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Oil and Gas

Sydney Farr

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SURVEY OF TEXAS LAW FOR THE YEAR 1948

OIL AND GAS

ESTOPPEL BY DEED APPLIED TO A RESERVATION OF A
MINERAL ESTATE

THE doctrine of estoppel by deed precludes the parties to a deed and their privies from contravening the truth of recitals of fact in the deed in a subsequent action between them.¹ To what extent does this doctrine apply to the grantee of a deed reserving a mineral interest in the grantor? The weight of authority in America is that the grantee is bound by the reservation *unless* he claims the reserved interest under an independent title.² The Texas rule, however, with certain qualifications noted below, is that the grantee is bound by the reservation *even though* he claims the reserved interest under an independent title.³ Thus it has been held that the grantee was estopped to deny the grantor's title in the reserved estate, even though at the time of the conveyance the grantor had no title to the reserved estate, and the grantee either already had title himself⁴ or was acquiring it by adverse possession.⁵

Accordingly, the recent case of *Adams v. Duncan*⁶ ruled that the grantees of a 1906 deed reserving a mineral estate in the grantor, which estate the grantor did not own in the first place, were estopped to claim for themselves the minerals so reserved, even though they based their claim on a subsequent conveyance

¹ 31 C. J. S. 213 (1942).

² *Eastern Gulf Oil Co. v. Lovelace*, 188 Ky. 238, 221 S. W. 544 (1920); 31 C. J. S. 218 (1942).

³ *Adams v. Duncan*, Tex., 215 S. W. (2d) 599 (1948); *Cleveland State Bank v. Gardner*, 286 S. W. 173 (Tex. Com. App. 1926).

⁴ *Adams v. Duncan*, Tex., 215 S. W. (2d) 599 (1948).

⁵ *Green v. White*, 137 Tex. 361, 153 S. W. (2d) 575 (1941).

⁶ Tex., 215 S. W. (2d) 599 (1948).

from third parties, who actually had held title to the reserved interest since before 1906. Had the court sustained title to the minerals in the grantees, it would thereby have permitted them to deny the truth of the recital in the 1906 deed that the grantors owned the minerals in 1906, but such a denial is precisely what estoppel by deed prohibits. This must not be taken to mean, however, that the grantee may never in any manner assert title to a reserved interest without a later conveyance thereof from the grantor, because he may do so in two instances, both recognized by the *Adams* case.

First, the grantee may acquire title by adverse possession or by purchase from someone who has so acquired title, so long as such possession was begun *after* the delivery of the deed.⁷ The assertion of such title is not in derogation of the recited reservation, since it is perfectly consistent for the grantee to admit that the grantor had title to the minerals at the time the deed was delivered and yet declare that he has himself acquired title to the same minerals by limitations begun since date.

Second, if the grantee is a married person or a married couple, and (1) at the time of the conveyance containing the reservation the spouses already have title to the land and (2) are claiming it as homestead, then the reservation in the deed from the grantor, who himself has no title to the land, will not deprive the grantees of any interest.⁸ This is true because they have not signed and acknowledged the deed in the manner required by statute for the conveyance of homestead.⁹ The deed is completely inoperative as to anyone unless and only unless it is ratified by a *later* deed conforming to the homestead statute. After the husband dies, the widow may ratify the reservation by an ordinary deed, but such

⁷ *Robertson v. Wood*, 15 Tex. 1 (1855); *Daniels v. Murray*, 103 S. W. 425 (Tex. Civ. App. 1907) *writ of error refused*.

⁸ *Green v. White*, 137 Tex. 361, 153 S. W. (2d) 575 (1941); *See Adams v. Duncan*, _____ Tex. _____, _____ 215 S. W. (2d) 599, 603 (1948).

⁹ TEX. REV. CIV. STAT. (Vernon, 1925) art. 1300.

a deed will operate to convey only the ratifying spouse's interest in the minerals so reserved.¹⁰

In limiting validation of the reserving recital to the sole method of ratification, the Texas court has reached a result seemingly dissonant with the rule that,

"[a] conveyance by a husband, not joined by his wife, of the homestead property is merely inoperative while the property continues to be homestead, or until such time as the homestead may be abandoned, or the deed ratified in accordance with law."¹¹

When the husband is the grantor of the inoperative deed, there are three methods of giving it force, but when he is grantee, only one.

