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Abstracts and Oil Titles

By NORMAN E. HANSON*

Lawyers today are becoming increasingly cognizant of oil and gas law, and oil and gas titles and problems.

In some respects the treatment of oil and gas titles differs from the examination of surface titles.

The examiner of oil titles has a greater responsibility than the examiner of surface titles, because on the basis of his opinion very large sums of money may be spent in procuring an oil and gas lease and in developing and drilling the property.

The subject "abstracts and oil titles" is exceedingly broad. Only a very few phases of the subject can be considered and discussed within the confines of this paper. The comments herein will be general, and entirely from the point of view of the title examiner in actual practice. This is not designed to be a technical or authoritative treatise. Eminent authors, jurists and oil attorneys have written volumes on the subject herein considered; those authorities should be consulted for a more detailed treatment of this topic. The statements made will be based almost entirely on Montana statutes and decisions, however, it is assumed that much of what is said will be applicable in the states of North Dakota and Wyoming.

The statements herein are applicable only to ordinary fee titles. This discussion does not cover Indian land titles or U. S. Oil and Gas Leases, nor the title evidence and data thereon, nor the examination thereof. Those are special subjects, complex and voluminous in themselves.

1. Abstracts

(a). In general—

An "Abstract of Title" is a compilation or summary¹ of the documents and facts of record which affect the title to land. For oil and gas title examination, the abstract should be a full, complete, and unabridged compilation of all matters of record affecting the title to the particular tract of land. The purpose of the abstract is to disclose the exact state and condition of the title.

The abstract should contain or show all instruments and matters on file or of record in the county records of the county wherein the land is situated, —not only from the office of the county clerk and recorder, but also of any courts of record in the county. It should be certified as constituting a true and correct abstract of title to the lands covered thereby, and containing judgments, judicial proceedings, liens, taxes and assessments.

The abstract shows the record state of the title as of the date and time shown in the certificate. Obviously, if there are continuations or supplemental abstracts, the examiner must verify that there is complete continuity—that there is no gap or hiatus in time left uncovered.

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¹The Abstract of Title most commonly known and used is an epitome of the recorded conveyances, transfers and other evidences of title, and also of such facts appearing of record as may impair the title. *State ex rel Freeman v. Abstractors Board of Examiners*, 99 Mont. 564, 577, 45 Pac.2d 668 (1935).

Any abstract of title to real estate, certified to be true and correct by an abstracter duly registered in accordance with the Montana statutes, will be received by the courts of Montana as prima facie evidence of its contents.*

The title examiner must make sure that the description, as set forth on the cover or caption page or certificate of the abstract, is complete and accurate in all respects. If any of the description is shown by metes and bounds, he must satisfy himself that the description is entirely right and that it "closes," by reference to a plat or map or survey diagram.

If there are any exceptions, qualifications or limitations made or indicated in the abstract, either on the cover or caption page or in the abstracter's certificate or elsewhere, they must be scrutinized and carefully considered. For example, suppose the abstracter specifies (usually following the land description or on the certificate page) :

"excepting therefrom all easements and rights-of-way for roads, ditches, pipes and transmission lines, railway and public highways."

At first appearance, this exception may seem innocuous. If the abstracter actually has shown in the abstract everything disclosed by the county records as to rights-of-way affecting the land, and by his statement intends only to point out expressly that he does not certify regarding rights-of-way not shown or disclosed by the records, that is acceptable; but, either the abstracter must alter his statement to so stipulate or else the examiner must be satisfied otherwise as to the true situation. If there are any right-of-way instruments of record in the county affecting the particular land, and the abstracter has decided by himself that they are mere easements and not important enough to show in the abstract, the abstracter should be requested to show or furnish the record information as to the rights-of-way so that the examiner can determine the legal effect thereof.

(b). Necessity for full and complete abstract —

Why is it important that the abstract covering mineral or potential mineral land be a full and complete compilation? Why is the customary abbreviated abstract or summary not adequate for a reliable determination of oil and gas titles?

