

1951

N. J. Meagher v. Uintah Gas Company et al : Brief of Appellants Ray Phebus, Paul Stock and Joe T. Juhan

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

N. J. MEAGHER,

Plaintiff and Respondent

 **Hillman**

**UINTAH GAS COMPANY and
VALLEY FUEL SUPPLY COM-
PANY,**

Defendants,

**RAY PHEBUS, ASHLEY VALLEY
OIL COMPANY, PAUL STOCK
AND JOE T. JUHAN,**

Defendants and Appellants.

**BRIEF OF APPELLANTS RAY PHEBUS,
PAUL STOCK and JOE T. JUHAN**

**Appeal From the District Court of the Fourth Judicial
District in and for the County
of Uintah
Honorable Wm. Stanley Dunford, Judge.**

FILED
SEP 12 1951

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IN THE SUPREME COURT of the STATE OF UTAH

N. J. MEAGHER,

Plaintiff and Respondent

— vs. —

UINTAH GAS COMPANY and
VALLEY FUEL SUPPLY COM-
PANY,

Defendants,

RAY PHEBUS, ASHLEY VALLEY
OIL COMPANY, PAUL STOCK
AND JOE T. JUHAN,

Defendants and Appellants.

Civil No. 7723

BRIEF OF APPELLANTS RAY PHEBUS,
PAUL STOCK and JOE T. JUHAN

This action, by reason of amendments made subsequent to the first appeal and the decision of this court herein, now involves the legal effect of a document designated "Release", Exhibit A-30, executed by appellant Stock in favor of respondent Meagher under date of October 21, 1944. These appellants contend that the document is a nullity and had no legal effect. The respondent contends that the document is effective to

transfer from appellant Stock to respondent Meagher an undivided one-half interest in the oil mineral leasehold estate in 440 acres of land. An issue with regard to what is referred to in the record as the North Forty and likewise resolved in respondent's favor by the trial court will be presented separately by appellant Ashley Valley Oil Company in a separate brief and argument. The North Forty is a part of the leasehold which comprises in all 480 acres, of which the 440 acres first above mentioned is a part.

STATEMENT OF THE FACTS

This action, a suit to quiet title to real property in Uintah County, Utah, commenced by the filing of a complaint on October 17, 1944, was before this court in *Meagher v. Uintah Gas Co. et al.* (1947), 112 Utah 149, 185 P. 2d 747, and incidentally in *Phebus et al. v. Dunford, Judge, et al.* (1948), 198 P. 2d 973.

The first decision was on appeal from a decree quieting title in favor of respondent Meagher, the trial court having held that the oil and gas lease of June 4, 1924, Exhibit A-1, as modified on May 21, 1927, Exhibit A-3, had terminated as to oil rights by the express provisions of the lease and had been abandoned as to gas rights. The trial court decreed on April 15, 1946 (R. 53) that the oil and gas lease of June 4, 1924 and modification agreement of May 21, 1927 were invalid and of no force or effect and cancelled, the defendants in the action, and

each of them, being thereby perpetually enjoined from asserting any claim to the premises or any part thereof. This court reversed the decision of the lower court and remanded the case for proceedings to conform to the opinion, holding, among other things, that the lessee had not given up the lease either by acts consistent with its forfeiture terms nor by acts that would justify a conclusion of abandonment. Following the decision on the first appeal of this case a petition for re-hearing was filed and under date of March 15, 1948 denied. The remittitur was issued March 16, 1948 (R. 65).

The case of *Phebus et al. v. Dunford, Judge, et al.*, supra, was a mandamus proceeding arising out of the action taken by the trial court ostensibly pursuant to the decision of this court in the first appeal, the trial court having vacated and set aside its former decision except as to Ray Phebus, the petitioner in the mandamus proceeding. In the mandamus proceeding this court held that its decision (*Meagher v. Uintah Gas Co. et al.*, supra), when filed in the lower court, automatically set aside in its entirety the lower court's decision and for the sake of clearing the record the lower court should enter an order setting aside without limitation its entire decision. Such an order was entered February 8, 1949 (R. 66).

