Some Practical Aspects of Oil and Gas Title Examinations in Nebraska

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With the increasing expansion of oil and gas development in Nebraska, lawyers must be on the alert to recognize at least the basic problems of the industry and the proper legal approach to solve such problems. The topics here under discussion are too broad to warrant more than a limited treatment. Eminent authors and jurists have written volumes on the subjects that will be discussed, footnote references to some of which will be made herein. These authorities and others should be consulted for a more detailed treatment of the matters herein discussed. It is intended that this article will share with the bar some of the practical experiences, observations and research of Nebraska lawyers engaged in the examination of oil titles.

In this state the oil and gas industry and the law pertaining thereto is still in its infancy. Therefore local judicial precedents are limited. Solutions to our problems must be sought in the decisions of other jurisdictions and the rules and reasoning weighted and applied to local cases. Occasionally this is not without difficulty since it has been said, "Oil and gas law has been in the same fluid state as the subject matter with which it deals." As a result cases may be found to support almost any proposition. Year after year the same cases are cited, and are either followed

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1 Member of the Nebraska Bar.

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(The above information was furnished by E. C. Reed, State Geologist)


2 Johns, American Bar Association, Mineral Law Section (1940).
or ignored, according to the predilection of the courts. Citation of abundant authority in support of almost any possible construction of instruments may be made from practically any state in the Union.\(^4\)

The oil and gas lease is the basic and fundamental contract of the petroleum industry. There are two parties to this contract—the landowner-lessee (and occasionally owners of mineral interests), and the lessee. Some lease provisions definitely favor the lessor while others benefit the lessee. The lawyer preparing the lease should be acquainted with these various provisions so he will be able to draft a contract for his client's best interests. However, before the actual preparation of the lease, the validity of the title must be determined and the necessary parties to the lease must be ascertained. This requires an examination of a certified abstract showing the chain of title to the land as it appears of record from the patent to the present date.\(^5\)

Most lessees (especially the major companies) will require such an examination but it is seldom that an attorney will insist upon this absolutely necessary precaution where he is representing the landowner. His client, the landowner, will usually say he owns the land and too often his attorney will be satisfied with such opinion. By doing this the attorney does his client a grave injustice for while the client may be the sole owner of the surface (and this has been the main consideration of the title examiner in the past) he may not be the sole owner of the mineral estate to

\(^4\) Moses, The Modern Oil and Gas Lease, Southwestern Legal Foundation Second Annual Institute on Oil and Gas Law.

\(^5\) The oil industry is of necessity fast moving. Delays may be extremely costly and the time consumed in the preparation or extension and examination of an abstract may result in the loss of a valuable lease. To satisfy a common request that title be approved "day before yesterday," the industry has occasionally resorted to abstracters' "Certificates of Title" which show only the record title owner. These are generally made without warranty or bond. But some attorneys will make a record title search from the original records. The first approach is emphatically condemned for reasons apparent to any qualified title examiner and the second tolerated only if the attorney takes the time to examine fully each instrument of record affecting title.

Frequently, in the height of an important "lease-play" lessees or persons procuring leases will find that time prevents even the examination of the record title. As a result some leases are taken upon the reliance of statements of the prospective lessors as to the mineral ownership. This practice, as well as other attempted "title short-cuts," has contributed to the development in some of the oil producing states of "title-busters"—persons who attempt to benefit from title defects in oil and gas leases.

A suggested approved form of oil and gas title opinion will be found as an appendix to this article.
which he proposes to lease and warrant title. Too frequently in
the past a careless abstracter or attorney has missed a mineral
reservation or exception or failed to consider properly the legal
effect of a conveyance in the chain of title insofar as it affects
the mineral estate. Oil titles are usually attacked or litigated ac-
cording to their prospective worth or importance. While it is an
old maxim among oil lawyers that "a producing well always clouds
a title and a dry hole cures it", a careful title examiner will know
his title and advise his client accordingly.

In examining the abstract of title pertaining to the mineral
estate there are many matters that must be considered in addition
to those relating solely to the surface estate. Some of these will
now be discussed, and others will by inference be readily identi-
fied in the hope that some of the pitfalls in oil title examinations
may be avoided. The basic considerations are of course the deter-
mination of the quantity and quality of the mineral estate and the
necessary persons to be joined as lessors.

1. THE PATENT.

The patent, the importance of which is too often overlooked,
is the primary link in the chain of title. Some patents contain
a specific reservation of all minerals\(^6\) but many of the earlier
abstracts fail to show this reservation, the abstracter's certifi-
cate reciting that it shows "all matters on file or of record . . .
that in any manner affect the title...." The present Uniform
Abstracter's Certificate, approved by the Nebraska Title Associa-
tion, certifies "all instruments of writing on record or on file (ex-
cept such instruments filed in the chattel mortgage records) ... that
affect the title to said real estate; that said instruments con-
tain no unusual conditions, limitations, recitals or covenants, ex-
cept as noted." Today most abstracters in preparing an abstract
which contains the patent entry are careful to note a mineral
reservation; however, where they merely extend an existing ab-
stract containing a prior patent entry, the present certificate is
not applicable or sufficient. A careful examiner should require
either (a) a photostatic certified copy of the recorded patent or
(b) a new patent entry certified by the present approved certifi-
cate.

Another patent problem is the mineral exclusion provision

(1946).
contained in patents to the Union Pacific Railway Co.\textsuperscript{7} This provision has been held to be void and of no effect\textsuperscript{8} and should be disregarded by the examiner.

2. THE CHAIN OF TITLE FROM THE PATENT TO THE LEASE.

In this part of the title examination the examiner must consider not only the ordinary conveyancing problems necessary for a determination of marketable title but in addition others that are peculiar to the mineral estate.

(a) Ownership of Minerals in Railroad Right of Way.

