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## DOWER RIGHTS UNDER OIL AND GAS LEASES

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A widow's right to dower in interests created under oil and gas leases, executed by her husband, varies in the different jurisdictions where oil and gas are produced. There are different forms of leases in use and different views held as to the nature of the rights created by them. It is necessary, therefore, at the beginning of a study of the rights of a widow of a lessor or of a lessee in such leases, to note those different forms and the nature of the interests created therein before we can arrive at any satisfactory conclusions regarding the dower rights created therein.

There is a lack of uniformity in the contents of oil and gas leases. One of the leading writers in this field of law sets out the following provisions found in oil and gas leases: (1) The payment of a cash bonus at the time of the execution of the lease; (2) A provision for a royalty payment if oil is produced upon drilling a well; (3) An agreement to drill a test well; (4) A positive provision imposing an obligation to drill and a stipulation that unless production is found within the term fixed, the lease shall expire; (5) Or an agreement giving the lessee an option to drill a test well or to pay a rental for a definite term, a "drill or pay" provision; and (6) A forfeiture clause for breach of these conditions is usually added.<sup>1</sup>

Among the names that have been used in referring to oil and gas leases we find the "unless" lease, also known as "Producers' Form 88." This form has been held to convey a determinable fee to the lessee.<sup>2</sup>

Another authority states that oil and gas leases are to be classified, first, with respect to the form of the granting clause; second, with regard to the form of the habendum clause; and third, with reference to the nature of the obligation, if any, to drill a well or wells, "or in lieu thereof, to pay delay rentals."<sup>3</sup>

The difficulty of setting out categorically the different forms of leases used in the production of oil and gas is readily seen when we glance at the various forms considered by an outstanding authority in this branch of the law. In his treatment of the habendum clause, Pro-

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<sup>1</sup>Thornton, *Oil and Gas* (1932) § 75.

<sup>2</sup>*Koenig v. Calcate*, 199 Miss. 435, 25 S. (2d) 763 (1946).

<sup>3</sup>Walker, *Property Interests Created by Leases* (1928) 7 Tex. L. Rev. 1 at 11.

fessor Summers refers to (1) a definite term lease with option to renew; (2) a short term lease; (3) a short term lease with a "thereafter" clause, used in "drill or pay" types of drilling clauses; (4) no-term leases; (5) a fixed term and "as long thereafter as oil and gas is produced in paying quantities"; and (6) the modern lease.<sup>4</sup>

It is interesting to note, at this point, what property interests are created by these leases. Since the courts of the various oil-producing states seem to have their own ideas on this point, it is necessary to bear this fact in mind when examining the decisions. It is also necessary to bear in mind that the earlier decisions under oil and gas leases were decided at a time when the rules of law as to solid minerals like coal were well established and the courts applied these rules to the first oil and gas cases.

Usually, we find the courts stating that oil and gas leases create an interest in real property. Texas represents the extreme view in this trend. It holds in keeping with the law governing mining coal and other metals of a solid nature that the lessee acquires ownership to the oil and gas in place. In a leading case on the point, the Texas court observed: "We do not regard it an open question in this state that gas and oil in place are minerals and realty, subject to ownership, severance, and sale, while embedded in the sands of rocks beneath the earth's surface, in like manner and to the same extent as is coal or any solid mineral."<sup>5</sup>

In *Zephyr Oil Co. v. Cunningham*,<sup>6</sup> the view of the court was that "an oil and gas lease as a license creates a kind of incorporeal hereditament in and to lands, and as an estate it vests a determinable title to oil and gas in place or produced from the same premises." The determinable fee interest will last only so long as oil or gas is produced, according to the ruling of the Texas Supreme Court.<sup>7</sup>

At the other extreme seem to stand Kansas and West Virginia. The courts in these states have referred to an oil and gas lease as a license or chattel real but nevertheless have said that it creates personal property interests. The question as to what interests are created under these leases has come up in actions for partition. In *Charter v. Maxwell*<sup>8</sup> the West Virginia court, after referring to earlier decisions, held that leases similar to the one under consideration created for the

<sup>4</sup>2 Thornton, Oil and Gas (1938) 105 et seq.