Oil was discovered in commercial quantities on September 18, 1948 (R. 255) on the property covered by the original lease and modification agreement. Such discovery was the result of drilling by Equity Oil Company,

as operator, under an operating agreement with Weber Oil Company, Paul Stock and Joe T. Juhan, who claimed the working interests in the leasehold, Exhibit A-25. Weber Oil Company is a wholly owned subsidiary of Equity Oil Company (R. 259). From September 18, 1948, date of discovery of oil (R. 255), and up to and including May 31, 1950 gross crude oil sales amounted to more than \$672,000.00, from which amount something slightly over \$105,600.00 had been withheld on account of royalties and approximately \$574,000.00 on account of operations and expenditures; indicating substantial values apparent on the date of discovery, September 18, 1948.

Meagher's original complaint filed October 17, 1944 (R. 1), his amended complaint of February 19, 1945 (R. 14) and the second amended complaint filed April 18, 1945 (R. 17) were all on the theory that Meagher was the fee owner of the 480 acres involved in the controversy unencumbered by any leasehold. On October 10, 1945 Meagher filed his verified reply (R. 41) alleging, in effect, that the lease of June 4, 1924 and the modification agreement of May 21, 1927 were void and of no force or effect due to the lessee's failure to fulfill the obligations thereof; that there had been no actual drilling for gas or oil for over fifteen years; that the lease and modification agreement had expired by the terms thereof; that the purposes and objects of the same had not been accomplished; and that the leasehold estate had been abandoned. The reply was directed to answers theretofore filed by Ray Phebus, Ashley Valley Oil Company

and Joe T. Juhan, which answers were practically identical in asserting that the lease of June 4, 1924 and the modification agreement of May 21, 1927 were in full force and effect and entitled the defendants to have the same confirmed and adjudicated as being in full force and effect as against Meagher and all persons claiming by, through or under him (R. 20-40). Ray Phebus was permitted to adopt the answer of Joe T. Juhan at the first trial in January, 1946 (R. 43). Such were the pleadings at the time of the first trial, at the time of the decree entered April 15, 1946 and at the time of the remittitur from this court in connection with the first appeal on March 16, 1948 and, in fact, until August 3, 1949 when the court ordered the filing of an amended reply to the answers of Juhan, Phebus and Ashley Valley Oil Company (R. 85). By the amended reply Meagher claimed an undivided one-half interest in the oil mineral leasehold estate, which claim was later identified as being by virtue of Exhibit A-30.

Prior to the date last mentioned Meagher served upon Juhan, Phebus and Ashley Valley Oil Company a notice of motion for order authorizing filing of a third amended complaint, attaching to the notice the proposed pleading (R. 67). On June 9, 1949 Meagher withdrew his motion to file the third amended complaint (R. 80) and on the same day served a motion for order authorizing filing of an amended reply to defendants' answers (R. 81). Objections were made to plaintiff's motion to re-open and to file the amended reply (R. 83) and on

August 3, 1949, by order dated on said day, the trial court overruled and denied the objections and permitted the filing of the amended reply. The order contained, among other things, the following:

"It now appearing that further pleading on the part of the parties may be desired and that the regular setting of the trial calendar for the Fall term in Uintah County is to be held during the court session of the court at Vernal, Uintah County, Utah on the 19th day of August, beginning at 10 o'clock a.m., and it appearing that there is no need for making a special setting in view of such facts, the motion for special setting is denied." (Italics ours).

The name Paul Stock was carried in the caption of the order of August 3, 1949 for the first time since after the filing of the amended complaint on February 19, 1945 (R. 85). Stock was a party defendant as the case was originally filed and was never dismissed out of the action. The order for publication of summons was filed October 17, 1944 (R. 11). The affidavit of attorney for plaintiff filed the same day (R. 10) states that to the knowledge of affiant the defendants Ray Phebus, Paul Stock and Joe T. Juhan reside outside of the State of Utah. In the order for publication of summons it is recited that the defendants are unknown or either dead or reside outside of the State of Utah and cannot, after due diligence, be found therein, and directs summons to be served by publication. Publication of the summons, carrying the name of Paul Stock as one of the parties

defendant, was duly made, with the proof thereof filed February 7, 1945 (R. 13), the same stating, in due form, that the first publication was on the 4th day of January, 1945 and the last publication on the first day of February, 1945, in the Vernal Express, a newspaper of general circulation published once each week at Vernal, Utah.