In examining title to a railroad right of way, the first step is to determine who owns the mineral rights. Basically there can be but little argument that if the railroad company owns the fee to the right of way as distinguished from a mere easement, it owns and may exploit the minerals therein.\textsuperscript{9}

Generally a railroad acquires its right of way by (1) legislative grant, (2) purchase or (3) condemnation. An example of acquisition of right of way by legislative grant is the Union Pacific grant,\textsuperscript{10} which authorized the construction of that railroad, granted a right of way through the public lands 200 feet in width on each side of the railroad where it passed over public lands and granted every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the railroad. It is very generally recognized that the grant of the odd numbered sections under these Acts granted the fee.\textsuperscript{11}

Some question has arisen, however, in regard to the title to the minerals in the right of way in the even numbered sections. The authorities indicate that, absent an abandonment, the right of way granted by these and other similar acts prior to 1875 was

\textsuperscript{7} The exclusion reads as follows: "Excluding and excepting from the transfer by these presents all mineral lands should any such be found to exist in the tracts described in the foregoing, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

\textsuperscript{8} Burke v. Southern Pacific R.R., 234 U.S. 669 (1914).

\textsuperscript{9} See 44 Am. Jur. 149.


\textsuperscript{11} In Great Northern Ry. v. United States, 315 U.S. 262, 278 (1942) the court said: "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act."
“the land itself” or a “limited” or “conditional fee subject to reverter” which included the underlying minerals. This “limited fee doctrine” appears to have been recognized by the Nebraska Supreme Court.

Right of way grants to railroads under the General Right of Way Act of 1875 granted only an easement and therefore excluded the mineral rights. It is apparent therefore that the basic consideration in the determination of the ownership of minerals in rights of way acquired by legislative grant is the language of and interpretation placed upon the granting act.

Generally, the purchase of railroad right of way has been by (1) warranty or quitclaim deed or (2) “Right-of-Way deed.” A determination of the estate conveyed by such deeds has given rise to much litigation resulting in a considerable conflict of authority. The title examiner must give careful consideration to the exact phraseology of the instrument for the determination of the estate created, e.g., whether a fee title or an easement. This must be ascertained from the intention of the parties as shown

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A suit is now pending in the United States District Court for the District of Wyoming (United States v. Union Pacific R.R. (Civil No. 3736)) wherein the Government seeks to quiet title to the minerals underlying the right of way in an even numbered section of land in Wyoming and to enjoin the railroad company from removing, leasing or otherwise disposing of the minerals in the right of way. The fee to the balance of the subdivision in issue is in the Government, having never been patented. Disposition of and decision in this case should assist in clarifying any uncertainties in the authorities pertaining to this question.


15 Great Northern Ry. v. United States, 315 U.S. 262 (1942).

16 “Right of way deeds” are common in western Nebraska. They usually contain substantially the following language: “...do hereby grant, bargain, sell and convey unto...Railroad Company...the following described real estate...a strip of ground 100 feet wide, it being 50 feet on each side of the center line of the railroad of said company as located upon (described land) to have and to hold the same unto the said railroad company, its successors and assigns forever. And in addition to the right of way described above we hereby grant, for ourselves and our heirs and assigns the right to said railroad company to erect and maintain a snow fence...” These deeds do not generally contain a warranty clause.
by the instrument itself and in the event of ambiguity consideration must be given to the circumstances surrounding the transaction. In such cases it is advisable to require either that the abstract contain a photostatic copy of the conveyance or the examiner should personally examine in detail all of the provisions of the recorded deed.

The general rule is that where the instrument conveys a strip, piece, parcel or tract of "land" or "ground" and does not contain additional language limiting the estate conveyed there is a grant in fee. But where the deed conveys a right of way rather than a strip or tract of land only an easement is granted.17

Two Nebraska cases have construed such deeds. In the first case18 a grant of a strip of land 100 feet wide across certain land "for right of way and for operating its railroad only" was held to be a mere easement, the quoted words limiting the rights of the grantee to a mere easement. In the second case19 a grant of described real estate "for terminal and railway purposes and uses" was held to convey a fee and in the absence of a provision for reversion or forfeiture, the quoted words were not a limitation on the estate conveyed but only a description of the use to which the land was to be put.

It is difficult to reconcile these two cases for in neither deed did there appear a reverter clause—a factor that was apparently given controlling weight in the latter case—and both grants were of land to be used for a specified purpose. It is submitted that the preferable rule is contained in the second case and represents the weight of authority. The significant question is whether the land is conveyed or merely a use of the land. If the deed conveys a strip of land, even though the purpose be recited, it should be construed as conveying a fee.20

The law seems well settled in Nebraska that a railroad company acquiring a right of way by condemnation proceedings acquires only an easement and the fee title, together with the minerals, remains in the servient owner.21

The majority of railroad right of way acquisitions occurred many years ago and much of the land over which the railroads ran has been the subject of many subsequent conveyances. A very troublesome title problem is created in cases where the rail-

17 See extensive Notes, 132 A.L.R. 142 (1941) and 84 A.L.R. 271 (1933).
19 Carr v. Miller, 105 Neb. 623, 181 N.W. 557 (1921); cf. George v. Pracheil, 92 Neb. 81, 137 N.W. 880 (1912), where the grant contained a reverter provision.
20 Carter Oil Co. v. Welker, 112 F.2d 299 (7th Cir. 1940).
21 Roberts v. Sioux City & P. R.R., 73 Neb. 8, 102 N.W. 60 (1905); see also Notes, 33 Neb. L. Rev. 640 (1954), and 36 A.L.R.2d 1424 (1954).
Title problems in oil and gas in Nebraska

road has acquired only an easement with the fee title to the land and the minerals remaining in the owner of the servient estate and the land is thereafter conveyed by deed purporting to "except" or "reserve" the land or interest so conveyed for railroad uses. Again there is a conflict in the authorities, with one line of cases holding that by such language the grantor reserved or excepted the fee to the right of way. The other view argues that the exception or reservation was merely to protect the grantor against a claim on the covenants of warranty in the deed based upon the existence of an outstanding easement over the land at the time it was conveyed and not as indicating any intention to reserve the fee to the land used as a right of way, which, of course, normally consists of a long, narrow strip which would by itself be of little value to the original owner of the tract from which it was taken. This line of cases hold that the fee to the right of way passes by the conveyance.