It should be observed that if the husband and wife are merely acquiring limitation title which has not matured at the time the titleless grantor executes the deed with minerals reserved, then even though the spouses are claiming the land as homestead, the deed is binding on both since they can have no homestead interest in land to which they have no title.¹²

CORRELATIVE RIGHTS

Since 1900 the states have had the imprimatur of the Supreme Court to regulate production for the purpose of preventing waste and protecting correlative rights¹³ of the owners over a common reservoir. Although the Texas courts acknowledged without reluctance the former power, for many years inhibitions based on the law of capture restrained them from according more than nominal recognition to the latter.

At its *laissez faire* best the law of capture unconditionally gave the owner of a tract title to minerals he produced through his own

¹⁰ Green v. White, 137 Tex. 361, 153 S. W. (2d) 575 (1941).

¹¹ Grissom v. Anderson, 125 Tex. 26, 30, 79 S. W. (2d) 619, 621 (1935); Marler v. Handy, 88 Tex. 421, 31 S. W. 635 (1895); Stallings v. Hullum, 89 Tex. 431, 355 S. W. 2 (1896).

¹² Green v. White, 137 Tex. 361, 153 S. W. (2d) 575 (1941).

¹³ Ohio Oil Co. v. State of Indiana, 177 U. S. 190 (1900).

wells, even though the minerals had been drained from beneath the land of a neighbor over the same reservoir. Every other owner was said to have the correlative right or privilege to do the same thing.¹⁴ This early definition of correlative rights subtracted nothing from the law of capture and is, in fact, on its face a mere restatement of that law. But the passage of time and several statutes have induced the Texas judiciary to give substance to this right and so necessarily to make encroachments on the law of capture.

Thus early cases enunciated the right of each owner that his neighbor not exercise his privilege of appropriation so as negligently to injure the common reservoir¹⁵ or to deplete it by wasteful operations;¹⁶ and the significant *Peterson v. Grayce*¹⁷ demonstrated the right of each that his neighbor's privilege of appropriation be limited to natural and normal means. In the latter decision the defendant had used a vacuum pump to produce oil in violation of a rule¹⁸ prohibiting such use issued by the Railroad Commission under a statute¹⁹ authorizing the promulgation of rules for the prevention of waste in drilling and producing oil and gas. The court awarded the neighboring landowner the value of the minerals drained from that part of the reservoir beneath its land on the ground that the statute and rule were for the benefit of the adjacent landowner as well as the state. But the decision presumably would have been the same even without this legislation, for the court says:

¹⁴ *Stephens County v. Mid-Kansas Oil and Gas Co.*, 113 Tex. 160, 254 S. W. 290 (1923).

¹⁵ *Comanche Duke Oil Co. v. Texas & Pacific Coal & Oil Co.*, 298 S. W. 554 (Tex. Com. App. 1927).

¹⁶ *F. C. Henderson, Inc. v. Railroad Commission*, 56 F. (2d) 218 (W. D. Tex. 1932).

¹⁷ 37 S. W. (2d) 367 (Tex. Civ. App. 1931) *writ of error granted, affirmed* 98 S. W. (2d) 781 (1936).

¹⁸ Rules and Regs. of R.R. Com. of Texas, Oil and Gas, Sec. 1, Rule 40: "The future installation of vacuum pumps or other devices for the purpose of putting a vacuum on gas or oil bearing stratum is prohibited . . ."

¹⁹ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) art. 6029.

"However, according to the rule which seems to be established by the decisions and which appears to be founded upon elementary principles of right and justice, the right of one leaseholder to thus acquire more than his *pro rata* portion of the common reservoir is limited to the production of oil from a natural flow or from pumping by ordinary methods . . ." ²⁰ (Emphasis supplied.)

Nonetheless, if this excerpt did not represent the common law rule previously, the court noted, the legislature had power to change the common law to protect (and apparently to create) the correlative right of each owner that his neighbor not use abnormal means to deplete the reservoir.