After the filing of the order of August 3, 1949 carrying the name of Paul Stock as one of the defendants and the suggestion of further pleading "on the part of the parties," Stock, on the 17th day of August, 1949, filed his answer to plaintiff's second amended complaint, and in connection therewith a counterclaim praying that a purported release executed by him on the 21st day of October, 1944, in favor of Meagher, be cancelled and decreed of record to be null and void and that it be decreed that the plaintiff and those claiming or to claim by, through or under him have no right, title or interest in or to the leasehold estate by reason of the purported release, or otherwise (R. 92).

Juhan and Phebus demurred to Meagher's amended reply (R. 91) and Meagher, in turn, on the 15th day of October, 1949, served a reply to the Stock answer and counterclaim (R. 107) which latter pleading was thereafter amended (R. 115). Stock demurred (R. 117) to the reply as amended and moved to strike portions thereof (R. 119). On November 25, 1949 Meagher served a second amended reply to the answer of the defendants Joe T. Juhan and Ray Phebus (R. 121) to which Juhan and

Phebus separately demurred (R. 125, 129) and separately moved to strike portions thereof (R. 127, 131). The demurrer of Stock to plaintiff's reply as amended, his motion to strike and the separate demurrers and motions to strike filed by Juhan and Phebus were overruled and denied by the court on March 28, 1950 (R. 134).

The second trial of the action was tried to the court without a jury at Provo, Utah County, rather than at Vernal, Uintah County, on the 26th day of June, 1950 (R. 135), at which time the court permitted the plaintiff to further amend his second amended complaint, introducing into the case for the first time an issue concerning a 2% landowners royalty. The court received in evidence the "A" series of exhibits, marked A-1 to A-62, both inclusive, with the exception of Exhibits A-43, A-44 and A-45, which were not presented to the court. The cause was presented largely upon the "A" series of exhibits offered and received in evidence, stipulations of counsel and the testimony of Paul Stock and Katherine M. Ivers.

On March 6, 1951 the trial court filed a 55-page memorandum decision (R. 140). Proposed findings of fact and conclusions of law were submitted on behalf of Meagher and thereafter and on the 4th day of June, 1951 adopted by the court (R. 200), notwithstanding objections to the proposed findings dated April 14, 1951 (R. 196) and overruled and denied by a supplemental memorandum dated June 4, 1951 (R. 197). The objections urged to the proposed findings were that they were

contrary to the evidence, facts and the law, and further that they were contrary to the 55-page memorandum decision. The inconsistency between the memorandum decision and the proposed findings was conceded by plaintiff's counsel (R. 327). The decree from which this appeal is taken is dated June 4, 1951 and was filed in the office of the Clerk of the District Court, Uintah County, Utah, June 8, 1951 and entered on said day (R. 220).

The "A" series of exhibits supplants the exhibits at the first trial and includes photostats and other stipulated evidence relative to title, whether it be to surface rights, leasehold interests or the fee, in and to the 480 acres of land in the Ashley Valley Oil Field, Uintah County, Utah, the subject of the litigation. The chain of the various titles is charted, for the convenience of the court, on Exhibit A-62, likewise on Exhibit A-57, both charts indicating the exhibit letter and number applicable to the specific title document. A copy of the chart, Exhibit A-62, is attached at the end of this brief to more readily illustrate the chain of title.

Exhibit A-30 is a photostatic copy of the recorded document entitled "Release" dated October 21, 1944, executed by appellant Stock in favor of N. J. Meagher, and is one of the pivotal questions involved in this appeal. It is contended by the appellants Phebus, Stock and Juhan that the so-called release is ineffective as a conveyance, that to assert the same as such, under conditions to be hereinafter more particularly pointed out, con-

stitutes fraud, that Meagher is decisively estopped and debarred from claiming the same as a transfer and that it is an abortive document so far as any relinquishment or surrender is concerned.