22 Typical illustrations of such grants are in notes 23 and 24 infra.


24 Carlson v. Duluth Short Line Co., 38 Minn. 305, 37 N.W. 341 (1888) ("reserving... a strip of land 150 feet wide, and any greater width, where necessary, for a right of way... "); Mahar v. Grand Rapids Terminal Ry., 174 Mich. 138, 140 N.W. 535 (1913) ("excepting the conditional right of way heretofore granted to the Ludington Railroad Co."); Barker v. Lashbrook, 128 Kan. 330, 263 Pac. 1048 (1928) ("less... 3.81 acres taken by the K.C.W. & N. Ry., containing 117.19 acres more or less."); Roxana Petroleum Corp. v. Corn, 28 F.2d 168 (8th Cir. 1928) ("except that part of out-lot 9... heretofore deeded to railroad for right of way."); Shell Petroleum Corp. v. Hollow, 70 F.2d 811 (10th Cir. 1934) ("excepting, however, and not included in this grant, one acre... deeded to School District No. 29."); Shell Petroleum Corp. v. Ward, 100 F.2d 778 (5th Cir. 1939) ("except therefrom 5.6 acres taken up by right of way of the Neches Canal Company lateral, making 156.4 acres herein and hereby conveyed."); Kansas City Southern Ry. Co. v. Marietta Corp., 102 F.2d 603 (5th Cir. 1939) ("less a right of way 100 feet in width reserved for railroad."); see also note in 139 A.L.R. 1355 (1942) and cases cited in 2 Summers, Oil and Gas § 229 (19-38). In Jennings v. Amerada Petroleum Co., 179 Okla. 561, 66 P.2d 1069 (1934) it is said: "The recitals 'less the right of way' and 'except right of way' in the granting clause of a deed have a well defined and accepted meaning and contain no element of uncertainty or ambiguity. Thereunder the grantor conveys his entire interest in the servient estate and at the same time expressly recognizes and acknowledges the dominant estate."
has not specifically passed on this type of case but aided by statutory canons of construction\(^{25}\) it seems that the doctrine announced in the last mentioned line of cases is to be favored in the absence of *clear and unequivocal* language in the grant to the contrary.

It has been previously noted that the Union Pacific Railroad Company acquired by legislative grant the fee title to certain odd numbered sections.\(^ {26}\) These lands were thereafter conveyed by grants purporting to reserve a certain portion of the land as and for a right of way.\(^ {27}\) Here again the question arises as to whether a fee to the land or an easement over the land is retained by the railroad company-grantor by such a provision. Likewise the Nebraska Supreme Court has never specifically passed upon such a deed or construed a similar reservation provision. The problem in this type of case is analogous to but differs in important details from the cases previously discussed. Here again the courts are in disagreement.

One line of cases, (the reservation clauses varying in some respects from that noted below) hold that such a provision reserves merely an easement and does not except the fee.\(^ {28}\) A contrary rule which seems more applicable and in point with the

\(^{26}\) Great Northern Ry. v. United States, 315 U.S. 262 (1942).

\(^{27}\) An example of this reservation clause follows: Grants (described land) "containing according to the U. S. survey thereof 1120 acres, more or less... reserving, however, to the said Union Pacific Railway Company, all that portion of the land hereby conveyed (if any such there be) which lies within lines drawn parallel with and 200 feet on each side distant from, the center line of its road, as now constructed and any greater width when necessary permanently to include all its cuts, embankments, and ditches and other works necessary to secure and protect its main-line...."

\(^{28}\) Carlson v. Duluth Short Line Ry., 38 Minn. 305, 37 N.W. 341 (1888); Hedderly v. Johnson. 44 Minn. 443, 44 N.W. 527 (1890); Bendikson v. Great Northern Ry., 80 Minn. 332, 83 N.W. 194 (1900); Biles v. Tacoma, O. & G.H. Ry., 5 Wash. 509, 32 Pac. 211 (1893). It is important to note that in these cases the conveyance preceded the location and construction of the railroad and there was no particular portion of the land identified or described, as it doubtless would have been had it been the intention to except the fee. This distinguishing fact is noted in the cases reaching a contrary result. Such a distinction is, however, not accorded much weight in the *Bendikson* case. In Bruegger v. Cartier, 29 N.D. 575, 151 N.W. 34 (1915) a plaintiff contracted to give good title to a tract of land that he had previously purchased from a railroad company, but containing a reservation similar to that in the *Bendikson* case. The court refused to pass on the validity of the clause but on the authority of the *Bendikson* case held that there was reasonable doubt as to the validity of plaintiff's title.
Union Pacific example in Nebraska holds such a clause to be an exception of the fee rather than a reservation of an easement.\textsuperscript{29} The distinction between the two lines of cases is shown by the following language of the court in the last cited case:

In view of the fact that the main railroad line had been constructed across the quarter section and actually existed at a time prior to the execution of the deed containing the clause now in dispute, thus giving definite location and identification to the strip to be affected thereby, we are not prepared to say that the court below erred in construing such clause to be an exception of the parcel rather than the reservation of an easement over the same.

It is important that the examiner therefore consider three factors in construing such clauses: (1) the language of the clause, (2) whether the railroad was in existence and its line located prior to the execution of the deed, and (3) the intention of the parties as ascertained from the language of the entire deed.

It is apparent that the problems discussed with regard to railroad rights of way are common with those in cases involving conveyances purporting to except or reserve lands granted for school sites, streets, highways, canals and irrigation ditches, to mention but a few.\textsuperscript{30}

\textit{(b) Lands Granted for Limited Purposes—Reverter Clauses.}

A previous article has pointed to title problems in cases involving conveyances for limited purposes\textsuperscript{31} and no attempt will be made here to elaborate on those cases, except as to the oil title problems in such conveyances containing a reverter clause.\textsuperscript{32} Generally, the abstract or the records will not contain evidence sufficient to determine whether or not, or when, the condition has arisen whereby the reverter has occurred. Therefore, it is im-

\textsuperscript{29} Newport v. Hatton, 195 Cal. 132, 231 Pac. 987 (1925). It is important to note the similarity between the reservation clause in this case and that cited in note 27 supra—"Excepting and reserving, however, for railroad purposes a strip of land 400 feet wide lying equally on each side of the tract of the railroad of said company, or any branch railroad now or hereafter constructed on said lands . . . ." The Union Pacific construction was completed through Nebraska in 1868.