Whatever meaning the court found between the lines in the statute above, that act, literally construed, only authorized rules to prevent waste and made no mention of correlative rights. The first enactment openly purporting to regulate production for the sole purpose of protecting correlative rights was Article 6008, Section 310 ²¹ passed in 1937, which pertained only to gas. A series of ensuing federal decisions ²² gave immediate sanction to this Statute with one qualification.

The United States Supreme Court held invalid a proration order of the Railroad Commission the sole purpose of which was to force one producer to share his market with his marketless neighbor, the question of waste not being involved. In other words there is no correlative right of one owner that his neighbor should share his market with him, and any state statute or administrative order intended solely to force such sharing is an unconstitutional taking of private property without due process. ²³ The correlative rights section of Article 6008 has never been construed by a square holding in the reported Texas decisions, but in the 1945 *Corzelius v. Harrell* decision the State Supreme Court in language that was

²⁰ 37 S. W. (2d) 367, 372 (Tex. Civ. App. 1931).

²¹ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) art. 6008, § 10.

²² *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937); *Henderson v. Terrell*, 24 F. Supp. 147 (W. D. Tex. 1938).

²³ *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937).

purely dicta went to great lengths to sustain a proration order based solely on the adjustment of correlative rights.²⁴

However in 1948 *Elliff v. Texon Drilling Co.*²⁵ indirectly sustained the statute. As a result of D's negligence his well blew out, drawing through it oil and gas from P's part of the reservoir. The court awarded P damages for the value of the minerals thus drained on the ground that since subject to the law of capture P had title to the oil and gas beneath his land, and since the law of capture did not authorize appropriation by wasteful or negligent methods, then D never acquired, and P never lost title to the minerals so exhausted. Hence, apart from any legislation, D was liable for the value of P's oil and gas which he wastefully dissipated. P's absolute ownership, the court said, though subject to the rule of capture, entitled P to a reasonable common law opportunity to get this fair share of the minerals, and D's negligent withdrawal of oil and gas from P's side was an infringement on this opportunity.

If each owner has a common law right to this opportunity, there can be no objection to the legislature's prorating production solely to protect this right. Furthermore, such an enactment would introduce no radical innovation in legislative policy, because since 1919 there has been permitted under appropriate circumstances the issuance of well drilling permits to protect correlative rights, waste or no waste.²⁶ Article 6008, Section 10, certainly seems to authorize proration on this basis, but with the exception of the *Corzelius* case all litigated orders issued under it to date have really had waste prevention as their ultimate object with correlative rights being adjusted only as incident to the attainment of that end.

Opportunity exists in many gradations, and the courts have run the gamut of these nuances since the day they recognized only the landowner's right to an opportunity to fend for himself. Pre-

²⁴ *Corzelius v. Harrell*, 143 Tex. 509, 186 S. W. (2d) 961 (1945).

²⁵ 146 Tex. 575, 210 S. W. (2d) 558 (1948).

²⁶ Rules and Regs. of R.R. Com. of Tex., Oil and Gas, Sec. 1, Rule 37.

sumably, the legislature could empower the Railroad Commission to assign a daily quota to each landowner calculated, independently of any concept of waste, from an estimate of each owner's fair share in the reservoir. While such an order would make inroads on the law of capture, it would not completely abrogate the law. If one owner did not produce his allowable on a particular day, he would forfeit his opportunity to that much of his fair share, which quantity would then become subject under the law of capture to drainage to and production from his neighbor's land. Further the legislature cannot go without doing violence to the long established principles of Texas oil and gas law. With regulation beyond this point "reasonable opportunity" ceases, and tenancy in common begins.

WAIVER OF BREACH OF CONDITION

It is axiomatic that equity abhors a forfeiture.²⁷ Texas courts long refused to apply this precept to oil and gas leases on the ground that the public's interest in seeing its mineral resources developed outweighed the reasons supporting the maxim.²⁸ Always, however, have they recognized that there may be no forfeiture unless the lease expressly so provides,²⁹ yet they have not been reluctant to find implied covenants, *e.g.*, implied covenants of reasonable development.³⁰ If public policy did in fact demand such cordial treatment of forfeitures in oil and gas leases, why were not the courts as willing to infer conditions (the basis of forfeitures) as they were to infer covenants?

