OPINION
56-150

November 26, 1956 (OPINION)

REGISTER OF DEEDS

RE: Not to Record Certain Instruments Unless

Your letter of November 16, 1956, has been received. You request an opinion from this office regarding the interpretation of sections 11-1802 and 11-1803 of the North Dakota Revised Code of 1943, and you ask in particular the following question: Does section 11-1802 include oil and gas leases, with particular attention paid to exemptions specified in section 11-1803?

We deem it best for a better understanding of the question to cite some of the law involved.

First, we refer to section 11-1802, which is the one you mention, and which provides as follows:

> REGISTER OF DEEDS NOT TO RECORD CERTAIN INSTRUMENTS UNLESS THEY BEAR AUDITOR'S CERTIFICATE OF TRANSFER. Except as otherwise provided in section 11-1803, the register of deeds shall refuse to receive or record any deed or patent unless there is entered thereon a certificate of the county auditor showing that a transfer of the lands described therein has been entered and that the delinquent taxes and special assessments or installments of special assessments against the land described in such instrument have been paid, or if the land has been sold for taxes, that the delinquent taxes and special assessments or installments of special assessments have been paid by sale of the land, or that the instrument is entitled to record without regard to taxes."

This as you notice shows what the register of deeds may not do. Then follows the exceptions which are found in section 11-1803 of the North Dakota Revised Code of 1943 with the amendment of Chapter 114 of the 1955 Session Laws. The particular exceptions are as follows:

> The following instruments may be recorded by the register of deeds without the auditor's certificate referred to in section 11-1802 which now means chapter 114 of the 1955 Session Laws.

The original law specified in subsection 2 of section 11-1803 as an exception, "A mineral deed conveying oil, gas, and other minerals in or under the surface of lands;"

This exception was first passed by the Legislature in 1941, Chapter 139 of the 1941 Session Laws, and it has since been on the statute books as section 11-1803 of the North Dakota Revised Code of 1943, and later as Chapter 114 of the 1955 Session Laws.

It is possible that the Legislature in passing this law was not fully aware of the status of the instruments referred to. Since at that

time the Supreme Court had not decided the effect of such statutes on the title involved. We now have, however, the Supreme Court decisions as follows: The Supreme Court of this state on March 6, 1956, decided the case of McGee v. Stokes' Heirs at Law, 76 N.W.2d. 145, and held in that case citing authorities that oil and gas leases are conveyances of real estate and makes it a separate estate. On page 155 of said case, we find the following:

> The mineral deed and the oil and gas lease were delivered to J.S. Martin. They were in his possession at the time of trial and are introduced as exhibits in this case. The stipulation modifying the original agreement recites that J.S. Martin 'has procured * * * a lease for oil and gas and a mineral deed * * *.' The agreement is not executory. It has been practically completed and performed. J.S Martin had purchased and been granted by the Tellers an interest in real property, an oil and gas lease. Petroleum Exchange v. Poynter, N.D. 64 N.W.2d. 718, and a mineral deed, which is also an interest in real property."

And the cited, Petroleum Exchange v. Poynter, 64 N.W.2d. 721, holds:

> The first question presented is whether under the statute quoted an oil, gas and mineral lease or an assignment thereof in the form of the leases and assignments involved in the instant case is an interest in real property. While this question has not been considered by this court it has been held by the courts in most of the oil producing states that oil, gas and mineral leases are transfers of interests in real property. In the case of Piney Oil and Gas Co. v. Allen, 235 Ky. 767, 32 SW 2d 325, 326, the Supreme Court of Kentucky had under consideration an oil and a gas lease similar in form and language to the leases involved in the case at bar, and it was there held that such lease creates an interest in real estate. We quote from the opinion:
>
> It is also settled that an oil and gas lease creates an interest in real estate, and is governed by the principles of law applicable to land.'" (Citing numeral cases.)

Again in the case of McGee v. Stokes, supra, on page 155, we find the court cites the case of Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 47 N.W.2d. 543, and the court held that after severance, the surface and minerals are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance.

In the case of Corbett v. LaBere, 68 N.W.2d. 211, we find the following: "interest acquired by lessee under ordinary oil and gas lease is known as a 'working interest' and is an interest in 'realty'. On page 213 of this case we find the following:

> The subject of this instrument is a 'royalty.' The appellant contends that the royalty was personal property, not an interest in real estate, was dependent entirely upon the estate of the mortgagor, Julius Bolstad, and that it was not necessary to join in the foreclosure action the owner of the royalty in order to have his interest eliminated. On the other hand, the

> plaintiff and respondent contends that the royalty was an interest in the real estate which was not affected by the foreclosure action to which the plaintiff, a royalty owner, was not a party."
>
> The lease which the Bolstads executed in favor of Thomas W. Leach on November 23, 1935, was for a period of ten years or as long as the lessee produced oil and gas, or either of them. It conveyed to the lessee an interest which under such leases is generally known as a working interest. It is an interest in real property. Petroleum Exchange, Inc. v. Poynter, N.D. 64 N.W.2d. 718; Ulrich v. Amerada Petroleum Corp., N.D. 66 N.W.2d. 397."