\textsuperscript{30} See also Elrod v. Heirs, Devisees, 156 Neb. 269, 55 N.W.2d 673 (1952), 33 Neb. L. Rev. 628 (1954).

\textsuperscript{31} Comment, 33 Neb. L. Rev. 628 (1954).

\textsuperscript{32} Typical of this type of clause is the following: "sells and conveys said tract of land to be used for school purposes and in case said second party shall cease to use said land as herein provided, then said land shall revert to said first party . . . ."
important that the examiner satisfy himself as to whether the condition has arisen—this is generally done by a recorded affidavit setting forth the facts.

The Nebraska Supreme Court in Ohm v. Clear Creek Drainage District held such a conveyance to create an estate in fee simple subject to a condition subsequent:

The deed vested in the district all the rights of a fee simple owner of real estate until it ceases to use the land for the purposes specified and divestment of its estate by re-entry. Until such termination it has the same rights and powers in connection with the estate conveyed by the deed as if the condition did not exist.

The court rejected the contention that the estate which had been created was a fee simple determinable and would therefore automatically terminate upon the occurrence of a stated event. Thus it is generally held that so long as the condition is not broken and the land continues to be used for the stated purpose the mineral fee is vested in the original grantee, and he has the power to lease it for oil and gas purposes.

Such a condition subsequent, until broken, runs with the land, and at least in cases where the reversion is to “the grantor, heirs and assigns” such grantor, or his heirs, if the grantor is dead, may claim a reversion of the estate, and can maintain an action in ejectment to recover it.

Under the common law the right of re-entry in the event of a breach of a condition subsequent is not alienable or assignable before the breach. It is the rule in some states that a conveyance by the grantor, after his grant of a fee subject to a condition subsequent, of the same land to another has the effect of destroying the condition, extinguishing the interest in the land remaining in the grantor upon the earlier conveyance, and leaving the grantee

33 153 Neb. 428, 45 N.W.2d 117 (1950) (“...to be used for ditching, diking and drainage purposes, and if abandoned or not used for that purpose to revert to...the grantors, their heirs and assigns.”). But see George v. Pracheil, 92 Neb. 81, 137 N.W. 880 (1912), where a deed conveyed a strip of land to a railroad company and provided “in case said railroad company do not construct their road through said tract or shall after construction permanently abandon the route through said tract, then the same shall revert to and become reinvested in the said grantors, heirs and assigns....” This was held to be a conveyance of a mere easement subject to a condition subsequent.


35 Jetter v. Lyon, 70 Neb. 429, 97 N.W. 596 (1903); George v. Pracheil, 92 Neb. 81, 137 N.W. 880 (1912).
with an absolute unconditional fee.\textsuperscript{36} This point does not appear to have been passed upon by the Nebraska court since it was not in issue nor discussed in the \textit{Ohm}\textsuperscript{37} case. In fact it would appear that the rule against assignability of the right of re-entry for breach of a condition subsequent has been abrogated by the Nebraska Uniform Property Act.\textsuperscript{38} If this act does abrogate the rule, then the owner of the fee at the time of the breach of the condition subsequent would have the right to re-enter and claim the reversion of the estate. This right, however, is one that could be extinguished by adverse possession, limitations or laches.

It is therefore important for the examiner to satisfy himself as to (1) whether a breach of the condition has occurred, (2) the date of the breach, and (3) the possessors of the property after the breach.

(c) Ownership of Minerals in River Beds.

Much of the potential oil land in western and central Nebraska is traversed by rivers and streams, notably the North and South Platte Rivers. Consequently, it is the duty of the oil title examiner to determine the ownership of the minerals underlying such rivers and streams.

The law is well settled in Nebraska that the state does not hold title to the river beds; instead the riparian owners acquire title at right angles to the thread of the stream.\textsuperscript{39} Such title includes ownership of the underlying minerals with the right to lease and explore the same.\textsuperscript{40} The extent or area of such ownership involves a determination of the location of the thread of the stream, or the center of the channel. The Nebraska court has established a definite guide and declared the thread of a non-navigable river to be based upon the water line at its lowest stage.\textsuperscript{41}

\textsuperscript{37} 153 Neb. 428, 45 N.W. 2d 117 (1950).
\textsuperscript{39} Theis v. Platte Valley Public Power & Irrigation Dist., 137 Neb. 344, 289 N.W. 386 (1939); Kinkead v. Turgeon, 74 Neb. 573, 104 N.W. 1061 (1905).
\textsuperscript{40} Glassmire, Law of Oil and Gas Leases and Royalties § 82 (2d ed. 1935).
\textsuperscript{41} Hardt v. Orr, 142 Neb. 460, 6 N.W.2d 589 (1942). The brevity of this discussion should not indicate the simplicity of the problems involved, or that in practice the rules of law are necessarily followed. While it is true that the riparian ownership extends at right angles to the thread of the stream, still in some cases the riparian owner will merely extend his section line fence straight out into the stream thereby creating a tri-
It might well behoove the examiner in such cases to require a survey or specific proof as to the location of the thread of the channel.

(d) Unreleased Oil and Gas Leases of Record.

During the past decade there has been sporadic oil and gas leasing activity throughout much of the present exploration area. Little or no development has been undertaken and many leases have expired by reason of non-development or nonpayment of rentals. In many instances, however, such oil and gas leases remain unreleased of record and as a result constitute a cloud on the title to the mineral estate.

As to leases in "wildcat areas", frequently a lawyer, with the acceptance of the lessee, will certify title, even though the title is clouded, by requiring a recordable affidavit of non-development and nonpayment of rentals.\(^{(42)}\) It is preferable, however, to obtain a release of such a lease, if possible, and if time permits, either by a recorded release\(^{(43)}\) or a marginal release\(^{(44)}\) as provided in the Nebraska statutes. The neglect or refusal of the owner of such forfeited lease to surrender and release it subjects him to a statutory liability for damages.\(^{(45)}\) However, this remedy is seldom used.