<sup>5</sup>*Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290 (1923). See *Norris v. Vaughn*, 152 Tex. 491, 260 S. W. (2d) 676 (1953) (that lessee's interest is a determinable fee in oil and gas in place, an interest in realty).

<sup>6</sup>265 S. W. (2d) 169 (Tex. Civ App. 1954).

<sup>7</sup>*Norris v. Vaughn*, 152 Tex. 491, 260 S. W. (2d) 676 (1953).

<sup>8</sup>132 W. Va. 282, 52 S. E. (2d) 753 (1919).

lessees a chattel real, "which is personalty. . . ." Being personal property, an earlier judgment did not create a lien upon the undivided interest in the leasehold estate. The Kansas court in *Holland v. Shaffer*<sup>9</sup> said: "In this state an ordinary oil and gas lease is held to convey no interest in the land therein described but to create merely a license to explore, personal property." And in *Tegarden v. Beers*<sup>10</sup> the same court held a royalty in oil and gas produced under the lease is not realty and a contract to share such royalty with others did not run with the land.

A majority of oil and gas producing states now designate the interest created by ordinary oil and gas leases as a profit *à prendre*, as an interest in the land.<sup>11</sup> In Louisiana, it was said that it is a well established principle in that state that mineral leases must be construed as leases and that the Code provision applicable to ordinary leases must be applied.<sup>12</sup> A statute in New York states that interest created under oil and gas leases shall be regarded as personal property but shall be taxed as real property.<sup>13</sup>

Another fact that must be borne in mind in considering dower rights created under oil and gas leases is that common law dower has been abolished in some states and provisions in descent and distribution statutes substituted therefor. This is especially true of community property states, many of which are leading producers of oil and gas. Among these are California,<sup>14</sup> Louisiana,<sup>15</sup> New Mexico<sup>16</sup> and Texas.<sup>17</sup>

In many leading oil and gas producing states curtesy and dower have been abolished and statutes enacted fixing the share of a surviving spouse in the estate of a deceased spouse. This is so in Indiana,<sup>18</sup>

<sup>9</sup>162 Kan. 474, 178 P. (2d) 235 (1947).

<sup>10</sup>175 Kan. 610, 265 P. (2d) 845 (1954).

<sup>11</sup>*Continental Supply Co. v. Marshall*, 152 Fed. 300 (C. C. A. 10th, 1946); *Roberts v. Tice*, 198 Ark. 397, 129 S. W. (2d) 258 (1939); *Basin Oil Co. of Calif. v. Baash-Ross Tool Co.*, 125 Cal. App. 578, 271 P. (2d) 122 (1954); *Walter v. Sohio Pet. Co.*, 402 Ill. 33, 83 N. E. (2d) 346 (1950); *Halbert v. Hendrix*, 121 Ind. App. 43, 95 N. E. (2d) 22 (1950); *Dempsey v. Diederick*, 313 Ky. 865, 233 S. W. (2d) 976 (1950); *Homestead Exploration Corp. v. Shorogge*, 81 Mont. 604, 264 Pac. 388 (1928); *Koenig v. Calcate*, 199 Miss. 435, 25 S. (2d) 763 (1946); *Exchange v. Poynter*, 64 N. W. (2d) 718 (N. D. 1954); *Vanzandt v. Heilman*, 54 N. M. 97, 214 P. (2d) 864 (1950); *Boatman v. Andre*, 44 Wyo. 352, 12 P. (2d) 370 (1932).

<sup>12</sup>*Dees v. Hunt Oil Co.*, 123 F. Supp. 58 (D. C. La. 1954).

<sup>13</sup>N. Y. Rev. Stat. (1883) c. 372; 1A *Summers, Oil and Gas* § 156.

<sup>14</sup>Cal. Civ. Code (Deering, 1937) § 173.

<sup>15</sup>La. Civ. Code (Dart, 1932) §§ 915 et seq.