The proper construction and legal effect of any instrument can only be determined from an examination of the entire instrument and a consideration of all its terms and provisions. Clauses or provisions which appear to the abstracter to be of no consequence may be of importance to the lawyer, and might cause the lawyer to reach a legal conclusion different from the decision he would have made if the phrase or sentence had been omitted. Occasionally, the legal effect or construction of an instrument may depend largely upon the punctuation in a sentence; I have known instances where the presence or absence of a comma was given great weight.

Although a number of examples will be mentioned in the following pages, which will point up the wisdom of having an abstract which shows the full, true and correct contents of all instruments of record, I do not wish to be understood as taking the position that an abbreviated or summarized abstract can never be used or relied upon for oil and gas title examinations. Oil and gas lawyers examine many such abstracts of title. But, in examin-

*REV. CODES OF MONTANA § 66-2116 (1947).

ing them, the lawyer must constantly be aware of their possible shortcomings and omissions, and he must keep in mind all of the things hereinafter stressed, among others. In using the abbreviated abstracts, the lawyer is under a greater burden, and he must require that the full contents or the complete instrument be furnished in every instance where he surmises that the entire instrument may disclose pertinent terms or provisions which are not reflected in the "skeleton" abstract.

2. *Some title matters*

Consider briefly a few oil and gas title matters,—which incidentally will serve to illustrate the need for examining the complete contents of instruments.

(a). *Mineral grants v. royalty* —

Probably the most important instance in which it is imperative that the full and precise wording be furnished exists where mineral grants or royalty conveyances are made, or where mineral or royalty interests are reserved.

Of course, no question arises where the grant or reservation is clearly one of an interest in the minerals in place in and under the land, or where the language employed simply conveys or reserves a certain royalty of all oil or gas or minerals which may be produced and saved. The one is "mineral," and the other is "royalty." A full knowledge and awareness of the distinction between them is essential to any competent examination or drafting of oil and gas instruments or provisions. However, there are innumerable instances where some question exists as to whether the grant or reservation constitutes a mineral ownership or a royalty. Difficulties frequently arise, either because the draftsman of an instrument does not know, or overlooks, the differences between a mineral interest and a royalty interest and uses language which appears to include some of the attributes of each. The name or label given to the instrument by the parties, or used therein to denominate the interest conveyed or reserved, is not controlling, though those things will be given consideration; the terms of the instrument determine its nature, character and effect.³

In *Marias River Syndicate v. Big West Oil Co.*,⁴ the deed contained the following provision:

Reserving . . . a 12½ per cent interest and royalty in and to all oil and gas and other minerals of whatsoever nature, found in or located upon or under said land . . . , or that may be produced therefrom.

It was argued by counsel in the case that the use of the word "royalty" must be given effect and the reservation must be held to be strictly one of royalty. Although the reasoning of the decision is somewhat obscure, the Montana Supreme Court held that the reservation created a separate mineral interest in the land and not a royalty interest.⁵

³See 3 Oil and Gas Reporter 445.

⁴98 Mont. 254, 38 P.2d 599 (1934).

⁵Oil and gas lawyers, from other states as well as from Montana, often comment on this decision. Most of them disagree with it.

It is difficult to see how the court could so definitely adjudge the reservation to be a mineral interest as a proposition of law. There is at least as much basis for holding it to be a royalty interest. In truth, the reservation is ambiguous and uncertain, and evidence should have been required to determine the intention of the parties.

The decisions are legion, involving the proposition of construction of instruments to determine whether a mineral interest or royalty interest was intended and effected.

(b). Prior reservations or grants —

Similarly, where there have been prior mineral or royalty reservations or grants in the chain of title, the relative mineral and royalty rights of all parties in interest can only be ascertained from an examination of the entire instruments.

Suppose A owns Blackacre in fee simple, and conveys it to B, reserving to A an undivided $\frac{1}{2}$ of all the minerals in and under Blackacre. Then B conveys Blackacre to C, by warranty deed, and therein B reserves unto himself $\frac{1}{2}$ of all the minerals. If B puts nothing in his warranty deed otherwise, and particularly says nothing at all about any prior mineral reservation, C will own $\frac{1}{2}$ of the minerals.⁶ In this situation, the courts take the position that, by virtue of B's warranty, C is entitled to have and receive full ownership of all of Blackacre save only $\frac{1}{2}$ of the minerals; and, accordingly, it will be considered that the reservation was made by B only for the purpose of protecting him on his general warranty.