It then states on page 214:

> The interest retained by the lessor, commonly known as a royalty interest, is also an interest in real estate. A lessor may convey in whole or in part to another his royalty under a specific lease or leases or he may convey his royalty in perpetuity, in which event the conveyance carries the royalty under present leases, if any, and leases made in the future. The unaccrued royalty in each of these instances is an interest in real estate entitling the royalty owner to share in the production of the minerals."

The court further states on page 214:

> The lease on the land involved in this case covered unaccrued royalties and, because the lease might continue as long as oil or gas or either was produced, was without definite limit as to time. Such royalties when separately transferred are interests in land." (Citing numerous cases.)

The Supreme Court of this state then states:

> In the authorities cited above we find these positive statements:
>
> we now announce the rule to be that royalties in gas or oil until brought to the surface and reduced to possession, are interests in real estate and not personal property.' Arrington v. United Royalty Co. (188 Ark. 270, 65 S.W.2d. 38).'"

There are other cases cited in said case holding to the same effect.

We have, therefore, in this state the decisions of our Supreme Court that mineral deeds, mineral leases and royalties are real property and are separate estates and as such must be taxed.

We may also consider the case of Smith v. Cook, 78 N.W.2d. 151. That was a case where the defendant Cook moved to open a default judgment and as a part of such moving papers the defendant for his answer set out that the tax deed executed to the land involved did not affect his leasehold interest in the property and the court held that such answer was a good answer and stated a defense. Therefore, by inference it follows that said decision held that the minerals,

either by deed, lease or transfer of royalty, constitute a separate title to the land and would have to be assessed and taxed separately.

The case of Bilby v. Wire, 77 N.W.2d. 882 (ND), in so many words states on page 886 as follows:

> After severance, the surface and minerals are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance." (Citing numerous cases.)

The court then states:

> No contention is made nor does the record show that the minerals under this land, if any, were ever assessed. As far as we can determine, the only provision under our law for the assessment of minerals in place is found in sections 57-0224 and 57-0225 N.D.R.C. 1943. Section 57-2430 N.D.R.C. provides for the sale of coal and mineral reserves for nonpayment of tax or taxes. These statutes clearly contemplate, after severance, separate taxation of minerals, if any. It then states failure to pay taxes on mineral reserves subjects the owner to forfeiture of his estate in the same manner as provided by law for the sale of real property for delinquent taxes. The statute provides for such forfeiture when the owner 'neglects' or refuses to pay any taxes legally assessed and levied thereon."

From the above cases we have learned that mineral deeds, mineral leases and royalties are separate estates and must be taxed separately, and that such taxes may be collected through the sale of interest in such lands the same as taxes of other lands.

We have different kinds of mineral deeds and mineral leases with reference to the time of recording of same. We are, therefore, of the opinion that prior to the passing of the law, Chapter 139 of the 1941 laws, the law was as follows:

> That leases and deeds presented, where the minerals have not been severed from the land at the time of the presentation of such leases and deeds where there appeared delinquent taxes against the surface of the land and no taxes against the minerals, such leases and deeds shall be recorded and whether or not taxes are delinquent on the surface of the land and none on the minerals after such severance, such leases shall be recorded." But after such severance if taxes are delinquent on minerals regardless of whether or not there are taxes delinquent on the surface, such instruments should not be records.

These are the laws with reference to what the law would be if the Legislature had not passed the exceptions referred to in Chapter 114 of the 1955 Session Laws and others.

We refer to the above for the reason, as we have mentioned, that the Legislature may not fully understand the effect of the transfers made by mineral deeds and leases and royalties. However, if the laws should be changed in that respect, it is for the Legislature to do.

We now come to the question regarding the effect of recording. After the passing of the law, which is now Chapter 114 of the 1955 Laws, paragraph 2 which states: A mineral deed conveying oil, gas, and other minerals in or under the surface of lands may be recorded by the register of deeds without the auditor's certificate referred to in section 11-1802. The question is, would the Legislature have authority to pass such law. Undoubtedly the Legislature had such power for the recording of an instrument does not affect the validity of the instrument itself. It makes it neither better nor worse if recorded. It is only notice to innocent persons and persons otherwise interested. It is, therefore, the opinion of this office that where a mineral deed which is expressly mentioned in the law is presented for recording, it should be so recorded by the register of deeds without the certificate of taxes and since mineral and oil leases and royalties are under the decisions of our Supreme Court, as hereinbefore set out, transfers of real estate and even though not in form of a deed has the same effect and passes title the same as a deed. It is, therefore, the opinion of this office that such mineral, gas and oil leases and royalties should be recorded without any certificate of transfer on the instrument.

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