<sup>16</sup>N. M. Stat. (1953) c. 27-1, 27-8, 27-9.

<sup>17</sup>Tex. Civ. Stat. (Vernon, 1948) Art. 2571-2578.

<sup>18</sup>Ind. Stat. Ann. (Burns, 1953) §§ 6-210, 6-211.

Kansas,<sup>19</sup> Oklahoma,<sup>20</sup> and Pennsylvania.<sup>21</sup> Common law dower is given, with statutory changes, in the following group of oil producing states: Illinois,<sup>22</sup> Kentucky,<sup>23</sup> Montana,<sup>24</sup> Ohio,<sup>25</sup> and West Virginia.<sup>26</sup>

Another statutory provision made for the surviving spouse and the minor children of a married couple is that of homestead, the right of a life interest in the premises that had been occupied by the couple as a home before the death of one of them. This right is created by statute and was nonexistent under the common law. The owner of a homestead is entitled to share in rents and royalties derived from the land. In *Brandenburg v. Petroleum Exploration*,<sup>27</sup> the Kentucky court did not apply this right to royalties from oil wells drilled under a lease executed by her adult children after the homestead had been assigned. It said the Kentucky statute gave the homestead to a widow so long as she should occupy the same and to the unmarried infant children of the husband to occupy it with her until the youngest unmarried child should arrive at full age. This, the court held, did not create an estate in land, but the right to use, occupy and enjoy the surface. The same result was reached in *Bartlett v. Buckner's Adm'r.*<sup>28</sup> The Oklahoma court took a different view. In *Lawley v. Richardson*<sup>29</sup> the homestead owner was allowed to collect and use in her own right the royalties from wells developed under a lease executed by her deceased husband; and in *Hembree v. Magnolia Petroleum Co.*,<sup>30</sup> where the homestead premises were subject to an oil and gas lease executed by her husband, the widow's conveyance of her right as cotenant to produce oil and gas was inconsistent with the right to use the royalties under the lease in force when the homestead accrued and was a waiver of such right.

In a Texas case a widow sued to set aside her homestead rights in two tracts, one that was community property and the other the separate property of the husband. Both tracts had been occupied by the plaintiff

<sup>19</sup>Kan. Gen. Stat. (1949) §§ 59-504, 59-508.

<sup>20</sup>Okla. Rev. Stat. (1951) c. 32, § 9(5); c. 84, § 213.

<sup>21</sup>Pa. Stat. Ann. (Purdon, 1953) c. 12, § 6; Pa. Stat. Ann. (Purdon, 1950) c. 20,

§ 1.2.

<sup>22</sup>Ill. Rev. Stat. (1953) Art. II, c. 3, §§ 162 et seq.

<sup>23</sup>Ky. Rev. Stat. (1953) §§ 381.135, 391.090 et seq.

<sup>24</sup>Mont. Rev. Code (Choate & Wertz, 1947) c. 22, §§ 22.102-22.117.

<sup>25</sup>Ohio Rev. Code Ann. (Page, 1954) c. 2103.

<sup>26</sup>W. Va. Code (Michie, 1955) c. 43, § 4096 et seq.

<sup>27</sup>218 Ky. 557, 191 S. W. 757 (1927).

<sup>28</sup>265 Ky. 747, 97 S. W. (2d) 805 (1936).

<sup>29</sup>101 Okla. 40, 223 Pac. 156 (1924).

<sup>30</sup>176 Okla. 524, 56 P. (2d) 851 (1935).

and her husband as their homestead. She sued also to recover for oil and gas royalties that had accrued since the husband's death. The leases had been executed by the husband and his first wife, and he had devised these tracts to his children by his first wife. Wells were drilled on both tracts and were producing prior to the husband's death. The widow was given homestead rights in half the community property and in all the other tract and accrued royalties and such royalties as might be derived from the lands as long as she used them as a homestead. The court admitted it followed *Petrus v. Cage Bros.*<sup>31</sup> with reluctance, since in Texas oil and gas were owned in place and the *Petrus* case made the royalties "annual profits of the land." In *Clayton v. Canida*,<sup>32</sup> however, it held that "a surviving common law husband's homestead interest in land of his deceased wife included the right to appropriate oil and gas royalties produced during his life from wells open prior to the wife's death as long as he should use the land as a homestead, and was not restricted merely to the interest earned therefrom."