If B, in his deed, unmistakably subjects his conveyance and grant to all prior mineral and royalty reservations and deeds, B's reservation of $\frac{1}{2}$ of the minerals will then effectively retain the remaining $\frac{1}{2}$ of the minerals for himself, and C will receive no mineral interest at all in Blackacre.

In an abbreviated or condensed abstract of title, the appropriate language or clause, making the grant "subject to" all prior mineral reservations, is often omitted; you can see what a completely different result will obtain if that language is missing when the lawyer examines the abstract.

Of course, B could also have achieved an effective reservation to himself of $\frac{1}{2}$ of the minerals by providing clearly in his deed that he was reserving to himself $\frac{1}{2}$ of the minerals in addition to or over and above all previous mineral reservations.

Where there are prior mineral or royalty reservations or grants in the chain of title, it will be difficult and risky for a draftsman to provide for a further partial mineral or royalty reservation, and fully achieve what he desires, unless that draftsman is fully apprised of the exact mineral and royalty interests previously severed or created and outstanding.

The situation can be just as complex with royalty. Suppose that A, owning Blackacre, conveys it to B, reserving to a A $6\frac{1}{4}\%$ royalty of all oil, gas and minerals which may be produced and saved from the land. At that point B owns the full interest in the minerals in and under Blackacre, subject however to A's $6\frac{1}{4}\%$ royalty. Then, B conveys Blackacre to C, by warranty deed, reserving to B $\frac{1}{2}$ of the minerals in and under Blackacre. If B makes no provision in his deed concerning A's royalty, B's reserved $\frac{1}{2}$ mineral interest will be subject to and burdened with the full amount of A's $6\frac{1}{4}\%$ royalty. By appropriate provision B can shift the royalty burden or equalize it; but, the language which B employs to accomplish his purpose must be carefully selected and considered,—his object must be clearly and unmistakably shown.

⁶Howell v. Liles, 246 S.W.2d 260 (Tex. Civ. App.) 1951). See discussion at 2 Oil and Gas Reporter 509 and note 2. Also, see 2 Oil and Gas Reporter 1359, and cases and authorities there enumerated.

(c). Rights-of-way —

Right-of-way instruments also must be perused in full for a proper decision as to whether fee simple title to the strip is conveyed or a mere easement results.

In *Basin Oil Co. of California v. City of Inglewood*,⁷ and in *Las Posas Water Co. v. Ventura County*,⁸ the California courts construed deeds covering strips of land for streets or highways; the applicable statutes are identical to those existing in Montana.⁹ The California courts held that these conveyances transferred fee simple title to the strips described.¹⁰

(d). Old oil and gas leases —

Where there are old unreleased oil and gas leases of record, the abstract should show the primary term and all provisions pertaining to expiration of the lease or providing for its continuance and the conditions thereof. If no release is obtainable, and proof that the lease has expired is to be furnished by affidavit or otherwise, the examiner must know the terms and provisions of the old lease (including all the lands covered thereby) before he can be satisfied that it is effectively terminated.

Sometimes an old lease, unreleased of record, will provide for payment of delay rentals indefinitely after the expiration of the primary term, and will specify that the lessor shall have the right to declare a forfeiture of the lease if delay rental payment is not made within a fixed time following written notice therefor by lessor to lessee. In the case of *McDaniel v. Hager-Stevenson Oil Company*,¹¹ where the oil and gas lease contained such a provision, the Montana Supreme Court held that notice to the lessee to pay rentals is unnecessary, that declaration of forfeiture by the lessor is wholly unnecessary, and that the lease ceases automatically and expires by limitation at the end of the fixed term in the absence of production (or in the absence of payment of delay rental under the lease considered in the decision, which the court pointed out was an anomaly).¹²

(e). Old mortgages —

Where old mortgages, unsatisfied of record, appear in the abstract, the most important single item is the maturity date or final due date of the mortgage obligation. In Montana the mortgage is a lien on the real property from the time it is recorded until 8 years and 60 days after the maturity of the entire debt or obligation secured; within 60 days after the 8 years the mortgage owner may file an affidavit of renewal; if such a renewal affidavit is properly made and filed of record, the mortgage lien continues for a further period of 8 years.¹³

An old mortgage may be safely waived, if the lien thereof has expired and no renewal affidavit or extension agreement whatever appears of record,

⁷3 Oil and Gas Reporter, 125 Cal. App. 2d 661, 1226, 271 P.2d 73 (1954).

