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Richard S. Woods

OIL AND GAS

RESERVATION OF ROYALTY DISTINGUISHED FROM MINERAL INTEREST

Oklahoma. In *Armstrong* v. *McCracken*[1] the problem of determining whether the grantors reserved a royalty interest or a mineral interest under a conveyance was presented. The reservation was of an undivided 1/16th interest in and to all oil and gas "produced" from the conveyed land. The right to lease and to collect all rentals and bonuses was conveyed to the grantee. The court held that the reservation was of a 1/16th of gross production free of costs of operation, emphasizing the fact that the owner thereof did not have the right to lease, or to bonuses and delay rentals. The court made a distinction based on phrases because of the case of *Swearingen v. Oldham.*[2] There a reservation of 1/16th of the oil and gas "in or under" the conveyed tract was retained in a conveyance which conveyed away the right to lease and to receive rentals and bonuses. The reservation was held to be of a mineral interest. In the case of *Hinkle v. Gaunt*[3] the exception from the conveyance of a 1/16th interest in oil and gas deposits read "that might be developed" on the conveyed tract. This was held to except a mineral interest, thus entitling the owner thereof to only 1/16th of royalties. But the *Hinkle* case is not squarely in point since the problem was to determine whether the interest was a 1/16th mineral interest or 1/2 mineral interest rather than to distinguish between a mineral interest and a royalty interest. The court said in that case, however, that recent mineral deeds use the phrase "of all oil, gas, and other minerals 'in and under' the above described land, or that may be 'produced' therefrom."[4] This phrasing would destroy the distinction made in *Armstrong* v. *McCracken.*

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[1] .....Okla....., 229 P. 2d 590 (1951).

[2] 195 Okla. 532, 159 P. 2d 247 (1945).

[3] 201 Okla. 432, 206 P. 2d 1001 (1949).

[4] 206 P. 2d at 1006.

In the Texas case of *Loeffler* v. *King*[5] the type of interest conveyed while a lease was outstanding was in question. The granting clause used the words "royalty interest." But the instrument went on to convey the money rentals, the right to execute future leases and all interest therein, and the right to bonuses. The court held the effect of this instrument was to divest the grantor of all his interest in the minerals and to convey all the mineral estate that the grantor had in the tract. This result was reached even though the interest conveyed was labeled a "royalty interest." The term "royalty" has definite meaning within the oil and gas industry and is not used interchangeably with the term "mineral interest" in Texas.[6] The court apparently did not consider the label placed on the interest by the parties to be wholly determinative as to the nature of the interest and looked to the distribution of the elements and rights pertaining to a mineral interest between the parties to determine the nature of the interest conveyed. This test would seem to be better adapted to ascertaining the intent of the parties when they have failed clearly to express their intent than the test applied in *Armstrong* v. *McCracken.* This test should be particularly useful in a state where "royalty interest" may refer to either a mineral interest or a bare royalty interest.[7] In fact, in such a state it is necessary to look to the other elements in the conveyance or reservation to tell whether the parties intended a mineral interest or a bare royalty interest. A Texas court has held that when looking to the intent in construing a mineral deed, the intent which controls is not that which the parties may have had, but failed to express, but the intention which by instrument they did express.[8]

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[5] .....Tex....., 236 S. W. 2d 772 (1951).

[6] Schlittler v. Smith, 128 Tex. 628, 101 S. W. 2d 543 (1937).

[7] Melton v. Sneed, 188 Okla. 388, 109 P. 2d 509 (1940).

[8] Loeffler v. King, 228 S. W. 2d 201 (Tex. Civ. App. 1950), *rev'd*, ...Tex....., 236 S. W. 2d 772 (1951).

PAYMENT OF DELAY RENTALS UNDER THE "UNLESS" TYPE LEASE

Texas. A recent Texas case has emphasized the problems involved in the payment of delay rentals under an "unless" type lease. In *Superior Oil Co.* v. *Stanolind Oil & Gas Co.*[9] the assignee of a lessee failed to make a timely delay rental payment and lost the lease. The lease form used was described as "C-88 R-Producers' 88 Special—Texas Form." The pertinent clause read as follows:

> If no well be commenced on said land on or before . . . [date], this lease shall terminate . . . , unless the lessee on or before that date shall pay or tender to the lessor . . . the sum of . . . [amount], which shall operate as rental and cover the privilege of deferring the commencement of a well for twelve (12) months, from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. . . .
>
> Should the first well drilled on the above described land be a dry hole, then and in that event, if a second well is not commenced on said land within twelve months thereafter, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. . . . [On resumption] the last preceding paragraph hereof, shall continue in force just as though there had been no interruption in the rental payments.[10]

The court held that the provisions of these two clauses when read together created an ambiguity as to the date on which the delay rentals were to be paid in the event a dry hole was drilled on this leasehold. The lessee's assignee made a proper tender of the rental money under the delay rental clause of the lease, but the tender was too late under the construction of the two clauses made by his assignor and the lessor. They had resolved the ambiguous terms so as to effect a change in the rental payment date on the completion of a dry hole, to the anniversary of the dry hole. This construction bound the assignee since the lease was held to be

[9] .....Tex....., 240 S. W. 2d 281 (1951).

[10] 240 S. W. 2d at 283.

ambiguous, and the lease automatically terminated. A like result was reached in *Humble Oil & Refining Co.* v. *Mullican*,[11] where a correction instrument was held to be ambiguous as to whether the delay rental date was to follow the date in the correction instrument or the date in the original lease. Although the correction lease was expressly stated to be in lieu of the old lease, the court held the instrument ambiguous and found the intent of the original parties to be for the original date to control. The lease terminated as to an assignee when he paid rentals under the correction instrument date. Under these well established principles—that an "unless" lease is a limitation and not a forfeiture,[12] that the lease must be strictly construed against the lessee,[13] and that since the purpose of the lease is oil and gas development,[14] time is of the essence in oil and gas leases[15]—the lessee has little remedy except his own extreme care in the making of rental payments and in the drafting of leases.

The exception to automatic termination for a defective rental payment is where the payee has in some manner been the cause of the mistake or misconstruction. Though the courts have indicated (but not expressly) that fault on the part of the payee will be found in extremely inequitable situations,[16] it seems that the exception is very limited.

When the defect in the payment is due to the actions of the transmitting agency and the transmitting agency has notice of the necessity for speed to avoid the loss of the lease, the lessee was accorded some relief in a recent Oklahoma case.[17] Though the lease

[11] 144 Tex. 609, 192 S. W. 2d 770 (1946).

[12] 2 SUMMERS, THE LAW OF OIL AND GAS (Perm. Ed. 1938) 230.

[13] Zeppa v. Houston Oil Co. of Texas, 113 S. W. 2d 612 (Tex. Civ. App. 1938) *er. ref.*; see Note, 14 A. L. R. 967 (1921).

[14] Texas Co. v. Davis, 113 Tex. 321, 254 S. W. 304, 255 S. W. 601 (1923).

[15] 31A TEX. JUR., *Oil and Gas*, § 154, p. 265.

[16] Humble Oil & Refining Co. v. Harrison, 146 Tex. 216, 205 S. W. 2d 355 (1947).

[17] Western Union Tel. Co. v. Jordan Petroleum Co. .....Okla....., 238 P. 2d 820 (1951).