, 485 P.2d 229 (Okla. 1971).
^32. A conventional life estate is one created by devise or grant, not by operation of law (as in the case of dower or curtesy).
^33. A life tenant cannot develop the minerals without being sued for waste by the remainderman, in absence of a statute. The life tenant is entitled only to the use of the minerals; i.e., to interest on the royalty.
^34. 92 Ark. 260, 122 S.W. 485 (1909).
^35. 146 Ark. 504, 226 S.W. 171 (1920).
Arkansas Supreme Court held that the lessee had no right to develop the property without a lease from the remainderners. Although neither of these decisions concerned a conventional life estate, the court held that the rule “applies to all persons whose estate in the land do [sic] not exceed that of a life-tenant,” thereby indicating that the rule is the same for conventional life estates. In a similar vein, a lessee of the remaindernan who has no lease from the life tenant would have no right to develop the minerals until the remainder vested at the death of the life tenant, which might be after the expiration of the primary term of the lease.

If the remainder is contingent, the lessee is uncertain to obtain a valid lease from all interested parties unless a statutory procedure exists to insure that the lease is binding on all interests. Such a procedure, which is the topic of the following section, exists in Arkansas for contingent remainders following a life interest that would have been an entailed estate at common law. In addition, a statute adopted in 1945 applies under very narrow circumstances to contingent remainders. For any contingent remainder falling outside the scope of these statutes, there is no available procedure to insure a lease binding all interested parties.

When the interests of both the life tenant and the remaindernan have been leased, the division of the lease proceeds between them has a parallel in the rules governing distribution of trust assets. For example, the life tenant is entitled to interest on royalty because this is income, while the remaindernan is entitled to the royalty itself, as it represents the corpus of the property.

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36. For the purpose of determining the rights of the parties in this instance, the distinction between homestead and dower is not important. Lee v. Straughan, 146 Ark. 504, 508, 226 S.W. 171, 172 (1920).
37. Id.
38. As noted in the following section on dower and curtesy, in 1961 the Arkansas legislature made special rules for lands assigned as dower.
39. Ark. Stat. Ann. § 53-311 (1971). This section was apparently adopted to cure title in one situation because the circumstances to which it applies are extremely specific. It applies only if the life interest has been in existence for 30 or more years, if there has been production of oil for 20 years under a lease executed by the life tenant, if the creator of the life interest has attempted to convey to the life tenant the creator's interest in the property, and if all the contingent remaindernmen in esse at the time of initial production have attempted to convey their interests by warranty deed to the life tenant or have executed a lease to the life tenant's lessee. If all these conditions are met, the deeds and leases of the contingent remaindernmen are binding upon all contingent remaindernmen.
40. This was mentioned, but was not the holding, in Dickson v. Renfro, 276 Ark. 223, 228, 634 S.W.2d 104, 106-07 (1982). Apparently this is the majority view. Another method of dividing royalty between life tenant and remaindernan is “to give the life tenant that portion of the roy-
The allocations of bonus, which is the initial consideration for the lease, and delay rental payments present more difficult questions. The general rule is to allocate delay rentals to the life tenant.\textsuperscript{41} This seems logical, because rentals are not payment for depletion of the mineral estate and thus should not be comparable to the corpus of a trust. Arkansas has never decided this in a definitive case.\textsuperscript{48}

In most jurisdictions the remainderman receives bonus, which is considered to be royalty paid in advance.\textsuperscript{48} This is consistent with federal tax treatment of bonus as royalty.\textsuperscript{44} At least one authority has cited Arkansas as being among a minority of jurisdictions that allocate bonus to the life tenant.\textsuperscript{46} However, the Arkansas case cited for this is \textit{Love v. McDonald},\textsuperscript{48} which involved a special statutory procedure for leasing by the life tenant when the life estate would be a fee tail at common law. Furthermore, the remaindermen in that case were the children of the life tenant and had agreed to award the lease money to the life tenant.\textsuperscript{47} Thus, the holding in \textit{Love v. McDonald} does not concern the allocation of bonus between a life tenant and remaindermen when there is a conventional life estate. All that one can conclude is that the allocation of bonus, like the allocation of delay rentals, has not been decided by the Arkansas Supreme Court in the case of a conventional life estate.

There is one situation in which the common law, by the "open mine doctrine," allocates royalty instead of interest on royalty to the life tenant. If there is production at the time the life estate commences, this doctrine assumes that the grantor or testator creating the life interest intended for the life tenant to receive the royalty.\textsuperscript{48} Of course, the grantor or testator may specifically provide otherwise.\textsuperscript{49}

The open mine doctrine is generally applied to life interests cre-
ated by operation of law as well as to conventional life estates. In the 1909 decision in *Cherokee Construction Co. v. Harris* and in the 1920 decision in *Lee v. Straughan*, the Arkansas Supreme Court recognized, but did not apply, the doctrine to a life interest created by operation of law because there was no "open mine" at the time the life interest commenced. These decisions thus indicate that Arkansas would apply the doctrine to life estates created by operation of law. However, as pointed out in the following section, Arkansas now has specific statutory provisions governing the lease proceeds from land assigned as dower or curtesy to a surviving spouse. These provisions, not the open mine doctrine, would apply in the appropriate circumstances.