From these decisions it is obvious that a widow of an owner of realty which has been used as the homestead of the couple while the husband was living might get, by statute, possibly a better income from oil and gas wells drilled and operated on such homestead lands under leases executed by the husband prior to his death than she might get, as we shall see, under the rules governing the dower rights of the widow of a lessor of an oil lease.

Turning now to dower interests of the widow of the deceased lessor, it seems best to consider the decisions of the various oil and gas producing states, in alphabetic order.

In Arkansas a widow's dower rights are set out in a 1945 act of the legislature of that state. It reads: "If the husband dies, leaving a widow and a child, or children, his widow shall be entitled, absolutely and in her own right to one-third of all money received from the sale of timber, oil and gas or other mineral royalty or mineral sales and one-third 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 production of other mines or minerals in lands in which she has a dower and homestead interest, unless she shall have relinquished same in legal form."<sup>33</sup>

Arkansas earlier had held that a lease was a license in land.<sup>34</sup> The

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<sup>31</sup>128 S. W. (2d) 537 (Tex. Civ. App. 1939).

<sup>32</sup>223 S. W. (2d) 264 (Tex. Civ. App. 1949).

<sup>33</sup>Ark. Rev. Stat. (1947) c. 61, § 204.

<sup>34</sup>Clark v. Dennis, 172 Ark. 1096, 291 S. W. 807 (1927).

lessee at the inspection of the lease was said to have a possessory interest protected by an action of ejectment.<sup>35</sup> The court the same year, 1927, said it was well settled that in that state an oil and gas lease conveyed an interest in land.<sup>36</sup>

As already noted, California has abolished the common law dower and interest taken by the surviving spouse in the deceased spouse's property is fixed by a provision of the Code.<sup>37</sup> One-half the community property belongs to the surviving spouse. In referring to oil and gas leases, the court in *Callahan v. Martin*<sup>38</sup> said the common law classifications were not applicable; and it has also said that interests acquired under oil and gas leases are profits à *prendre* which vest in the lessee an incorporeal hereditament, a present estate in land; consequently, such interests come within the Code provisions covering the right of succession.

Illinois and Indiana also come within the group of oil producing states that have statutory provisions abolishing dower and curtesy and giving the surviving spouse interests in the deceased spouse's estate under the descent and distribution acts.

In Illinois, the earlier cases involving dower rights in oil and gas leases referred back to mining cases, especially to the cases of *Lenfer v. Hanke*<sup>39</sup> and *Priddy v. Griffith*,<sup>40</sup> and accepted the principles laid down in those cases as far as they were adaptable to the oil situation, including the doctrine of opened mines. The latter of these gave the widow of a lessor interest in royalties from coal mines opened up by the lessee after her husband's death.

A statute now gives the surviving spouse, where the decedent leaves descendants, one-third of the personal estate and also one-third of each parcel of real estate. If there are no descendants but the decedent is survived by parents or other relatives, the proportions of decedent's estate going to the surviving spouse differ. Provision is made for the surviving spouse to elect to take dower instead of the portions given her under the statute.<sup>41</sup>

As in Illinois, the early cases on dower under oil lease in Indiana are based on their decisions worked out in coal mining cases, referring in particular to the case of *Hendrix v. McBeth*<sup>42</sup> where the widow of

<sup>35</sup>Henry v. Gulf Refining Co. of Louisiana, 176 Ark. 133, 2 S. W. (2d) 687 (1927).

<sup>36</sup>Roberts v. Tice, 198 Ark. 397, 129 S. W. (2d) 258 (1939).

<sup>37</sup>Cal. Civ. Code (Deering, 1953) §§ 201-203.