The foregoing policy of the unsuspecting public has been abandoned by the most recent Texas cases.

"It is now the settled law of this state that the rule of construction

²⁷ 31A TEX. JUR. § 190 (1935).

²⁸ *Gulf Production Co. v. Cruse*, 271 S. W. 886 (Tex. Civ. App. 1925); *Cockrum v. Christy*; 223 S. W. 308 (Tex. Civ. App. 1924); 19 TEX. JUR. *Forfeitures* § 6 (1932).

²⁹ *Grubb v. McAfee*, 109 Tex. 527, 212 S. W. 464 (1919); *Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S. W. (2d) 27 (1929).

³⁰ *Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S. W. (2d) 27 (1929).

against the right of forfeiture is as applicable to oil leases as it is to other characters of grants."³¹

Even before the rule acquired the status of a positive judicial utterance, the courts actually followed it by their eagerness in each case to detect a waiver of the breach of condition. The early oil and gas case of *Benavides v. Hunt*³² declared:

"It is universally held that a grantor entitled to re-enter or forfeit an estate on breach of condition, who does not exercise this right when facts within his knowledge occur that would entitle him to do so, has waived his right, or is estopped from exercising it, in all cases in which, after breach of condition, he permits the grantee, without objection, to prosecute the enterprise and expend large sums of money in so doing, which must be lost to the grantee if a forfeiture be subsequently allowed."³³

In the later case of *Wisdom v. Minchen*³⁴ the lessee subjected his lease to forfeiture by failing to drill two wells within the time required by the lease. It was held that when the lessor stood by and knowingly permitted the lessee to spend more money in development of the lease, he thereby waived the breach and could not subsequently declare a forfeiture for that particular breach.

The 1948 case of *Hoover v. General Crude Oil Co.*³⁵ is in perfect harmony with these two cases. The lease executed in 1928 contained a covenant of diligent development and also a general forfeiture clause, giving the lessors the option to terminate the lease at the expiration of ninety days after a breach of covenant by the lessee. Although the lessee had not developed the property at all, the lessors in 1942 agreed in writing that he had complied with all covenants in order to induce the drilling by the lessee of a test well which later came in dry. Negotiations between lessors and lessee in February, 1945, for the former to develop the prop-

³¹ *Wisdom v. Minchen*, 154 S. W. (2d) 330, 336 (Tex. Civ. App. 1941) writ of error refused; accord *Ryan v. Kent*, 36 S. W. (2d) 1007 (Tex. Com. App. 1931).

³² 79 Tex. 383, 15 S. W. 396 (1891).

³³ *Id.* at 391, 15 S. W. 396, 399.

³⁴ 154 S. W. (2d) 330 (Tex. Civ. App. 1941) writ of error refused.

³⁵ _____ Tex. _____ 212 S. W. (2d) 140 (1948).

erty themselves failed to produce any contract. Later the same year the lessee obtained a tentative agreement by A Co. to develop the land, A Co. demanding, however that the lessors first ratify the lease. Reversing the lower courts, the Supreme Court upheld the lease, declaring that the lessors had expressly waived all breaches prior to 1942 by the written agreement of that year and impliedly waived all breaches prior to 1945 by their conduct in permitting the lessee to expend time and money in negotiations with A Co. in reliance on the continued operation of the lease. Consequently, if the lessors wanted to forfeit for the continuing breach extending after these waivers, they could do so only by giving the lessee a reasonable notice of such intent plus the concomitant opportunity to comply with the broken covenant, it being unjust under these circumstances to tolerate a summary declaration of forfeiture.

The above line of decisions may be based consistently on either waiver or estoppel, since the waivers involved are all waivers by estoppel. Where the waiver is express, there is no problem; the lessor has formally surrendered his power to terminate the lease for the breach waived, whether or not there is reliance by, and supervening detriment to, the lessee. But there must be both reliance and detriment to give rise to a waiver by estoppel.