A perplexing problem arises if production does not begin until after the vesting of the life estate under a lease that was in effect prior to the vesting of the life estate. Under these circumstances, the mine has not been "opened" but the execution of a mineral lease has indicated that the grantor or settlor intended for the minerals to be developed. In the 1925 decision of *Warren v. Martin*, the Arkansas Supreme Court, quoting from a holding in another jurisdiction, noted that "a mine lawfully leased to be opened is an open mine within the reason of the rule permitting a life tenant to work open mines."

The issue in that case was whether a widow was entitled to receive delay rental payments, which would give her the power to waive forfeiture of the lease when payments were not tendered as required. The court, by reference to the open mine doctrine, held that she was entitled to receive the delay rentals. The decision fails to note that the life tenant generally receives delay rentals whether or not the open mine doctrine applies. Despite this, it appears that the court would apply the open mine doctrine if the lease was in effect at the time the life estate commenced, even if there was no production at that time. This is in accordance with most authority on the question.

If a lease "opens the mine," and that lease expires during the life tenancy, does another lease, executed by the life tenant and remainder-
men, reopen the mine? This question has been answered in the negative by decisions in Oklahoma and Texas but there are no decisions in Arkansas addressing this issue.

b. Lease of Estate that Would Be Fee Tail at Common Law

There is one situation in which the Arkansas statutes permit a life tenant to petition the chancery court for authority to execute a lease binding on the remaindermen. These statutes, adopted as Act 76 in 1929, apply only to a life tenant whose interest at common law would have been an entailed estate, or a fee tail. Generally speaking, the fee tail was created by grant or devise using the words "to E and the heirs of his body," or "to E for life, remainder to the heirs of his body." Such language in Arkansas creates an interest similar to a life estate in E, with a contingent remainder in the heirs of E's body. The legislature decided to permit a lease by the life tenant in this situation, presumably to provide for development of the property as a protection against drainage. In absence of this type of statutory provision, a lessee wishing to develop the property could obtain, at best, leases from remaindermen whose interests were only contingent.

This statutory procedure requires the life tenant to join as respondents all contingent remaindermen and to include the terms of the proposed lease in the petition. The statutory provisions for allocation of lease proceeds depart from common law rules governing conventional life estates. Upon approval of the lease, the court awards the life tenant title in fee simple to a portion of the minerals, not to exceed an undivided 1/16. The life tenant then becomes a fee simple owner of an undivided mineral interest, free of all claims of remaindermen, and is entitled to a share of the lease proceeds and to compensation out of the lease proceeds for damages resulting from operations or delay thereof. The court appoints a bonded trustee for the benefit of the remaindermen.

61. For a more detailed analysis of the fee tail, see T. Bergin & P. Haskell, Preface to Estates in Land and Future Interests 28-34 (2d ed. 1984).
66. Ark. Stat. Ann. § 53-306(a) (1971). If the court awards the life tenant an undivided 1/16 mineral interest, the tenant is entitled to ½ of a ½ royalty. Id.
men and reversioners.67

The constitutionality of these provisions was upheld in the Arkansas Supreme Court decision in *Love v. McDonald*.68 The defendant contended that a lease obtained under these provisions was not marketable because the act was violative of state and federal due process. The court upheld the act, even though it provided for vesting in the life tenant some of the interest of the contingent remaindermen. The court reasoned that the owner of a contingent interest is not entitled to the due process protection extended to the owners of vested property interests.69 The court also upheld the act against contentions that it authorizes a life tenant to commit waste and is violative of state constitutional protections against impairment of contracts.

c. Interests Subject to Dower and Curtesy

Interests in oil and gas, as property interests, are subject to dower and curtesy laws [hereinafter dower laws].70 Generally, Arkansas statutes provide for dower to be a one-third life interest in real property and a one-third interest absolutely in personal property if the deceased spouse left surviving a child or children.71 If the deceased spouse left no child or children, the provisions for dower vary according to whether the real property is ancestral and whether the dower is claimed against creditors or collateral heirs.72 Anyone examining title to minerals should be aware of these and other statutes governing dower and should also be aware that a spouse can take as an heir if the deceased

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67. Ark. Stat. Ann. § 53-306(b) (1971). A reversioner is one to whom the property reverts in the event there are no remaindermen to take at the death of the life tenant. In the case of a fee tail, the reversion would be in the estate of the grantor or the testator.

68. 201 Ark. 882, 148 S.W.2d 170 (1941).