⁸97 Cal. App. 296, 275 Pac. 817 (1929).

⁹REV. CODES OF MONTANA §§ 32-107, 67-1608, 67-1518 (1947). All were adopted by Montana from the California Civil Code.

¹⁰See also *Haines (Boothe) et al v. McLean et al*, 4 Oil and Gas Reporter 683 (Tex. Sup. Ct. 1955). And see discussion note at 4 Oil and Gas Reporter 696.

¹¹75 Mont. 356, 243 Pac. 582 (1926).

¹²See also *Steffes v. Allen*, 295 Mich. 510, 295 N.W. 245 (1940); *Lewis v. Grininger*, 198 Okla. 419, 179 P.2d 463 (1947).

¹³REV. CODES OF MONTANA § 52-206 (1947).

provided title to the mortgaged land is not still vested in the mortgagor, and provided either the present owner of the land or the lessee is a bona fide purchaser without notice.¹⁴

(f). Record reference to unrecorded instrument —

A record reference to some unrecorded instrument should not be overlooked either in the abstracting or in the examination.

This can be best illustrated by an actual case. A, owning Blackacre, gave X an oil and gas lease, which was not recorded. Thereafter A gave B an option to purchase the land; the option, by its terms, was made subject to the lease to X; the option was duly recorded. Later, A conveyed Blackacre to C by warranty deed. Upon the commencement by exploration for oil and gas under the lease, C sought to restrain and enjoin the operations. The question which arose was whether C purchased the land with notice of the unrecorded oil and gas lease. On these facts, the Montana court held in *Guerin v. Sunburst Oil & Gas Co.*,¹⁵ that C took the land with constructive notice of the option and of the contents thereof, including the recital therein about the oil and gas lease, and that C was chargeable also with notice of all material facts which an inquiry suggested by that recital would have disclosed; the court held that C was chargeable with notice of the contents of the oil and gas lease even though it was not recorded.¹⁶

(g). Miscellaneous —

Full and complete acknowledgments should be shown for instruments recorded after June 30, 1947.¹⁷ An acknowledgment may be void, as where it is taken by a Notary Public on a corporate instrument when the Notary Public is an officer of the corporation and as such is a party to the instrument as a representative of the corporation;¹⁸ or, it may be otherwise defective or insufficient, such that the acknowledged instrument does not constitute constructive notice even though recorded.

Even with such comparatively simple instruments as quitclaim deeds the full contents must be furnished if any question of after-acquired title is involved in order to ascertain whether the instrument is one under which after-acquired title will be held to have passed.¹⁹

3. *Facts not shown in the abstract*

It must be recognized that there are non-record items and matters, which accordingly will not be disclosed by the abstract, which could affect or change the title situation shown by the abstract. In general, these are:

(a) rights or claims of parties in possession;

¹⁴See *Aitken v. Lane*, 108 Mont. 368, 374, 92 P.2d 628 (1939); 1 MONT. LAW REVIEW 74; IV AMERICAN LAW OF PROPERTY, § 16.168.

¹⁵68 Mont. 365, 218 Pac 949 (1923).

¹⁶Other facts shown in the decision were: just before A conveyed to C, X assigned the oil and gas lease to Y, who in turn assigned it to Z, both such assignments being duly recorded. These assignments were not discussed by the court. Since the oil and gas lease was unrecorded, the recorded lease assignments would not furnish constructive notice of the lease.

¹⁷The last validating statute was REV. CODES OF MONTANA § 39-133 (1947) effective July 1, 1947.

¹⁸REV. CODES OF MONTANA § 56-106 (1947).