The proposition is sometimes stated that before a lessor may declare a forfeiture he must give notice to the lessee of the default upon which the forfeiture is based, so that the lessee may perform whatever acts are necessary to forestall such forfeiture.³⁶ It is respectfully suggested that this statement is too broad and that notice of intention to terminate is necessary in only two instances: first, where the lease expressly calls for notice³⁷ and second, where, as in the *Hoover* case, the grantor's conduct has been such as to render it inequitable not to require such notice.

The fact is that the leases usually do call for notice, but in the

³⁶ 31A TEX. JUR. § 194 (1935).

³⁷ *Gulf Production Co. v. Cruse*, 271 S. W. 886 (Tex. Com. App. 1925); *Wisdom v. Minchen*, 154 S. W. (2d) 330 (Tex. Civ. App. 1941), *writ of error refused*.

cases in which they do not, the courts have been forced to base their requirement of notice on estoppel. See, *e.g.*, the quotation from the *Hoover* case: "If in such a case . . . a summary declaration of forfeiture would be *unjust*"³⁸ then a "court of *equity*" will require notice plus a reasonable opportunity to mend the breach. Therefore, if a summary declaration of forfeiture would not be unjust, it should be permitted.

VALIDATION OF DEED THAT OMITTS DESCRIPTION OF LAND

An examination of Texas cases discloses two methods of validating a deed that fails to describe any land.

First, the deed may be made operative by the subsequent insertion of the description of the land with the grantor's written or oral consent, provided this is the same land the parties had in mind to begin with.³⁹ Courts always allowed the effectuation of a deed by latter addition with the grantor's permission of the grantee's name.⁴⁰ The fact that the grantor died before the blank was filled was held, in *Threadgill v. Butler*⁴¹ to revoke the permission, since it constituted a power coupled with an interest, the theory being that the deed even in its incomplete form at least passed equitable title. An early case, by way of dictum, stated that the same doctrine applied when the land was left undescribed in the original instrument, but that the unexercised power to fill the blank would be revoked by the death of the grantor.⁴² Since the pronouncement of this latter qualification was a mere dictum, and since the court did not expressly purport to overrule the *Threadgill* case, the rule should still be that the power to fill in a blank is not revoked by the grantor's death, unless a distinction is to be drawn between omission of the grantee's name and omission of a description of

³⁸ Tex., 212 S. W. (2d) 140, 143.

³⁹ Reserve Petroleum Co. v. Hodge Tex., 213 S. W. (2d) 456 (1948); *Glasscock v. Farmers Royalty Holding Co.*, 152 F. (2d) 537 (C. C. A. 5th, 1945).

⁴⁰ *Threadgill v. Butler*, 60 Tex. 599 (1884); *Schleicher v. Runge*, 37 S. W. 982 (Tex. Civ. App. 1896), *writ of error dismissed*.

⁴¹ *Threadgill v. Butler*, 60 Tex. 599 (1884).

⁴² *Tarrant County v. McLemore*, 8 S. W. 94, (1888).

the land. Each being equally essential to the formal validity of the deed, the distinction appears immaterial.

From these indefinite derivations the recent *Glasscock v. Farmers Royalty Holding Co.*⁴³ case with a square holding crystallized the rule that when the grantor delivers a deed giving the grantee specific oral directions to fill in the description data, the deed becomes operative when such description of the land is added. However, when the grantor subscribes his name to a blank deed form and delivers it to the grantee so as to give the latter a carte blanche to fill in whatever he pleases, the deed is utterly void and cannot be ratified.⁴⁴

The second method of vitalizing a deed of this nature is by ratification in a subsequent conveyance which contains an express reference to the former deed. Unless such intent is negated by the latter instrument, this recital is taken as a binding recognition of the validity of the conveyance which it recites.⁴⁵ Upon this principle is based the 1948 case of *Reserve Petroleum Co. v. Hodge*.⁴⁶ H and W had conveyed to A sans description of the land a deed to an undivided half of the minerals in their homestead tract. The Supreme Court held that when H and W joined A as lessors in executing an oil and gas lease on the same tract, which lease contained a recital asserting that H and W had previously conveyed one-half the mineral estate to A, H and W thereby ratified the defective deed. Impliedly overruled was an earlier Civil Appeals case⁴⁷ which held to the contrary, though the decision went unmentioned in the court's opinion.