<sup>38</sup>3 Cal. (2d) 110, 43 P. (2d) 788 (1935).

<sup>39</sup>73 Ill. 405, 24 Am. Rep. 263 (1874).

<sup>40</sup>150 Ill. 560, 37 N. E. 999 (1892).

<sup>41</sup>See note 21, supra.

<sup>42</sup>61 Ind. 473, 28 Am. Rep. 680 (1878).

the deceased lessor was given dower in the royalties received from coal mines opened in the lifetime of her husband. A surviving spouse is given certain interests in the estate of the decedent according to the provisions of the statute of descent and distribution:<sup>43</sup> one-third of the net estate if there are surviving two children or one child and issue of a deceased child; one-half if but one child or issue of a deceased child; three-fourths if no surviving issue, but the intestate is survived by one or both parents, etc.

The Kansas statute provisions are very similar. If the decedent leaves no children or issue of a previously deceased child, all the decedent's property passes to the surviving spouse. If he leaves a child or children or issue of a previously deceased child or children, one-half of the entire estate goes to the surviving spouse. Another section gives, under certain circumstances, the surviving spouse one-half the realty of which the decedent was seized during the marriage.<sup>44</sup> If the deceased spouse leaves a will, the surviving spouse may elect to take under the statute.<sup>45</sup> In the recent case of *In re Randolph's Estate*<sup>46</sup> the husband elected to take under the statute. The court held that the wife's lease did not work a severance of the oil and gas from the land and her interest in the oil and gas as a lessor was real estate so that the husband took one-half of the land and also one-half of the royalties she had devised to a relative. In *National Bank of Tulsa v. Warren*,<sup>47</sup> the court said: "We have examined the authorities cited and relied on by the plaintiff where we have held an oil and gas lease to create personal property and conveys no interest in land. These cases are not in point here. The question with which we are dealing is governed entirely by the statutes<sup>48</sup> we have discussed and the cases interpreting them." The court was considering the necessity of recording a mortgage of an oil payment reserved out of the production of oil and gas leases.

The Kentucky statute gives a surviving spouse one-third of the real estate of which his or her spouse was seized in fee simple during coverture and one-half of the surplus personalty.<sup>49</sup> As shown in *Crain v. West*,<sup>50</sup> the widow is also entitled to rents and royalties in her hus-

<sup>43</sup>Ind. Stat. Ann. (Burns, 1953) §§ 6-201 et seq.

<sup>44</sup>Ky. Gen. Stat. (1949) §§ 59.504, 59.505.

<sup>45</sup>Ky. Gen. Stat. (1949) § 59.2233.

<sup>46</sup>175 Kan. 685, 266 P. (2d) 315 (1954).

<sup>47</sup>177 Kan. 281, 279 P. (2d) 262 (1955).

<sup>48</sup>Ky. Gen. Stat. (1949) § 79.3101.

<sup>49</sup>Ky. Rev. Stat. (1953) § 392.020.

<sup>50</sup>191 Ky. 1, 229 S. W. 51 (1921). See *Collins v. Lemaster*, 232 Ky. 188, 22 S. W. (2d) 567 (1929).

band's dowable estate until dower is assigned. In that case, the statute was construed to give the wife profits and royalties from oil wells opened in the lifetime of the husband. She was given one-third the royalties outright from the death of the husband until dower was assigned.

On appeal from an adverse ruling of the trial court in an action by a widow to set aside assignments of oil and gas leases, made by her husband without consideration and without his wife's knowledge, the Court of Appeals said: "In this state a widow is entitled to dower in mineral leases owned by her husband."<sup>51</sup> However, in *Van Camp v. Evans*,<sup>52</sup> growing out of the same set of facts, the court held the widow was not entitled to dower in the particular leases since the husband was not seized of a fee simple estate in them. It was provided in the leases that the lessee covenant to begin a well on the premises within fifteen days and to drill other wells within specified times, and forfeiture for failure to drill as required was provided for. This did not create a fee simple estate in the lessee in which his widow would be entitled to dower under the statute. The court approved the statement in *Swiss Oil Corp. v. Hupp*<sup>53</sup> that the right of such a lessee is limited to exploring and producing, and does not acquire any title to the oil until it has been taken from the ground.