¹⁹See *Henningsen v. Stromberg*, 124 Mont. 185, 221 P.2d 438 (1950).

- (b) whether land has been riparian, or title has been affected by alluvial changes, though the land is no longer riparian;²⁰
- (c) facts an accurate survey would show;²¹
- (d) roads, ways and easements, not shown of record;
- (e) mechanic's and materialmen's lien claims not shown of record, because of improvements on the land;²²
- (f) homestead (in North Dakota and Wyoming) dower (in Montana);
- (g) judgments in U. S. District Courts, not of record in county;
- (h) zoning ordinances, if city property;
- (i) claims of persons under unrecorded instruments;
- (j) fraud, incapacities of grantors, forgery of instruments, lack of delivery, acknowledgment of grantor never actually taken (although proper certificate of acknowledgment appears of record), etc.;
- (k) parts of instruments not recorded, through error or omission in transcribing onto the county records, or because of deletion from original instrument before recording, etc.

As regards items (a) through (h) above, the title opinion will expressly except them,²³ or be made subject to them, or otherwise attention will be called to them or appropriate requirements made for the furnishing of satisfactory proof to obviate them.

Items (i) through (k) above comprise possible, but improbable, situations which cannot be discovered from the records or an inspection of the land. It is not considered necessary to call attention thereto,²⁴ unless their presence is in some manner suggested or indicated from the abstract or title data examined.

Certainly, however, anything in the title data which raises some question should be investigated. As an example, consider this actual case. The abstract showed that A, owning Blackacre, conveyed it to B. Thereafter A gave an oil and gas lease to X Company, and B separately gave an oil and gas lease to Y Company. In that situation, inquiry should be made to ascertain why A has given an oil and gas lease to X Company after having apparently conveyed the entire interest in Blackacre to B. It developed that in the deed A had reserved 50% of all the oil, gas and minerals in and under Blackacre. However, B felt that the mineral reservation was unfair, and took it upon himself to eradicate the mineral reservation from the instrument before he recorded it. Under these circumstances, certainly A remained the owner of ½ of the minerals, his ownership not being affected by

²⁰i.e. avulsion; or situations where the water no longer crosses over or adjoins the particular tract being examined.

²¹i.e.: riparian land, accretion, erosion, alluvial changes; conflicts of surveys or lines.

²²REV. CODE OF MONTANA § 45-501 (1947).

²³A qualification or limitation sometimes expressed in a title opinion is as follows: "We render no opinion as to the following: possessory rights, discrepancies of survey or location, rights of way, or claims not reflected by the data examined, the existence of which will be reflected or may be determined from a physical examination or inspection of the land; and mechanic's liens or other statutory liens not reflected by the data examined."

²⁴A bona fide purchaser for value will be protected, to a considerable extent, against most of such matters by the recording acts, statutes or limitation, and other statutory bars and equitable defenses.

B's wrongful act. Y Company had only a half-interest oil and gas lease, despite the fact that the title to the full interest in Blackacre appeared to be vested in B according to the record.

May I suggest a precaution which I take concerning U. S. patents? In patents issued prior to July 17, 1914 the U. S. A. did not reserve any interest whatever in the oil and gas (or in any of the minerals, excepting coal). In some of the patents issued after July 17, 1914, the U. S. A. reserved the oil and gas, and in some of the patents issued after December 29, 1916 the U. S. A. reserved all the minerals. For all U. S. patents issued after July 17, 1914 I suggest that a photocopy thereof be obtained from the Bureau of Land Management or from the U. S. Land Office. The U. S. Land Office at Billings now has, on microfilm, all of the patents issued after July 17, 1914, covering lands in Montana, North Dakota and South Dakota, and it can furnish a photocopy of any thereof on request for \$1.00 each. In view of the ease with which photocopies of these patents can be obtained, at very small expense, it would seem prudent to do so before actually drilling upon the land. I follow this practice because I know of several actual cases where the oil, gas or mineral reservation contained in a U. S. patent was not transcribed onto the county records for some inexplicable reason. In one instance in northern Montana, the U. S. patent was recorded in the county in 1920, but the record thereof showed no oil or gas reservation. A host of oil and gas leases, conveyances, and oil agreements affecting the land were placed on the county records during the years 1920 to 1952,—all on the premise that the patentee had received the fee simple title. In 1952 a photocopy of the patent was obtained and recorded in the county, and thereby it became evident that the U. S. A. had reserved and still owned the oil and gas in and under the land.