If a voluntary release cannot be obtained and if an affidavit of non-development and nonpayment of rentals is not deemed sufficient, the examiner should require compliance with the statutory forfeiture proceedings.\(^{(46)}\)

(e) Legislative Restrictions Governing Oil and Gas Leases.

angular segment between the extended fence line which would be at right angles to the thread of the stream. This results in ownership of such segment depending upon adverse possession rather than the rules of law announced by the court. Here again the necessity of a survey is important.

\(^{(42)}\) Form of such affidavit is found in 5 Am. Jur. Legal Forms § 5:1839.
\(^{(46)}\) Neb. Rev. Stat. §§ 57-202 to 57-204 (Reissue 1952). The provisions for publication of notice for three weeks and a waiting time of twenty days following service or publication of notice disregard the realities of the fast moving oil industry. It has been demonstrated in practice that in cases where such procedure has been invoked notification seldom is given of a claim that the lease is in effect (§ 57-204). The time required to process the surrender should be reduced by legislative amendment; this recommendation is contained in the current report of the Nebraska State Bar Association Committee on Oil and Gas Law.
In several localities in western Nebraska production is being obtained from lands in close proximity to or contiguous with the corporate limits of towns and villages. It is reasonable to assume that such examples will increase as development progresses. As a result it is necessary to anticipate some of the legal problems which may confront the title examiner if properties within a corporate limit become the proposed subject of an oil and gas lease. In such an instance it is important to examine the zoning ordinances and local laws to determine whether or not valid restrictions have been imposed which prohibit or regulate the drilling of wells within the corporate limits.

It is recognized that the privilege of producing oil and gas from one's property is inherent in ownership and may be fully exercised unless legally restricted or prohibited by enactments which protect the public welfare. So where a state or municipality, through a valid exercise of its police power, restricts and regulates the production of oil and gas from certain areas of land, the landowner's privileges of producing oil and gas and his powers of leasing the land for those purposes are restricted.47

(f) Boundaries and the Survey.

A large amount of litigation has developed in Nebraska with regard to boundaries of land and the ownership of marginal tracts. Generally the record title will not disclose facts sufficient to put a prospective oil and gas lessee or the title examiner on notice as to any matters affecting the boundaries of the land or discrepancies in quantity. Faced with uncertainty many oil title examiners require a survey which definitely fixes the boundaries and determines the acreage of the tract of land. This precaution has proved practical in western Nebraska because of lost, destroyed or disputed monuments coupled with the acquiescence of adjoining landowners for long periods of time as to division lines which vary with official surveys. It is well known that in certain parts of western Nebraska some sections contain an excess or deficiency of as much as 160 acres.48


48 Township 16, Range 51 in Cheyenne County, is a typical example of this situation. The original government survey made in 1869 established certain corners and division lines but with the passing of time monuments were lost or destroyed and boundaries were more-or-less arbitrarily established by officials. It has in fact been established that no interior govern-
Boundary lines were early established in many instances by fences or other visible indicia of separation based upon a mistaken assumption that such boundaries were the true governmental dividing lines, and such fences have been recognized by the adjoining land owners over the years as being in fact the dividing line between their respective properties. In these cases it has been held that if no intervening rights or claims arose, the excess acreage would be divided according to the respective acreage of each tract as shown by the survey. But when a fence is constructed as a boundary between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed as their own land.\(^49\)

The impact or significance of situations of this kind which affect the mineral estate is apparent and fully justifies the requirement of a survey disclosing governmental corners and boundaries as well as the location of fences or other evidence of physical separation.\(^50\) If indication of a variance in the acreage from the governmental subdivision is found or suspected it should be specifically pointed out by the title examiner so that appropriate lease provisions may be adopted.

(g) \textit{Determination of Necessary Parties—Lessors.}

Equally important with the quantity and quality of the mineral estate subject to lease is a determination of the necessary
determination corners were placed by the original government surveyors in Township 16 and only three exterior government corners located. Subsequent surveys in 1918 (Bordwell), and 1928 (Simmons) relocated the boundaries, resulting in considerable discrepancies in acreage. See State v. Cheyenne County, 123 Neb. 1, 241 N.W. 747 (1932).

\(^49\) Typical of cases announcing this rule are Romine v. West, 134 Neb. 274, 278 N.W. 490 (1938); Johnston v. Aden, 109 Neb. 625, 192 N.W. 220 (1923); Pfeifer v. Scottsbluff Mortgage Loan Co., 105 Neb. 621, 181 N.W. 533 (1921).

\(^50\) In Carter Oil Co. v. Stewart, 36 F. Supp. 121 (E.D. Ill. 1941), where an original fence was constructed by adjoining landowners to establish uncertain and unascertained division line, which was accepted and acquiesced in by them, it was held that such fence line and not the line fixed in accordance with a government survey constituted the boundary line, and hence ownership of an oil well would be determined by the line of such fence and not the line fixed in accordance with the government survey. Other illustration cases are found in 2 Summers, Oil and Gas § 229 (2d ed. 1938). See also 3 Oil and Gas Reporter (1950).
parties-lessors. A full interest, valid lease can be obtained only by the joint execution by all cotenants appearing in the chain of title. Some illustrations of the problems here presented will now be discussed.

(1) Deceased Persons, Beneficiaries of a Trust, Minors and Incompetent Persons.

Oil and gas leases executed by minors or incompetent persons are at least voidable so the examiner should be on the alert to recognize or investigate any circumstances appearing in the chain of title which indicate minority or incompetency. The Nebraska statutes specifically authorize an executor, administrator, guardian or trustee to execute oil and gas leases covering lands owned by a deceased person, beneficiary of a trust, minor or incompetent. The statutory procedure should be strictly followed.

In cases where there are unknown owners, heirs, devisees, or legatees of deceased owners, who claim or appear to have some interest in, rights or title, or lien upon the real estate sought to be leased, additional procedural requirements must be followed.

(2) Contingent Remaindermen.