*Bartlett v. Buckner's Adm'r*<sup>54</sup> was a case in which two widows were each entitled to interest for life on one-third of one-eighth of such royalties, where their husbands had owned a one-eight interest in the oil and gas leases. However, one who had elected to claim homestead rights in her husband's land was held not entitled to participate in the oil royalty.

In the recent decision of *Mills v. Taylor*,<sup>55</sup> the court noted that the general rule was recognized in Kentucky that "a life tenant is entitled to the rentals and royalties accruing under a gas and oil lease as part of the profits of the land if the land was being exploited under such lease at the time of the acquisition of the life estate."

As recently as 1946, the Louisiana court applied the strict rule as to "open mines" to an oil lease case and said the widow of the lessor was not entitled to the royalties from wells opened on a half-interest of community property after the death of her husband but was entitled to royalties from wells on another tract which had been developed in her husband's lifetime.<sup>56</sup> It said that under the Louisiana Code the

<sup>51</sup>Pursifull's Adm'r v. Pursifull, 299 Ky. 245, 184 S. W. (2d) 967 (1944).

<sup>52</sup>306 Ky. 59, 206 S. W. (2d) 38 (1947).

<sup>53</sup>353 Ky. 552, 564, 69 S. W. (2d) 1037, 1043 (1934).

<sup>54</sup>265 Ky. 747, 97 S. W. (2d) 805 (1936).

<sup>55</sup>268 S. W. (2d) 412 (Ky. 1954).

<sup>56</sup>Gulf Refining Co. v. Garrett, 209 La. 674, 25 S. (2d) 329 (1946).

usufructuary had no right to mines and quarries not opened when the usufruct commenced. The federal court in Louisiana has said that an oil and mineral lease in Louisiana or a royalty interest creates an interest in real property and is governed by the same rule that governs property rights.<sup>57</sup>

As early as 1892 it was settled in Michigan that a widow was entitled to one-third of the royalties that accrued under a lease made by the remaindermen, with the court's permission, although the mines had not been opened during her husband's lifetime.<sup>58</sup> The statute in that state gave a widow a life estate in one-third of the land whereof her husband was seized in fee simple during marriage.

The Michigan court did not allow a widow dower in oil and gas leases given for five years "and so long thereafter as oil and gas or either of them, is produced from said land by lessee." It said this was not an estate of inheritance, since oil and gas could not be produced forever within the terms of the leases.<sup>59</sup>

The Mississippi code provisions are sufficiently broad to make the statutory substitution for dower cover any interest a deceased spouse may have had in any oil and gas interests.<sup>60</sup> Where an intestate leaves no children or descendants, the entire net estate goes to the surviving widow. If he leaves children or descendants, his widow is given a child's part. Dower as such is abolished in Mississippi.

The Montana code gives the widow a one-third dower interest in the real estate of which her husband was seized during the marriage. It includes equitable estates as well as legal. Where there are no issue living, she has an election whereby she can take one-half.<sup>61</sup> A recent decision under the code<sup>62</sup> gave the widow dower in an unpatented mining claim.<sup>63</sup>

New Mexico likewise abolishes dower and makes provision for a surviving spouse to take under the statute of descent and distribution.<sup>64</sup> It regards grants or reservation of royalty rights as grants and reservations of "real property."<sup>65</sup>

<sup>57</sup>Angichiodo v. Cerami, 28 F. Supp. 720 (D. C. La. 1939).

<sup>58</sup>Seager v. McCabe, 92 Mich. 186, 52 N. W. 299 (1892).

<sup>59</sup>Redman v. Shaw, 300 Mich. 314, 1 N. W. (2d) 555 (1942).

<sup>60</sup>Miss. Code Ann. (1942) §§ 470, 478.

<sup>61</sup>Mont. Rev. Code (Choate & Wertz, 1947) §§ 91.401 et seq.