Although the original deeds in such cases have been called both void and voidable,⁴⁸ the suggestion is made that they are neither void, since a void deed cannot be ratified, nor voidable, since a

⁴³ 152 F. (2d) 537 (C. C. A. 5th, 1945).

⁴⁴ *Southern Pine Lumber Co. v. Arnold*, 139 S. W. 917 (Tex. Civ. App. 1911).

⁴⁵ *Green v. White*, 137 Tex. 361, 153 S. W. (2d) 575 (1941); *Glasscock v. Farmers Royalty Holding Co.*, 152 F. (2d) 537 (C. C. A. 5th, 1945).

⁴⁶ _____ Tex. _____, 213 S. W. (2d) 456 (1948).

⁴⁷ *Blankenship v. Mott*, 104 S. W. (2d) 607 (Tex. Civ. App. 1937).

⁴⁸ *Glasscock v. Farmers Royalty Holding Co.*, 152 F. (2d) 537 (C. C. A. 5th, 1945).

voidable deed is operative *until* avoided, but rather that they are "validable," since they are inoperative until validated. While the *Hodge* case is the first Texas Supreme Court decision sustaining ratification of a deed without a description of land, it is in line with previous holdings permitting ratification by the wife after the husband has executed,⁴⁹ or been a party to,⁵⁰ a deed purporting to convey homestead without the wife's joinder.

TIME AND MODE OF DELAY RENTAL PAYMENTS

The usual oil and gas lease, being for a primary term and as long thereafter as production continues, creates in the lessee a determinable fee, also called a fee simple with a special limitation. The special limitation is embodied in the clause "and as long thereafter as oil or gas is produced." An "unless" lease adds still another special limitation. Such a lease is one wherein it is provided that if the lessee does not commence drilling operations within a certain period, frequently one year, after execution of the lease, the lease will terminate *unless* the lessee pays the lessor or a designated escrow agent a stipulated delay rental. Failure of the lessee to pay the delay rental when due automatically terminates the lease,⁵¹ just as does failure to produce oil and gas after the primary term.⁵² However, in two types of situations the courts have declined to apply this rule rigorously.

First, if the lessee tenders the overdue delay rentals within a reasonable time after due date (eleven days⁵³ and six months⁵⁴ have each been held a reasonable time), and the lessor accepts the payment, the lessor is said to be estopped to say that the lease has terminated.⁵⁵ However it is difficult to accept estoppel as the

⁴⁹ *Grissom v. Anderson*, 125 Tex. 26, 79 S. W. (2d) 619 (1935).

⁵⁰ *Green v. White*, 137 Tex. 361, 153 S. W. (2d) 575 (1941).

⁵¹ *Gulf Production Co. v. Continental Oil Co.*, 139 Tex. 183, 164 S. W. (2d) 488 (1942); 2 SUMMERS, LAW OF OIL AND GAS, § 452 (Perm. Ed. 1938).

⁵² *Stevens County v. Mid-Kansas Oil and Gas Co.*, 113 Tex. 160, 254 S. W. 290 (1923).

⁵³ *McCoy v. Texon Royalty Co.*, 124 S. W. (2d) 877 (Tex. Civ. App. 1939), *writ of error dismissed*.

⁵⁴ *Mitchell v. Simms*, 63 S. W. (2d) 371 (Tex. Com. App. 1933).

⁵⁵ *Ibid.*

real basis for these decisions, since apparently the same result is reached whether or not there is material change of position by the lessee in reliance on the lessor's acceptance.⁵⁶ Likewise there is no basis for calling this a waiver, since there is nothing for the lessor to waive. No promise has been breached, no wrong done to the lessor. A breach of condition may be waived, but not a limitation. If there is no groundwork for estoppel or waiver, the only conclusion left is that these late delay rental holdings constitute an outright exception to the general rule that failure to pay rentals on time unalterably concludes the lease.