Ashley Valley Oil Company is not concerned in the so-called Stock release but is concerned in maintaining its position as the holder and owner of the leasehold or working or operating interest in what is called the North Forty, or the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 15 of the lands involved. On the other hand Phebus, Stock and Juhan, or their assigns, can claim no direct interest in the operating right or working interest in the North Forty by way of transfer or assignment. Weber Oil Company, Stock and Juhan claim to be the owners of the entire working interest by virtue of the lease and modification agreement, in all but the North Forty, with Equity Oil Company the operator thereof, all pursuant to Exhibit A-25.

At the time of the execution of the Stock purported release on October 21, 1944, four days after the commencement of this action, Phebus had, of record, an undivided one-half of the oil mineral estate in 440 acres of the original lease, Stock the other one-half of the oil mineral estate and Juhan the entire gas mineral estate. The title exhibits in the "A" series supporting the statement just made and in the order of the respective dates thereof are: 1, 2, 3, 5, 6, 11, 15, 12, 13, 14 and 17.

The title situation of the oil and gas mineral estates up to October 21, 1944, the date of the alleged release, with reference to the chart, Exhibit A-62, was: R. C. Hill, the lessee in the lease dated June 4, 1924, Exhibit A-1, sublet the same on October 30, 1924 to Utah Oil Refining Company, with the exception of the North Forty, Exhibit A-2, reserving in addition to the North Forty certain interests which he assigned to Ashley Valley Oil Company under date of November 10, 1924, Exhibit A-3. On May 21, 1927 Ashley Valley Oil Company entered into the modification agreement with M. P. Smith, Exhibit A-5, in contemplation of the modification agreement of June 9, 1927, Exhibit A-6, between it and Utah Oil Refining Company. On April 24, 1929 Utah Oil Refining Company, Exhibit A-11, by agreement, sublet the property to Ray Phebus and Paul Stock. On May 29th of that year, Exhibit A-15, Ray Phebus and Paul Stock assigned the gas rights to Valley Fuel Supply Company. On April 30, 1931, Exhibit A-12, Phebus and Stock assigned the oil rights to Standard Oil Company of California, which, in turn, and under date of December 31, 1931, assigned the same to The California Company, Exhibit A-13, which latter company assigned back to Stock and Phebus on March 21, 1934, Exhibit A-14. In the meantime, on October 30, 1930, Edward Watson, Trustee, successor to R. C. Hill, assigned the North Forty to Ashley Valley Oil Company, Exhibit A-16. On November 7, 1941 Valley

Fuel Supply Company assigned the gas rights to Juhan, Exhibit A-17. Thus the title to the mineral estate stood at the time of the Stock release dated October 21, 1944, Exhibit A-30.

Subsequent assignments of the original leasehold, with the exception of the North Forty, after October 21, 1944 are evidenced, in order of their date, by the "A" series of exhibits numbered 18, 19, 20, 21, 24, 23 and 25. Restating the various exhibits, Ray Phebus, by quitclaim and assignment, transferred whatever interest he had to Juhan. This was on January 19, 1945, Exhibit A-18. On April 14, 1945 Paul Stock, by a similar document, transferred whatever rights he had to Charles S. Hill, Exhibit A-19. Hill in turn, by a similar document dated January 5, 1946, transferred his interest to Juhan, Exhibit A-20. At the time of the first trial, January 8, 1946, when Phebus adopted the answer of Juhan, and excluding the North Forty and giving no effect whatsoever to the so-called Stock release of October 21, 1944, Juhan was the holder and owner of the entire oil and gas mineral estates.

At the time of the entry of the decree on April 15, 1946 (later reversed) the title picture, so far as the leasehold pertaining to the oil and gas mineral estates was concerned, had changed by Juhan's quitclaim and assignment of an undivided one-half interest to Equity Oil Company on January 11, 1946, Exhibit A-21. Equity Oil Company under date of December 30, 1947, by a similar

document, Exhibit A-24, assigned its interest to Weber Oil Company, its wholly owned subsidiary. On July 12, 1948 Juhan quitclaimed a one-fourth interest to Stock, Exhibit A-23, to be followed on December 30, 1948 by an operating agreement of that date, Exhibit A-25, wherein and among other things it was agreed between Weber, Stock and Juhan that the working interests in and to the entire leasehold were held 50% by Weber, 25% by Stock and 25% by Juhan, with Equity Oil Company as operator. Thus was the record status of the oil and gas leasehold estates, excluding the North Forty and giving no effect to the so-called Stock release as of the time of the second trial, June 26, 1950, and at the time of the quitclaim deed from Meagher to his children dated January 27, 1948, Exhibit A-22, and concerning which instrument we will have more to say.