<sup>62</sup>Mont. Rev. Code (Choate & Wertz, 1947) §§ 22.101, 91.2607, 91.2608.

<sup>63</sup>Clark v. Clark, 242 P. (2d) 992 (Mont. 1952).

<sup>64</sup>N. M. Stat. (1953) §§ 29-1(7), 29-1(10).

<sup>65</sup>See Vanzandt v. Heilman, 54 N. M. 97, 214 P. (2d) 864 (1950); Duval v. Stone, 54 N. M. 27, 213 P. (2d) 212 (1949); Terry v. Humphreys, 27 N. M. 564, 203 Pac. 539 (1922).

Oklahoma is another of the states that have abolished common law dower and given the widow of an intestate property owner a share of intestate's holding in lieu thereof. In *Aldridge v. Houston Oil Co.*<sup>66</sup> the widow was given absolutely one-third of the annual rentals and delay money contracted for an oil lease and not merely the interest of one-third of such payments. The court distinguished between *rent* and *royalties* in connection with oil and gas leases. Rent, it said, was a term applied to the privilege of boring for oil and gas and for delay in beginning operations, while royalty is a percentage of the oil and gas after it is found. In a very recent case, the Oklahoma court held that a life tenant is entitled to rents and royalties accruing from mines and oil wells existing at the death of a testator or which may be opened under a conveyance or a lease executed prior to vesting of the life estate. In the particular case the will vested a life estate in the testator's widow. It said that unaccrued royalties, which mean oil and gas and other minerals, are usually treated as real property.<sup>67</sup>

The Pennsylvania case of *Bubb v. Bubb*<sup>68</sup> gave the husband curtesy in his deceased wife's lands and royalties received after her death under oil and gas leases, which were executed prior to the inception of his life estate. The court in its earlier cases was influenced by its holding in coal mining law. The surviving spouse's share in the intestate's estate is fully set forth in the statute of descent and distribution which has replaced common law dower and curtesy.<sup>69</sup>

The situation is similar in Texas. The statute gives the surviving spouse one-third of the lands of the intestate for life with remainder to the child or children of intestate. If there are no children or descendants, one-half of the estate of the intestate goes to the surviving spouse. If there are no surviving children, parent, brother, sisters or descendants thereof, the entire estate goes to the surviving spouse.<sup>70</sup> In accordance with this statute a surviving widow was held entitled to a life estate to one-third of the one-eighth of the mineral royalties in the entire tract of land in question.<sup>71</sup> In *Roswurm v. Sinclair Prairie Oil Co.*,<sup>72</sup> where the wife died intestate, leaving no children or descendants and no parents surviving her, the husband was given one-half of the wife's realty and the wife's brothers and sisters were allowed to take the other

<sup>66</sup>116 Okla. 281, 244 Pac. 782 (1926).

<sup>67</sup>In re Shailer's Estate, 266 P. (2d) 613 (Okla. 1954).

<sup>68</sup>201 Pa. 212, 50 Atl. 759 (1912).

<sup>69</sup>Pa. Stat. Ann. (Purdon, 1953) c. 20 § 1.2.

<sup>70</sup>Tex. Civ. Stat (Vernon, 1948) Art. 2571.

<sup>71</sup>Belote v. Brown Securities Corp., 129 S. W. (2d) 395 (Tex. Civ. App. 1939).

<sup>72</sup>181 S. W. (2d) 736 (Tex. Civ. App. 1944).

half. In another case the court, noting that the oil and gas in place were part of the "corpus" of the land itself, held the surviving wife was entitled to oil and gas royalties accruing from her husband's homestead and not merely income from the royalties.<sup>73</sup> In *Thompson v. Thompson*,<sup>74</sup> the "open mine" doctrine was applied, and the wife was given a life tenancy in the royalties from oil wells producing at the time the life estate came into being.