The oil title examiner is frequently confronted with the prob-

This identical case was recently encountered in the development of one of the most prolific oil and gas leases in western Nebraska. The lease covered and described a specific governmental tract and did not contain a "coverall clause" or what has sometimes been referred to as a "Mother Hubbard Clause." Before actual production, it was discovered that the landowner, because of a boundary fence and his occupancy and use of the land thereto, actually owned several acres in the adjoining governmental tract, sufficient in size to lease and drill. Fortunately, the problem was amicably adjusted but not without much apprehension on the part of the producing oil and gas lessee.

62 Neb. Rev. Stat. §§ 57-211, 57-212 (Cum. Supp. 1953). Section 57-212 vests the manner of notice of hearing in the discretion of the court. Generally the trial judges in western Nebraska have allowed a hearing instanter following personal service upon the minor, incompetent, beneficiary or adjudicated heirs or devisees. Where notice by publication is directed, a single publication is generally deemed sufficient with hearing one week or ten days thereafter except in cases wherein it is alleged that there are unknown heirs under § 57-212.01.
63 Neb. Rev. Stat. § 57-212.01 (Reissue 1952). It is submitted that the additional procedural requirements under Neb. Rev. Stat. § 25-321, 517 and 518 are neither necessary nor practical and that this statute should be amended to provide that the court or a judge thereof shall set the matter down for hearing and direct to what persons and in what manner notice of such hearing shall be given as is now provided in § 57-212.
lem of a contingent remainder when he attempts to obtain a full lease of land. An example of this problem is as follows: Title is vested in A for life with the remainder interest in his children. A, still living, has certain children alive. There is a possibility that after born children may have some interest in the fee.

In such a case the statutes provide that the life tenant may apply to the district court of the county wherein the land is located for the appointment of a trustee, under bond, to lease the land for oil and gas development purposes. The procedure to obtain such authority is substantially the same as provided for obtaining permission to mortgage real estate. It does not appear that any notice is necessary preceding the appointment of the trustee, who may be appointed instanter with his bond fixed and approved. The trustee then files a petition for authority to lease the interests of the contingent remaindermen, an order is made fixing a time for hearing and notice is published for three successive weeks prior to the hearing. It is noted that in such cases the bonus and rentals shall be paid to the life tenant “or other person entitled thereto” while the royalties are to be paid entirely to the trustee for investment until the ultimate taker is determined. Then the funds are paid over to such ultimate taker and the trust is closed. The income or interest from such royalty investments is payable to the life tenant “or other person entitled thereto.”

(3) Life Tenants and Remaindermen.

A conveyance by a life tenant, purporting to pass the fee or the entire interest in the property involved, operates validly as a conveyance of the life estate of the grantor, and the life estate passes to the grantee designated, but the remainder also purported

54 Neb. Rev. Stat. § 57-222 (Reissue 1952). Where this situation is encountered in the chain of title the examiner should require an additional showing regarding the age, marital status, etc., of the life tenant. Suppose the life tenant is a widow, age 80, with two living children. The possibility of additional children is, to say the least, remote, and in such case a recordable affidavit setting forth the facts is generally considered sufficient.

55 Neb. Rev. Stat. § 57-223 (Reissue 1952). An oil and gas lease is in legal effect a conveyance of a property interest. It is anomalous that a procedure provided for permission to mortgage real estate rather than that for sale should have been adopted. See Ellis v. Rudy, 253 S.W.2d 382 (Ky. 1952).

56 Neb. Rev. Stat. §§ 30-1202 to 30-1206 (Reissue 1948). Again it is suggested that these procedural requirements are neither necessary nor practical. To expedite the proceedings the court should be permitted to direct to what persons and in what manner notice of such hearing should be given. See § 57-212.

to be conveyed is unaffected, and the grantee ordinarily acquires no interest by virtue of such conveyance against a remainderman.\textsuperscript{58}

In contrast to this rule, however, it is generally recognized that neither the life tenant nor the remaindermen can singly make a valid oil and gas lease, and one who procures a lease executed by the life tenant alone thereby acquires no right to exploit the leasehold. If he attempts to do so, the remaindermen may be entitled to relief, not only against him, but also against the lessor. It follows that for a lease to be valid it must be executed by both the life tenant and the remaindermen.\textsuperscript{59}

(4) Cotenants - Tenants in Common.

To obtain a valid full-leasehold lease it is obvious that all cotenants must join in the execution of the instrument. Here the examiner must keep in mind that there can be a cotenancy in the mineral estate which is separate and distinct from the ownership of the surface estate. For example, a landowner may execute various types of mineral or royalty conveyances prior to the execution of an oil and gas lease, thus making such mineral-grantees cotenants with power to lease.\textsuperscript{60} It is important that the examiner makes a full examination of any such mineral conveyances in order to determine whether the grant is sufficient to carry with it a power or right to lease.

While there is some conflict in the authorities, the majority view is that any cotenant who executes an oil and gas lease makes the lessee a cotenant of the other tenants, entitles him to possession of the entire premises, and authorizes him to extract gas and oil subject to the right of the nonsigning cotenants to an accounting of the profits.\textsuperscript{61} The developing cotenant cannot render the other tenants personally liable. Therefore, if the venture is unsuccessful, the developing cotenant must bear the loss. But if it is successful, the developing cotenant is entitled only to be reimbursed proportionately from production for the reasonable cost of drilling, operating and marketing.\textsuperscript{62}

It is important to note that the Nebraska Statutes now specifically provide that all tenants in common, joint tenants, or lessees of any estate in land or interest therein, or of any mineral, coal, petroleum or gas rights, may be compelled to make or suffer parti-

\textsuperscript{58} Moffitt v. Reed, 124 Neb. 410, 246 N.W. 853 (1933); Bohrer v. Davis, 94 Neb. 367, 143 N.W. 209 (1913).
\textsuperscript{59} 24 Am. Jur. 527.
\textsuperscript{60} 3 Summers, Oil and Gas § 599 (2d ed. 1938).
\textsuperscript{61} 24 Am. Jur. 526.
\textsuperscript{62} See Notes in 40 A.L.R. 1400 (1926) and 91 A.L.R. 205 (1934).
tion which may be either in kind or by sale and division of the proceeds.