The second group of cases involves the situation in which the lessee tenders or pays the rental to the escrow agent, but the latter for some reason fails to transfer the money to the lessor on time. It is uniformly held that tender to the escrow agent is tender to the lessor⁵⁷ and so a sufficient compliance with the delay rental clause. The escrow agent is the agent of the lessor, not the lessee, and consequently the latter is not accountable for the escrow agent's errors.⁵⁸ Thus where the escrow bank returned the lessee's payment for the sole reason that the lessor had no account with it to which it would credit the sum,⁵⁹ or inadvertently failed to credit the lessor's account with the payment before due date,⁶⁰ it was held that the lessee had satisfactorily complied with the rental requirements. But when the lessee deposited the payments in the escrow bank with directions to pay the lessor's guardian, when, in fact, the lessor having reached majority no longer had a guardian, the court ruled that the lease had terminated.⁶¹

The liberal policy of the courts in this second line of cases is

⁵⁶ *Ibid.*

⁵⁷ *Gulf Production Co. v. Perry*, 51 S. W. (2d) 1107 (Tex. Civ. App. 1932) *writ of error refused*.

⁵⁸ *Hunter v. Gulf Production Co.*, 220 S. W. 163 (Tex. Civ. App. 1920).

⁵⁹ *Gulf Production Co. v. Perry*, 51 S. W. (2d) 1107 (Tex. Civ. App. 1932) *writ of error refused*.

⁶⁰ *Hunter v. Gulf Production Co.*, 220 S. W. 163 (Tex. Civ. App. 1920).

⁶¹ *Clark v. Humble Oil and Refining Co.*, 57 S. W. (2d) 597 (Tex. Civ. App. 1933) *rev'd on other grounds*, 87 S. W. (2d) 471 (Tex. Com. App. 1935).

extended somewhat by the recent decision of *Hamilton v. Baker*.⁶² The lessee's agent A had an oral agreement with an officer of the escrow bank that A's check for the lessee's delay rental would be honored whether A had sufficient funds in the bank or not. As it developed, A did not have sufficient funds in the bank at the time his check was tendered, and through an oversight the bank forgot about the agreement and returned the check unpaid. Holding that the lease had not terminated, the court said in effect that A's agreement with the bank was as good as money in the bank. Since the escrow agent is the agent of the lessor,⁶³ the latter should be bound by the contracts of the former within the actual or apparent scope of authority. If the agreement was not a true contract for want of consideration, the lessor should still be bound in this particular instance on the basis of promissory estoppel.

SURRENDER CLAUSE

A surrender clause entitles the lessee to surrender his interest in an oil and gas lease at any time with impunity. The early Texas cases held categorically that such a clause required consideration, but these cases were based on the premise that a mineral lease is itself a mere option contract and also requires consideration.⁶⁴ If the premise is correct, the conclusion is correct, but the premise has long since been rejected, the present Texas rule being that an oil and gas lease is a conveyance of a determinable fee⁶⁵ and as such requires no consideration.⁶⁶ There has been no square holding, however, that a surrender clause needs no consideration, and the recent *Adams v. Duncan*⁶⁷ case very definitely indicates that it does. There such a clause was adjudged operative *because*

⁶² Tex., , 214 S. W. (2d) 460 (1948).

⁶³ *Hunter v. Gulf Production Co.*, 220 S. W. 163 (Tex. Civ. App. 1920).

⁶⁴ *Robert & Corley v. McFaddin, Weiss & Kyle*, 74 S. W. 105 (Tex. Civ. App. 1903); *Guffey Petroleum Co. v. Oliver*, 79 S. W. 884 (Tex. Civ. App. 1904) *writ of error refused*; *Patton v. Texas Pacific Coal & Oil Co.*, 225 S. W. 857 (Tex. Civ. App. 1920) *reversed on other grounds*.

⁶⁵ *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290 (1923).

⁶⁶ *Jones v. Bevier*, 59 S. W. (2d) 945 (Tex. Civ. App. 1933) *writ of error refused*.

⁶⁷ *Superior Oil Co. v. Dabney* Tex. , 211 S. W. (2d) 563 (1948).