69. Id. at 889, 148 S.W.2d at 174-75.


If a person die [dies], leaving a surviving spouse and no children, such surviving spouse shall be endowed in fee simple of one-half (½) of the real estate of which such deceased person died seized where said estate is a new acquisition and not an ancestral estate; and one-half (½) of the personal estate, absolutely, and in his or her own right, as against collateral heirs; but, as against creditors, said surviving spouse shall be invested with one-third (⅓) of the real estate in fee simple if a new acquisition and not ancestral and of one-third (⅓) of the personal property absolutely. Provided, if the real estate of such deceased person be an ancestral estate, the surviving spouse shall be endowed in a life estate of one-half (½) of said estate as against collateral heirs, and one-third (⅓) as against creditors.
spouse leaves no descendants, according to the Arkansas statutes on intestacy.\textsuperscript{78}

Although the general statutes on dower and curtesy apply to oil and gas interests, Arkansas also has specific statutory provisions on dower that relate to oil and gas leases and their proceeds:

If a person dies, leaving a surviving spouse and a child or children, the surviving spouse shall be entitled, absolutely and in his or her own right, to one-third ($\frac{1}{3}$) of all money received from the sale of timber, oil and gas or other mineral leases, oil and gas or other mineral royalty or mineral sales and one-third ($\frac{1}{3}$) of the money derived from any and all royalty run to the credit of the royalty owners from any oil or gas well or royalty accruing from the production of other mines or minerals in lands in which he or she has a dower, curtesy or homestead interest, unless said surviving spouse shall have relinquished same in legal form.\textsuperscript{74}

This provision is consistent with the general statute on dower in personalty.\textsuperscript{76}

The provisions on assignment of dower in Arkansas change the common law with respect to the leasing of minerals and to the division of the lease proceeds. The heirs of the deceased spouse must grant to the surviving spouse the right to execute oil and gas leases on land set aside as dower, and the surviving spouse is entitled to all bonus and delay rentals for his or her life.\textsuperscript{76} This provision changes the common law rule that a mineral lease must be executed by both the life tenant and the remaindermen. It also changes the general rule that bonus is allocated to the remaindermen. A related provision entitles the surviving spouse to royalty payments for as long as he or she lives.\textsuperscript{77} This changes the common law rule that the life tenant is entitled to interest on royalty, not to the royalty itself.

d. Defeasible Fees

Defeasible fees are interests that tend to puzzle the first-year law student, partly because there are three basic types of defeasible fee and these three types themselves are given different names by different authorities. For purposes of this treatise it is helpful to identify them as

follows: the fee simple determinable, the fee simple upon condition subsequent, and the fee simple subject to an executory limitation. Each of these interests is characterized by a grant or devise in fee simple which will terminate upon the happening of a certain event.

A textbook example of a fee simple determinable (or a determinable fee) is "to A and his heirs so long as the property is used for church purposes." In the event that the property is not used for church purposes, the title reverts to the grantor, who holds a possibility of reverter. The general rule is that A, as the owner of the fee, may develop the minerals or may execute an oil and gas lease without the consent of the owner of the possibility of reverter.76 In the event that A conveys his interest by deed, devises it by will, or dies intestate, his successors in interest may likewise lease or develop the minerals without the consent of the owner of the possibility of reverter. Like the owner of a fee simple determinable, the owner of one of the other types of defeasible fee may develop the minerals without the consent of those who own contingent interests in the property.76

In the 1982 decision of Dickson v. Renfro80 the Arkansas Supreme Court arguably recognized an exception to this general rule. The grant before the court was to a husband and wife and their heirs, but in the event that they had no children, the title was to vest in others. The grantees had no children and the husband died. The Arkansas Supreme Court held that the wife was not entitled to royalties from production which began after the husband's death. The court reasoned that the wife's estate terminated with the husband's death, as the only way she could have kept her interest was to have children by her husband. But the court declared that even if the wife did not lose her interest at the death of the husband, she had a duty not to commit waste. The court cited the Restatement of Property, which would permit the owner of a future interest to enjoin the owner of a defeasible fee for waste when there is a reasonable probability that the future interest will vest and when the owner of the defeasible estate does not have the power to destroy the future interest.81 The decision thus indicates that the Arkansas Court will look to circumstances such as those outlined in the

78. See, e.g., Frensley v. White, 208 Okla. 209, 254 P.2d 982 (1953); Davis v. Skipper, 125 Tex. 364, 83 S.W.2d 318 (1935). Of course, A must make certain that the development of the minerals would not breach the condition that the property be used for church purposes.
79. See 1 E. Kuntz, supra note 5, § 7.1, at 161.
80. 276 Ark. 223, 634 S.W.2d 104 (1982).
81. RESTATEMENT OF PROPERTY § 193 (1936), cited in Dickson, 276 Ark. at 229, 634 S.W.2d at 107.
Restatement in determining the right of the owner of a defeasible fee to lease and develop the minerals.