The question whether or not the judgment of a federal court rendered in Montana becomes a lien, even though not filed in the county wherein the land is situated, has not been judicially determined. The appropriate federal statute²⁸ provides that every judgment rendered by a U. S. District Court within a state shall be a lien on the property located in such state, and that the state law requiring the docketing of such a judgment in the county before such lien attaches shall apply only if the state law makes provision for equal treatment between federal judgments and state court judgments from the standpoint of docketing and time of attachment of the lien. If the state statute provides the necessary conformity, the federal court judgment does not become a lien upon real property of the judgment debtor until it is filed with the Clerk of the District Court of the county wherein the land lies; but, if the state statute fails to provide the necessary degree of conformity, the federal judgment becomes a lien as soon as docketed in the office of the Clerk of the Federal Court²⁹ and without more it extends to all lands of the judgment debtor located anywhere within that federal court district.³⁰ It would seem that the Montana statute³¹ provides the requisite conformity and equality. However, at least some doubt has been ex-

²⁸28 U.S.C.A. § 1962.

²⁹The entire state of Montana is one federal district.

³⁰IV AMERICAN LAW OF PROPERTY § 18.77; THOMPSON, REAL PROPERTY § 5533.

³¹REV. CODES OF MONTANA § 93-5714 (1947).

pressed as to whether it furnishes the exact equality and complete conformity established as the test by the U. S. Supreme Court.²⁹ Two eminent authors on real property, Patton and Parsons, have said that in the Montana statute there is the required conformity; but a third authority, Evans, indicates there is no satisfactory solution to the question. In the absence of judicial determination as to the effectiveness of the Montana statute, it is impossible to say with certainty whether the statute meets the test; therefore, for complete safety, some title examiners require a judgment search of the docket of the federal courts of the district.³⁰

If the title data examined in any way indicates or suggests that the lands have been or are riparian lands, or are covered or affected by a stream or lake or body of water, further investigation is required. Sometimes the informal map or plat, which usually follows the caption page in complete abstracts, will show a river, stream or lake adjoining; or these facts may come to your attention as a result of any physical inspection made of the premises. It will then be necessary to determine just what changes have occurred, over the years, in the course and channel of the river or in the banks and boundaries of the body of water. The U. S. government plats of survey covering the land will have to be examined, and possibly also the notes of the U. S. Surveyor and Engineer. A current survey will probably be advisable or necessary. Without facts showing all changes which have occurred, how and when the changes were effected, and concerning the alluvial changes and accretions and any avulsion, no reliable determination can be made of what legal effect has resulted to the title to the affected lands. Even with such facts, an examiner's only recourse in many cases will be to indicate the necessity for a court action, to fully and conclusively determine and establish the title situation and the rights of all parties.³¹

There may be other facts, pertaining to oil and gas leases, which will not be shown in the abstract. It is necessary that it be determined that the oil and gas lease, of the party for whom the title is being examined, is currently in full force and effect. If any delay rentals have accrued under the oil and gas lease, a determination must be made that all such delay rentals have been timely, properly and fully paid in all respects; the title examiner will either require proof thereof, or will specify in his opinion that the lease-owner should satisfy himself on that score. Of course, if the oil and gas lease provides that it will terminate if drilling is not performed within a designated area, either on or outside the particular tract covered by the lease, the examiner must be furnished with proof from which he can determine whether or not such drilling was performed.

4. *The title opinion*

Writing the title opinion is the final act in a title examination, and the purpose for which all the work has been performed. There is no standard or set form for the title opinion, except such as may be prescribed by the client. Every lawyer develops his own variations. A suggested outline,

²⁹See complete discussion of the problem in 8 MONT. LAW REVIEW at 65.

³⁰This applies regardless of whether or not the federal court clerk's office is located within the county of the situs of the land involved in the examinations.

