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## Kansas

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# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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## KANSAS



*Sarah Trainer\**

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### *I. Introduction*

The following is an update on Kansas legislative activity and case law relating to oil and gas law from August 1, 2018 to July 31, 2019.

### *II. Legislative and Regulatory Developments*

There has not been any significant Legislative or Regulatory Developments affecting Kansas Oil and Gas Law from August 1, 2018, to July 31, 2019. It is worth noting that Kansas House Bill No. 2240 has been introduced to the Legislature in 2019.<sup>1</sup> If enacted, the Bill would require the state corporation commission to ensure that a seismic risk analysis is conducted upon class II disposal wells.<sup>2</sup>

### *III. Judicial Developments*

#### *A. Supreme Court Cases*

##### *1. Oxy USA Inc. v. Red Wing Oil, LLC<sup>3</sup>*

This case arises from a dispute over a one-half ownership interest in the minerals under a quarter section of land in Haskell County. The Supreme Court of Kansas held that the purported holders could not establish adverse possession based on receipt of royalties for 15 years.<sup>4</sup>

##### *a) Facts and Procedural History*

Oxy USA Inc. (“Oxy”) developed a productive oil and gas well on a unitized production unit of land.<sup>5</sup> Though the well is not on the land, “the owner of the minerals under the Property is entitled to receive royalties from the production by virtue of the unitization agreement.”<sup>6</sup> When Oxy was unable to determine “who owned a disputed one-half mineral interest in and under the Property,” the company initiated an action to quiet title.<sup>7</sup>

The landowners entered into an oil and gas lease, and following their death, Frank Luther took control of the property and lease. Luther sold the property, “reserving an ‘undivided one-half interest in the oil, gas or other minerals in and under and that may be produced from the ...property...for a

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1. H.B. 2240, 2019 Leg., Reg. Sess. (Kan. 2019).

2. *Id.*

3. *Oxy USA Inc. v. Red Wing Oil*, 442 P.3d 504 (Kan. 2019).

4. *Id.* at 505.

5. *Id.*

6. *Id.*

7. *Id.*

period of twenty (20) years or as long thereafter as oil, gas or other minerals is produced therefrom.”<sup>8</sup>

When the mineral interest expired, “the one-half mineral interest reverted to the fee holder at that time,” Alice King’s father, who owned the property at the time.<sup>9</sup> Between the time the term interest expired in 1972 and when Oxy completed the well in 2009, the term mineral interest holders were receiving royalties from their alleged one-half mineral interest.<sup>10</sup> However, because interest had already expired and the right to receive royalties reverted to King’s father, “the term mineral interest holders should not have been receiving the royalties.”<sup>11</sup> Not until Oxy filed this action did King attempt to enforce her reversionary rights.<sup>12</sup>

The Kansas Supreme Court distilled the case down to one question: “Can King enforce her reversionary interest in the minerals against the term mineral interest holders or is she now prevented from doing so by a statute of limitations or adverse possession?”<sup>13</sup>

*b) Analysis*

The Supreme Court exercised unlimited review to interpret Sections 60-503 and 60-507 of the Kansas Code. The court determined that “the term mineral interest holders did not claim that the cause of action accrued more than 15 years prior,” and therefore, there was no concert whether the action was time-barred.<sup>14</sup> Rather, the focus of the case is whether the term mineral interest holders satisfy a claim of adverse possession under Section 60-503.<sup>15</sup>

While a mineral interest is susceptible to adverse possession, the “mere misappropriation of royalties” is insufficient on its own to establish such a claim.<sup>16</sup> Relying on *Stratmann v. Stratmann*,<sup>17</sup> the court determined that royalty payment “represents a portion of the value of minerals *after* production and therefore; being in open, exclusive, and continuous possession of a royalty can never suffice to establish an adverse claim over minerals *in place*.”<sup>18</sup>

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8. *Id.* at 506 (internal citation omitted).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 507.

15. *Id.*

16. *Id.* at 508.

17. 628 P.2d 1080, 1085 (1981)

18. *Oxy USA Inc.*, 442 P.3d at 508 (emphasis original).

*c) Conclusion*

Ultimately, the court concluded that adversely possession of minerals in place requires more than merely “receiving royalties *after* the minerals have been extracted.”<sup>19</sup> An adverse possessor must work the minerals actively.<sup>20</sup> Passively receiving royalties, despite being open, exclusive, and continuous for a period of 15 years, does not constitute adverse possession.<sup>21</sup>

*2. Jason Oil Co. v. Littler*<sup>22</sup>

The Kansas Supreme Court reviewed the mineral interest conveyed when grantor attempted to except the mineral interests for a “period of 20 years or as long thereafter” as minerals continued to be produced.<sup>23</sup> The Supreme Court determined that the common-law rule against perpetuities, was not applicable. This was a case of first impression for the Kansas Supreme Court.<sup>24</sup>

*a) Facts and Procedural History*

Prior to his death, Frank E. Littler (Grantor) executed two deeds conveying two tracts of land situated in Rush County, Kansas to relatives.<sup>25</sup> Both deeds conveyed the following language:

“EXCEPT AND SUBJECT TO: Grantor saves and excepts all oil, gas and other minerals in and under or that may be produced from said land for a period of 20 years or as long thereafter as oil and/or gas and/or other minerals may be produced therefrom and thereunder.” (the reservation)<sup>26</sup>

While no drilling operations occurred from the original conveyance through 2017, Jason Oil Company (“Jason Oil”) entered into a leasing agreement with successors in interest of Grantor’s mineral estate and sought to quiet title with respect to Grantor’s multiple conveyances (through deed and then later inheritance).<sup>27</sup>

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19. *Id.* (emphasis added).