(h) Application of Nebraska Statutes.

Title problems peculiar to the law of oil and gas add to those common problems in the examination of land titles generally, and in some instances differ in various states due to statutory differences and interpretations. It is essential that the title examiner have a thorough knowledge of the statutes pertaining to real property and give them full consideration.

The stability of titles in Nebraska has been greatly improved by the adoption of The Uniform Property Act in 1941, The Marketable Title Act in 1947 and The Standards of Title Examination Act in 1947. These acts, as well as the various curative laws, should be crystal clear and foremost in the examiner's mind at all times. A realistic and practical adherence to these laws will continue to contribute to the ultimate demise of that proverbial nuisance—"the over meticulous title examiner."

(i) The Marketable Title Act.

No attempt will be made to discuss in any detail the Nebraska statutes above referred to other than The Marketable Title Act. The purpose of this Act is to simplify and facilitate real estate title transactions by allowing persons to deal with the record title owner—any person, having legal capacity to own real estate, who has an unbroken chain of title to any interest in real estate by himself and his immediate or remote grantors under a deed of conveyance which has been recorded for a period of twenty-two years or longer, and is in possession of such real estate. Thus it appears that two prerequisites are necessary to invoke the application of the Act: (1) unbroken chain of title for twenty-two years, and (2) possession of the real estate. If these appear, such record title owner holds free and clear of all interest, claims, and charges whatever, the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred twenty-two years or more prior thereto, and all such interests, claims, and charges affecting such interest in real estate are barred and not enforceable at law or equity unless notice is given as required by the Act.

67 Williams, The Over Meticulous Title Examiner as a Nuisance to the Public and to the Profession, 17 Neb. L. Bull. 98 (1938).
The following are two examples of oil title problems that have been encountered several times:

(1) A is the record title owner of section number one in 1900. He lives in New York and dies there with none of his heirs having knowledge of his ownership of Nebraska land. In 1905 B, an interloper without title, conveys section number one by warranty deed to C, who goes into possession and there remains until 1954 when he desires to execute an oil and gas lease upon the land.

(2) A is the record title owner of section number two in 1900. A conveys to B by warranty deed in 1905 reserving an undivided one-half of the oil, gas and other minerals. B then conveys to C in 1910 by warranty deed which contains no mineral reservation or exception. C goes into possession of the land under his deed and remains in possession until 1954 when he desires to execute an oil and gas lease upon the land.

The law appears to be well settled that where there has been no severance of the mineral estate from the surface estate, adverse possession of the surface constitutes adverse possession of the underlying minerals and title thereto may be so acquired. On the other hand, where there has been a severance of the mineral estate from the surface estate, the owner of the severed minerals does not lose his right or his possession by any length of nonuser, nor does the owner of the surface acquire title by adverse possession or by limitations to the minerals by his exclusive and continuous occupancy and enjoyment of the surface alone. In such a case the only way the statute of limitations can be asserted against the owner of the minerals is for the owner of the surface estate to take actual possession of such minerals by drilling or some other legally recognized act of possession and continuing such possession for the required prescriptive period.

Applying these rules, problem number one may be resolved in favor of mineral ownership in C by applying either the doctrine of adverse possession or by compliance with the requirements of The Marketable Title Act, since in either case C has had sufficient possession of both the surface and mineral estates. But applying the same rules in problem number two, C could not acquire title by adverse possession as to the severed one-half interest in the minerals. May C acquire title to the severed one-half interest in

63 1A Summers, Oil and Gas § 133 (2d ed. 1954); Masterson, Adverse Possession and the Severed Mineral Estate, 25 Texas L. Rev. 139 (1946); see Notes, 93 A.L.R. 1232 (1934), 67 A.L.R. 1440 (1930) and 13 A.L.R. 372 (1921).
the minerals by compliance with The Marketable Title Act?

It is clear that the first of the two requirements necessary to invoke the application of the Act, i.e., unbroken chain of title for twenty-two years, is present. But does C have possession of the severed one-half interest in the minerals sufficient to satisfy the second requirement of the Act? This question is apparently unanswered in Nebraska and in states with similar statutes. There is considerable diversity of opinion among Nebraska title examiners as to the proper conclusion to be reached. It is submitted, however, that if the reasoning of the authorities which deny acquisition of title to minerals by adverse possession of the surface is to be followed, then it seems clear that C would not have possession of the minerals sufficient to satisfy the requirement of the Marketable Title Act.

There are very few decisions which spell out what type of possession must be exercised over oil and gas before title to these minerals will arise by adverse possession. The drilling of a well and actual production has been held sufficient possession upon which to base a title by adverse possession if such possession is continuous over the prescriptive period. Generally the mere execution of an oil and gas lease by the surface owner, without any drilling or operation on the land by the surface owner or his lessee, will not constitute such acts of possession as will ripen into title to the minerals. However, there is authority to the contrary.69

These cases illustrate the nature of the possession of the minerals by the surface owner, after a prior severance, necessary to commence the limitation period. But under The Marketable Title Act no future limitation period after possession is required and no person, other than the one claiming title under the Act through his unbroken chain of title for a period of twenty-two years or longer, appears to be required to be in possession of the real estate.

As a suggested solution to problem number two, C could execute an oil and gas lease upon the land. Once production had been started, he could file his affidavit of possession as required by the Act and have some assurance that his title to the minerals would be recognized.

It is evident, however, that with the continued development of the oil and gas industry in Nebraska and the title problems that are created thereby, it would be wise to amend The Marketable Title Act so it would apply more specifically to mineral titles.

CONCLUSION

The examiner of oil titles has perhaps a greater responsibility

69 1A Summers, Oil and Gas § 138 (2d ed. 1954).
than the usual examiner of titles because on the basis of his opinion large sums of money may be spent in procuring an oil and gas lease and developing it. Mistakes and errors of title involving $2000 on town property or $20,000 on farm property are often rectified with little expense, inconvenience or loss of professional dignity, but contrast this with the illustration of the oil title examiner, who, through legal error or an abstract deficiency, fails to recognize an outstanding valid mineral ownership. The lessee develops the land at a large expense and obtains production, the value of which may run into astronomical figures. How then can the error be cured?