³¹See IV AMERICAN LAW OF PROPERTY § 18.26.

showing only headings and sub-headings considered desirable, is appended hereto.²²

In an oil and gas title opinion, it is not sufficient merely to set forth the ownership and state of the title to the land. The oil and gas lease is the most important instrument to the lessee or lease-owner; he desires to know explicitly what his ownership, rights, privileges and obligations are under that lease contract. He expects the lawyer, in addition to setting forth the title ownership and all title defects or objections, to indicate clearly and unmistakably in the title opinion all matters whatever which may in any way impair, detract from, or reduce the full leasehold estate.

Therefore, the lawyer must examine the oil and gas lease carefully. The necessary parties to the lease must be ascertained; and the lawyer must determine that all of them have duly executed the lease, that the lease has been properly acknowledged and appropriately recorded, and that the lease effectively covers and includes the full and entire interest in the oil and gas (and possibly other minerals) in the land.

Oil and gas leases which cover only a partial interest raise additional questions. Illustrative of this proposition is the holding of the Texas Court of Civil Appeals in *Texas Co. v. Parks*.²³ In that case the oil and gas lease described and covered an "undivided one-half interest" in Blackacre, which contained 320 acres. The lease provided for the payment of \$160.00 per year delay rental. The lessee paid \$80.00 delay rental, which the lessor refused to accept as being insufficient. The lessor contended that he was entitled to the full delay rental which was specified in the lease, the entire \$160.00. The lease contained the usual "lesser interest" clause; and the company contended in the lawsuit that it was entitled to reduce the rental

²²Petroleum Oil Company
 Billings, Montana
 Gentlemen:

Re: File No.
 DESCRIPTION OF LANDS
 Acreage
 County
 John Doe lease

TITLE OPINION

ABSTRACT EXAMINED:
 INSTRUMENTS EXAMINED:
 TITLE TO THE LAND:

Subject only to the objections and requirements hereinafter set forth, the above abstract and instruments show fee simple title to the captioned lands to be vested as follows:

Surface -
All Minerals, including oil and gas -

OIL AND GAS LEASE:
 TITLE TO LEASEHOLD AND ROYALTIES:
 ENCUMBRANCES:

Mortgages -
 Judgments -
 Taxes -
 Other liens -
 Unreleased oil and gas leases -
 Easements and rights-of-way -

TITLE COMMENTS:
 OBJECTIONS and REQUIREMENTS:

²³247 S.W.2d 179 (1952), 1 Oil and Gas Reporter 555, 2007.

in proportion to the lessor's interest in the entire fee simple estate, in other words by one-half. The court held that the lessor was entitled to receive an annual rental of \$160.00, because the lease stipulated a lump sum payment of \$160.00 and there was no failure of title as to the leasehold interest *specifically granted and leased* by the lessor. The court held that the lessee could not rely upon the reduction clause to decrease the specified rental, in view of the fact that the lease clearly described only the "undivided one-half interest" which the lessor owned.

Whether or not lawyers generally agree with that decision, the title examiner cannot ignore it. If he is confronted with such a situation, he must take the safe course and point out the risk that other courts may hold likewise. Moreover, in the situation mentioned immediately above, the risk exists that some courts may apply the same principle to payment of royalty. Where a lease by its terms purports to cover only a partial interest, the courts may rule that the lease-owner is not entitled to decrease the stipulated royalty; if so, the lease-owner will be obliged to pay that one lessor a full $\frac{1}{8}$ of all oil or gas produced and saved, even though the lease is only a partial-interest lease. The court in *Texas Co. v. Parks* indicated that its holding would not necessarily govern as to royalty payment; but, it is difficult to see why the same principle would not apply.

Under the heading "oil and gas lease" in the title opinion, some pertinent information concerning the integral parts and provisions of the lease should be stated. Usually the oil and gas lease will be tabulated in some form. If the lease has been altered or changed from the ordinary, or if it contains special provisions or additional requirements which are not customary in the usual form of lease, those things should be pointed up in the opinion in such fashion that they will not be overlooked.