20. *See* 1 Kuntz, *Law of Oil and Gas* 10.5 (1987).

21. *Oxy USA Inc.*, 442 P.3d at 508.

22. *Jason Oil Company, LLC v. Littler*, 446 P.3d 1058 (Kan. 2019).

23. *Id.* at 1059.

24. *Id.* at 1061.

25. *Id.* at 1060.

26. *Id.*

27. *Id.*

Jason Oil's petition alleged that the successors to the Grantees in both deeds owned all of the minerals in and under each tract. The heirs of the Grantor answered, claiming a valid interest in the mineral rights, arguing that after the deeds were properly executed and delivered, Grantor was vested with a fee simple determinable in the mineral rights and the Grantees to the deeds held springing executory interests which were subject to and invalidated by the Rule Against Perpetuities (the Rule).<sup>28</sup>

The district court granted summary judgment in favor of Jason Oil. The trial court noted that "[t]here is no dispute that Frank E. Littler [Grantor] conveyed all of his interest in the subject properties to the respective grantees, subject only to the grantor's express reservation, excepting and saving a term mineral interest."<sup>29</sup> The trial court noted that the intent of the grantor is a legally binding principle, and that Grantor's intentions "could not be clearer than stated."<sup>30</sup> The lower court also found that Grantor's reservation had not restricted alienation of the surface and mineral estates, and the Grantor's heirs thereafter timely appealed to the Kansas Supreme Court.<sup>31</sup>

*b) Analysis*

The Supreme Court addressed the question of first impression regarding the nature of a common practice of reserving a term mineral interest as a potential springing executory interest, and noted the potentially large or catastrophic effect (if the conveyance did indeed create the executory interest) on the evaluation of title conveyances.<sup>32</sup>

The Court exercised a standard of unlimited review, based on the review of summary judgment and the question of legal interpretation.<sup>33</sup> The Rule "precludes the creation of any future interest in property which does not necessarily vest within twenty-one (21) years after a life or lives presently in being, plus the period of gestation, where gestation is, in fact, taking place."<sup>34</sup> The Rule in Kansas "began as a creation of common law."<sup>35</sup> The Kansas Legislature statutorily adopted, and also modified, the Rule in 1992.<sup>36</sup> This

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28. *Id.*

29. *Id.* at 1061.

30. *Id.*

31. *Id.* at 1061.

32. *Id.*

33. *Id.*

34. *Id.* at 1062 (quoting *Rucker v. DeLay*, 289 P.3d 1166, 1170 (Kan. 2012) (internal citation omitted)).

35. *Id.* (quoting *Rucker*, 289 P.3d at 1170).

36. *Id.*

statutory modification applied only to non-vested property interests created on or after the statute and so did not apply to the 1967 deeds at issue.<sup>37</sup> Therefore, the Court had to determine whether the common-law Rule applied to Grantor's conveyance.<sup>38</sup>

The Court stated that the district court was correct in concluding that the Grantor's mineral interest was a "defeasible term mineral interest" under Kansas law.<sup>39</sup> However, the district court had determined that the mineral interest was a future, rather than present, interest, which was an incorrect interpretation. The result, that Grantor's heirs maintained an interest in the mineral estate, was therefore correct but not because the Rule applied to a future interest but because the conveyance granted a present, vested interest.<sup>40</sup>

The Court noted:

The future interest created by the deeds that the district court should have focused on is the interest in the minerals that passed to the Grantees. That interest is the right for the Grantees to have full possession and use of the mineral interest following the expiration or termination of the Grantor's reserved defeasible term interest. . . [This] future interest would [likely] violate the Rule. Our task, then, is to determine if the Rule should be applied to this type of future interest.<sup>41</sup>

Kansas case law had not considered whether to apply the Rule to a grantee's future interest in a mineral estate when the grantor had reserved a defeasible term mineral interest.<sup>42</sup>

*c) Conclusion*

The Court concluded that precedent supported an interpretation of the Rule that promoted the alienability, and therefore productive use, of real property.<sup>43</sup> The common industry practice of retaining a defeasible term-plus-production interest in minerals promoted the alienability and use of land and mineral estates. The Court went on to state that "[a]pplying the Rule here would be counterproductive to the purpose behind the Rule and create

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1063.

42. *Id.* at 1064.

43. *Id.* at 1068.

chaos.” Therefore, the Court held that where a conveyance creating a defeasible term-plus-production mineral interest by exception, where the future interest is held by an ascertainable grantee, the future mineral interest is not subject to the Rule. The Court held that the Rule did not apply to Grantee’s interests, and therefore Jason Oil’s lease, affirming the district court’s granting of summary judgment.<sup>44</sup>

*B. Appellate Activity*

No relevant appellate activity was reported during the survey period.

*C. Trial Activity*

No relevant trial activity was reported during the survey period.

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44. *Id.*