The Virginia court, after stating the rule, set forth in *Corpus Juris*,<sup>75</sup> as to a widow's right to work mines opened in the lifetime of her husband, quoted with approval from the text: "So where the land is subject to oil and gas leases, the widow is entitled to dower in the rents or royalties, even of wells thereafter drilled."<sup>76</sup>

A West Virginia statute fixes the proportion of an intestate's estate that goes to the surviving spouse.<sup>77</sup> Confusion was introduced into the question by one of the earlier oil lease cases.<sup>78</sup> The wells produced after assignment of dower and partition of the land. It was held that the widow was entitled to dower in all the royalties and rents accruing from wells on the entire tract. This holding was overruled in *Musgrove v. Musgrove*,<sup>79</sup> which case made it doubtful whether, after dower has been specifically assigned, the widow would be entitled to share from wells on other parts of the land. It was said: "She may take and appropriate to her use the issues of profits of the real estate assigned her, but must not destroy or remove the corpus thereof." The later cases allow the owner of a subdivision the right to only the royalties from oil wells produced on his subdivision.<sup>80</sup>

Wyoming has abolished curtesy and dower and made provision for a surviving spouse to share in the intestate spouse's estate, in amounts varying according to whether there are surviving children, descendants and other relatives.<sup>81</sup>

In passing we should take notice of the fact that in very recent years North Dakota has become an important oil producing state. It has abolished curtesy and dower,<sup>82</sup> and code provisions give the order of succession of property.<sup>83</sup>

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<sup>73</sup>*White v. Blockman*, 168 S. W. (2d) 531 (Tev. Civ. App. 1942).

<sup>74</sup>149 Tex. 632, 236 S. W. (2d) 779 (1951).

<sup>75</sup>19 C. J. 469.

<sup>76</sup>*Graham v. Smith*, 170 Va. 246, 196 S. E. 600 (1938).

<sup>77</sup>W. Va. Code (Michie, 1955) §§ 4089, 4096, 4731.

<sup>78</sup>*Campbell v. Lynch*, 81 W. Va. 374, 94 S. E. 739 (1917).

<sup>79</sup>86 W. Va. 119, 103 S. E. 302 (1920).

<sup>80</sup>See *Pridemore v. Lucas*, 131 W. Va. 1, 47 S. E. (2d) 839 (1946).

<sup>81</sup>Wyo. Comp. Stat. (1945) § 6-2501.

<sup>82</sup>N. D. Rev. Code (1943) § 56-0102.

<sup>83</sup>N. D. Rev. Code (1943) §§ 30-1705, 56-1014.

To recapitulate: the problem of whether a widow of one who has rights under an oil and gas lease is entitled to dower calls for consideration first of what property interests are created by oil and gas leases and what statutory changes in the various oil producing states, especially those abolishing common law dower, have been enacted.

There is no uniformity in the decisions as to the nature of the property interests created. Texas rulings, for instances, are based upon the proposition that oil and gas, since they are minerals, are subject to ownership in place. Many other states that at first accepted this view now regard oil and gas leases as creating "profits à prendre," "chattels real" or "incorporeal hereditaments."

Some leases are given for definite periods of time and some to last as long as oil and gas are produced in paying quantities. The former gives a term of years and creates a chattel real, not subject to dower, and the latter is said by many courts to create determinable fees.

A surviving spouse may be given a homestead in lands occupied by the couple as a homestead. This right is given by statute and was unknown at common law. The survivor is given a life estate in such property and may continue to operate oil and gas wells that were opened at the time the estate came into being.

In community property states, (and several of the leading oil and gas producing states do follow the community property law) statutes fix the interest the survivor takes in such property, usually one-half absolutely. In jurisdictions that have abolished dower as such or greatly modified the right, shares in the intestate spouse's estate are provided for under descent and distribution statutes, varying from one-third to the entire estate, depending upon the relatives the decedent leaves surviving him or her.

Those having dower or curtesy have life estates and were originally allowed to continue to operate oil and gas wells that were in production when the life estate came into existence. This has now been changed to allow the owner of such an estate to have the royalties from wells opened up under leases executed by the deceased spouse during his or her lifetime.

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