5. *Curative instruments and information*

The instruments, proof or data necessary to meet the objections or requirements set forth in the title opinion are very important. Too often the curative material and facts are given little consideration, either because the person obtaining the curative considers it of no great consequence or because of the desire to expedite the acquisition of the oil and gas lease or drilling in the area. The lawyer cannot accept less than full compliance with his requirements.

Oil titles are attacked or litigated only when they become valuable or prospectively so. It is an old maxim in the oil industry that "a dry hole cures the title." Conversely, however, when production has been discovered or is imminent, curative instruments usually cannot be secured and litigation is the only course open to the parties.

Where old oil and gas leases have apparently expired by reason of non-development or non-payment of rentals, but have not been released of record, the lawyer will usually accept proof by affidavit or otherwise of non-development, non-production, and non-payment of rentals, satisfactorily evidencing that the lease has terminated by its own terms. It is preferable, of course, to obtain a release of such leases if possible (and if practicable, when consideration is given to the factors of expense and time). In cases where the primary term has not expired, a release should be required; if, for good

reason, such a release is not obtainable, strong and credible evidence should be presented to the lawyer, sufficient to convince him that the lease has indeed expired or terminated, because such a situation is fraught with the risk that there may be a controversy between the parties as to the sufficiency of delay rentals or performance of terms of the lease, etc.

Obviously, it is not sufficient that such an affidavit of non-development covers only the lands under examination or described in the lease under title consideration. The affidavit must describe and cover all of the lands which were covered by the old unreleased lease, since otherwise it is at least possible that production from other lands have kept the old lease in force and effect as to all the lands.

A "proof of possession" affidavit is insufficient if it recites simply that the lessor is in possession. The affidavit or proof should show clearly and positively that no person whomsoever except the lessor is in possession or occupancy of the land or any thereof. And, it is prudent that at least some facts concerning the use of the land, and as to the persons using it, be recited, in order that the meaning of "possession" is not left entirely to the conclusion of the affiant.*

Affidavits of heirship are certainly not conclusive of the facts therein shown. They are simply some proof. A summary statement as to the "heirs" of a decedent is unsatisfactory, because standing alone it is a pure legal conclusion. In any such affidavits or proofs, it is always desirable that facts be stated, and that some information be shown regarding the means of knowledge or qualifications of the affiant. Is he an old-timer, long a resident of the county, or a neighbor, who is well-acquainted with the land? Is he a close friend, family doctor or lawyer, or otherwise particularly situated or qualified to know whereof he speaks? If no other good affiant is available, sometimes the affidavit of the owner will be accepted. But, usually his affidavit should be only additional, or in support of other proof.

If any mineral interest whatever remains outstanding, not effectively covered by the client's oil and gas lease, it must be committed by the obtaining of an oil and gas lease or appropriate ratification instrument. Where an ambiguous mineral-royalty instrument appears, the examiner will require that the parties stipulate as to the nature of the interest intended to be reserved or conveyed, or that they clarify in writing what their specific interests are. If it is impossible to obtain a stipulation or clarification, or an appropriate ratification, the only thing to do is to treat the interest as a possible mineral interest and secure a lease from the owner or owners thereof, and then let the respective parties determine their interests in production if oil is discovered and before the royalty is distributed. If the title instrument is not ambiguous, but is clearly erroneous, a correction instrument should be obtained.

*On one occasion, an affidavit was furnished containing the general statement that no one was in possession of the land. It was subsequently shown that no one resided upon the land, but that a tenant who resided on adjoining land was farming the tract under an agreement with the owner. Because no person actually resided upon the land, the affiant said it was his opinion that no one was in "possession" thereof.

Conclusion

It is not suggested that the oil title examiner should be over-meticulous. But he certainly should, by all standards, exercise greater care in resolving reasonable doubts as to the mineral title than would perhaps be exercised in most ordinary title examinations. A such an examiner must be constantly alert to ferret out, recognize and investigate any circumstances appearing in the chain of title which indicate some title question. He must never *assume* anything; a diligent adversary will uncover and show the actual facts, if production is obtained and litigation arises.

A famous English barrister of two centuries ago said that a lawyer must painstakingly adhere to accuracy and must have "an ignominious regard for details." This is especially true of the oil title examiner.