On the other side of the chart, Exhibit A-62, the fee title was in the Sheridans et al. on June 4, 1924, the date of the R. C. Hill lease, by which lease a landowners royalty of 12½% was reserved in favor of the lessors, the Sheridans et al. On November 14, 1924, by a warranty deed, Exhibit A-4, the Sheridans conveyed to M. P. Smith. Out of the landowners royalty Smith proceeded to carve out royalty interests by way of covenants running with the land totaling 12½% in all, evidenced by assignments and agreements of which Exhibit A-46 is not only an example but gives to Meagher a royalty interest of 1%. Meagher thereafter, as evidenced by Exhibit A-52, secured an additional 1% royalty interest from T. G.

Alexander. The two exhibits last mentioned are not shown on the chart, but disclose two of the royalty interests referred to in the modification agreement of May 21, 1927. The latter instrument accounts for the entire so-called landowners royalty converted into the form of covenants and disposed of by Smith before the modification agreement and before a quitclaim of an undivided one-fifth interest, with exceptions and reservations, to T. G. Alexander, Exhibit A-8, and a quitclaim of an undivided four-fifths interest with the same exceptions and reservations to Meagher, Exhibit A-7. These documents are shown on the chart and are both dated December 19, 1927.

Exhibits A-7 and A-8, with the exceptions and reservations therein contained, will be analyzed at some length. They are important in determining the nature of Meagher's interest as the owner of surface rights as distinguished from possible future reversions, the nature of the interest quitclaimed by Meagher to his children on June 27, 1948, Exhibit A-22, and the effectiveness of the Stock instrument of October 21, 1944 as a surrender, relinquishment or release. It can be said, however, that Meagher, at the time of the commencement of this action on October 17, 1944 and at the time of the so-called Stock release on October 21, 1944 and up to the quitclaim of January 27, 1948, was the owner of at least surface rights subject to the lease of June 4, 1924 as modified by the

agreement of May 21, 1927. On January 27, 1948 the children of N. J. Meagher became the owners of at least surface rights by virtue of the quitclaim deed of that day.

When the trial court permitted Meagher to amend his reply by the order of August 3, 1949, practically eleven months after the discovery of oil, a new element was injected into the case. Meagher claims, and the trial court has so held, the Stock release to be a conveyance of the oil rights possessed by Stock on October 21, 1944. If Meagher obtained any right by reason of the release it was a right acquired after the commencement of this action. Over objections the court permitted the new matter to be so litigated, considering the amended reply to be **germane to the cause of action or complaint** as originally filed. The injection of the new issue after the first appeal to this court, and after the discovery of oil, is perhaps a question preliminary to consideration of the release itself.

At the time of the trial on June 26, 1950 Meagher further amended his second amended complaint (R. 230), the effect of which was to reduce the outstanding oil royalty interests carved out of the landowners royalty by M. P. Smith to $10\frac{1}{2}\%$ rather than $12\frac{1}{2}\%$ on the theory that Meagher, at the time of the trial, was the owner of a 2% royalty interest merging in his claim of ownership to the entire property, interjecting for the first time this issue into the case but with the understanding that the

defendants, without the necessity of amendment or further pleading, should be deemed to have controverted any assertion resulting from the amendments and that they might raise any legal or equitable defense which, by any manner of pleading, could have been brought into the case (R. 232.) Plaintiff's counsel stated, for the record, that the issue with respect to the royalty, as brought in by amendment, is whether Meagher is entitled to 2% or to 1-1/3% oil royalty interest, and this for the reason that, as counsel stated, if plaintiff did not assert such position that he might be subjected to the doctrine of res judicata (R. 233).

The royalty issue comes about by a reduction of outstanding oil royalty interests, as evidenced by Exhibit A-40, whereby Meagher assigned one-third of his 2% oil royalty interest to Stock and Phebus. There is no prayer for specific performance in any of plaintiff's pleadings and the controlling issue, with regard to the one-third of 2% oil royalty interest claimed by Meagher, is whether he can claim the same in an action to quiet title such as we have here or whether his proper remedy, if any he has, is that of specific performance, where issues of laches, estoppel, performance and the like can be litigated.