It is not suggested that the oil title examiner should be over meticulous but he should, by all standards, exercise greater care in resolving reasonable doubts as to the mineral title than would perhaps be exercised in an ordinary land title examination.

An attempt has been made to present a few of the multiple practical problems with which an oil title examiner in Nebraska may be confronted and to discuss possible approaches and solutions to such problems. Several cardinal principles of oil title examinations are suggested, two of which are: (1) the advisability of requiring copies of all instruments in the chain of title affecting the title to the minerals and (2) the desirability of having Nebraska titles examined by Nebraska lawyers who are well acquainted with necessary statutes and judicial precedents, who will not be unduly influenced by laws and practices of other jurisdictions, who may readily examine original recorded records when necessary and have knowledge of unusual local title problems not appearing of record.

This article is therefore designed to be practical and provocative, rather than authoritative or technical; to stimulate rather than decide and to serve as a partial guide to some of the oil title problems properly to be considered preceding the oil and gas lease. If it serves these purposes, even to some small extent, the writer will be gratified.70

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70 The writer is indebted to the several distinguished members of the Nebraska Bar and counsel representing the oil industry for their suggestions and comments in the preparation of this article.
APPENDIX

A SUGGESTED OIL AND GAS OPINION

Date: 
State: 
County: 
Lessors: 
Lease No: 

X Oil Company 
Denver, Colorado

Attention: A. C. Jones

DESCRIPTION:

NW ¼, Section 4, Township 13 North, Range 50, 
West of the 6th P. M., Cheyenne County, Nebraska.

ABSTRACTS EXAMINED:

(1) Base abstract of title to the captioned land prepared by 
Cheyenne County Abstract Company, Sidney, Nebraska, 
containing 44 entries and 27 pages of court proceedings, 
exhibits and certificates and certified from the patent to 
September 30, 1950, at 9:00 A. M.

(2) Supplemental abstract of title prepared by the same 
abstracter containing 22 entries and 12 pages of court 
proceedings, exhibits and certificates and certified from 
September 30, 1950, at 9:00 A. M. to September 30, 
1954, at 9:00 A. M.

OWNERSHIP:

(1) Surface: 
John Jones and Mary Jones, Sidney, Nebraska All

(2) Minerals:
John Jones and Mary Jones, Sidney, Nebraska ⅓
Z Royalty Company, Denver, Colorado ⅓
Henry Smith, Chicago, Illinois ⅓

(3) Delay Rentals and Royalties:
Same as minerals.

(4) Mineral Interest Under Lease To: 
X Oil Company

(5) Overriding Royalty:
Z Oil Company 1/16 of ⅓ ORRI.

(6) Production Payments: 
American National Bank, Sidney, Nebraska $10,000.00
(7) Mineral Deeds:
   Z Royalty Company, Denver, Colorado \(\frac{1}{6}\) of \(\frac{1}{8}\) R.I.
   Henry Smith \(\frac{1}{6}\) of \(\frac{1}{8}\) R.I.

(8) Mortgages:
   American National Bank, Sidney, Nebraska $10,000.00

(9) Taxes:
   Taxes for 1953 and all prior years paid.

(10) Reservations, Easements, Judgments, Etc.:
   None.

BASE LEASE:

(1) Form: Nebraska Producers 88-B
(2) Date: 7-1-53.
(3) Filed for Record: 7-7-53 Book 37, Page 483, Oil and Gas Records of Cheyenne County, Nebraska.
(4) Lessors: John Jones and Mary Jones, husband and wife.
(5) Lessee: Z Oil Company
(6) Assignee: X Oil Company
(7) Land Covered: NW \(\frac{1}{4}\) 4-13-50 and W \(\frac{1}{2}\) 2-13-50, Cheyenne County, Nebraska.
(8) Primary Term: 10 years.
(9) Royalty: \(\frac{1}{8}\)th.
(10) Rental: $420.00 payable 7/1/54 and annually thereafter.
(12) Entirety Clause: Yes.
(13) Force Majeure Clause: Yes.
(14) Unusual Provisions: None.

ASSIGNMENTS:

(1) Date: 8-1-53
(2) Filed for Record: 8-2-53, Book 37, Page 600, Oil and Gas Records of Cheyenne County, Nebraska.
(3) Assignor: Z Oil Company
(4) Assignee: X Oil Company
(5) Lands Covered: NW \(\frac{1}{4}\) 4-13-50 Cheyenne County, Nebraska.
(6) Interest Assigned: All right, title and interest subject to reservation in favor of Z Oil Company of 1/16 of \(\frac{7}{8}\) ORRI.
MORTGAGES AND PRODUCTION PAYMENTS:

(1) Date: 7/10/53
(2) Filed for Record: 7/10/53, Book 100, Page 63, Mortgage Records of Cheyenne County, Nebraska.
(3) Mortgagor: Z Oil Company
(5) Lands Covered: All lands in base lease.
(6) Amount: $10,000.00 due and payable five years from date with interest at 4% per annum.
(7) Production Payments: All royalties from production due and payable to Z Oil Company are assigned as production payments until full amount of mortgage indebtedness is paid in full.

MINERAL DEEDS:

(1) Date: 7/30/53
(2) Filed for Record: 7/30/53
(3) Grantors: John Jones and Mary Jones, husband and wife.
(4) Grantees: Z Royalty Company 1/3 int.
Henry Smith 1/3 int.
(5) Lands Covered: All lands in base lease.
(6) Unusual Provisions: Grantors reserve right to execute future leases without joinder by mineral owners.

Gentlemen:

From our examination of the above abstracts and documents we find title to the lands described in the caption hereof to be as stated, subject to the following comments, qualifications and objections:

I.

Objection: 
Requirement: 

II.

Objection: 
Requirement: 

This opinion does not cover the rights of persons in possession, liens for labor or materials accrued but not filed, chattel mortgages, matters involving area or boundaries, or any other matters not ascertainable from an examination of the above described abstracts and documents.

Very truly yours,