Among the "A" series of exhibits, in the order of their date, is correspondence between Meagher on the one hand, or on his behalf, and Stock, Phebus and Juhan or some of them on the other hand, or on their behalf,

Exhibits A-26 to A-39, both inclusive . The theory of the exhibits just mentioned is that through them, or some of them, will appear a situation that would make it a fraud for Meagher to claim the Stock instrument of October 21, 1944 as a transfer or conveyance of interest, and through which exhibits, or some of them, appears one or more of the various estoppels relied upon defensively by Stock.

Attached at the end of this brief is a chronology under Appendix "B" of events which we trust will be of help to the court by way of ready reference to our statement of the case and aid the court in putting each event in its proper chronological setting, thus demonstrating the equities in favor of these appellants and the inequitable position of respondent.

Upon the record showing the position of the parties, the inducement, lack of consideration in connection with the so-called Stock release, the stale demands attempted to be asserted by Meagher, the inconsistent position taken by Meagher's pleadings and Meagher's utter lack of any position of equity in the premises, the attack upon the decree appealed from and the findings and conclusions follows:

STATEMENT OF POINTS

1. *The court erred in permitting Meagher to amend his reply and to assert in this action a purported title acquired after the commencement thereof.*
2. *Meagher is not the real party in interest.*

3. *Meagher is guilty of laches and is otherwise estopped by his conduct to assert an interest in the leasehold mineral estate.*
4. *Under the undisputed facts in the case the assertion of the Stock release as a conveyance or transfer of interest constitutes fraud.*
5. *Exhibit A-30 lacks consideration.*
6. *A-30 should be cancelled on the ground of mistake.*
7. *A-30 is abortive as a surrender or relinquishment.*
 - (a) *The purported surrender is not to all of the oil mineral estate as required by A-5.*
 - (b) *The purported surrender lacks consideration.*
 - (c) *Stock did not have the power to surrender a portion of the oil mineral leasehold estate, even if that was his intention.*
 - (d) *Meagher is not a reversioner of the oil or gas mineral estate.*
8. *A-30 is not effective as a transfer.*
9. *Meagher's alleged oil royalty interest cannot be adjudicated in this action.*

ARGUMENT

1. THE COURT ERRED IN PERMITTING MEAGHER TO AMEND HIS REPLY AND TO ASSERT IN THIS ACTION A PURPORTED TITLE ACQUIRED AFTER THE COMMENCEMENT THEREOF.

Throughout the entire case, and until the decision of this court on the first appeal in 1947, and after the

discovery of oil in 1948, Meagher's position was that he was the owner in fee of the lands involved unencumbered by any oil and gas lease. The amended reply ordered filed August 3, 1949 was a little less than eleven months after the discovery of oil and more than sixteen months after the filing of the remittitur on the first appeal, wherein this court held that the lands involved were subject to and encumbered by the lease of June 4, 1924 and the modification agreement of May 21, 1927. The amended reply alleged ownership of an undivided one-half interest in the leasehold, a position inconsistent with and a complete departure from Meagher's previous pleadings in this action, and particularly the verified reply that he filed on October 10, 1945 (R. 41), wherein he took the position that the lease and modification thereof had terminated by their express terms, had been forfeited and abandoned and were otherwise null and void. The discovery of oil on the premises, pursuant to the activities of Equity Oil Company, made Meagher's situation a desperate one and caused him to reach out for anything, no matter how ill conceived or inconsistent, so as to benefit by the capital and resourcefulness of others. Meagher is now, and during all of these proceedings has been, a banker of Vernal, Utah.

The attempt to inject the new issue by the amended reply was met by specific objections (R. 83), which were denied and overruled, the ruling resulting in the order

of August 3, 1949. These maneuvers all occurred prior to the adoption of the present Utah Rules of Civil Procedure.

The principle that one cannot, by amendment or by reply, introduce a new or different cause of action is well established. As to an amended complaint this court in *Marshall v. Salt Lake City et al.* (1943), 105 Utah 111, 141 P. 2d 704, said: "Of course, it is fundamental that an amendment which states an entirely new and different cause of action should not be permitted." As to a reply this court in *Combined Metals, Inc., et al. v. Bastian et al.* (1928), 71 Utah 535, 267 P. 1020, had the following to say:

"The reply thus was not only inconsistent within itself, but stated a different cause, on a different theory, on a different ground, and on a different contract from that stated in the complaint, and was a complete departure therefrom. It, of course, is familiar doctrine that where allegations of a declaration are repugnant to and inconsistent with each other, they thereby neutralize each other and render the declaration bad on general demurrer; that a cause of action alleged in an amended petition, though founded on the same grievance or injury as that described in the original, is a different cause of action, if it is dependent upon different grounds for holding the defendant responsible for the wrong alleged; and that the power of a court to permit an amendment of a pleading does not authorize an importation which in effect introduces a new or different cause of action. *Hancock v. Luke*, 46 Utah, 26, 148 P. 452; *Johnson v. American S. & R. Co.*, 80 Neb.

255, 116 N.W. 517; Kirton v. Atlantic Coast Line R. R., 57 Fla. 79, 87, 49 So. 1024; Herlihy v. Little, 200 Mass. 284, 86 N.E. 294; Altpeter v. Postal Tel. Cable Co., 26 Cal. App. 705, 148 P. 241; Blair v. Brailey (C.C.A.) 221 F. 7.”

To the same effect are the cases of *Graham v. Street et al.* (1946), 109 Utah 460, 166 P. 2d 524, *Hartford Accident & Indemnity Co. v. Clegg* (1943), 103 Utah 414, 135 P. 2d 919, *Johnson et ux. v. Brinkerhoff et al.* (1936), 89 Utah 530, 57 P. 2d 1132 and *Straw v. Temple et al.* (1916), 48 Utah 258, 159 P. 44.

The statutory provision in effect at the time of the filing of the amended reply was that a reply could not be inconsistent with the complaint. We quote from subsection (b) of Section 104-11-1, *Utah Code Annotated 1943* on the contents of a reply, as follows:

“Any new matter *not inconsistent* with the complaint, constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, *not inconsistent* with the complaint, which avoids the same.” (Italics ours).

The inconsistency of Meagher’s position is obvious. The entire title theory of his complaint including the second amended complaint has been entirely abandoned. He no longer seeks to quiet title to 440 acres of the land involved, but now seeks, through the medium of his amended reply to say that the lease, which he said before did not exist, does exist and that he has an undivided

interest therein. Furthermore, the right that Meagher now asserts was acquired after the commencement of this action, and still further and before the amendment the same was quitclaimed to his children on January 27, 1948, Exhibit A-22, which leads us to the next point.

2. MEAGHER IS NOT THE REAL PARTY IN INTEREST.

That respondent Meagher is not the real party in interest was raised by objections to plaintiff's motion to re-open and file amended reply (R. 83), and concerning which the affidavit of J. W. Ensign, with exhibit attached, was in the record, having been filed May 9, 1949 (R. 75). The exhibit attached to the Ensign affidavit is a certified copy of the photostat received in evidence as Exhibit A-22. Katherine Meagher Ivers, one of the grantees named in the deed, testified that she claimed to be one of the beneficial owners of the working interest in the leasehold estate by virtue of the quitclaim (R. 310). Meagher, by paragraph 6 of his reply to answer and counterclaim of defendant Paul Stock (R. 110), served October 15, 1949, alleges that "plaintiff and his said grantees have thus far elected to continue this action in the name of plaintiff." No testimony was adduced at the trial by Meagher that the action was being maintained as alleged. In that regard Finding of Fact numbered 45 is entirely unsupported by the evidence.

While we do not concede that a leasehold interest can be transferred by quitclaim deed, the question of the respondent not being the real party in interest was argued and the point overruled and denied on the theory that the quitclaim was an efficient document for the transfer *pendente lite* of respondent's alleged interest in the leasehold to his children and that he maintains the action in his own name for the benefit of his grantees under Section 104-3-19, *Utah Code Annotated 1943*. The section is as follows:

“An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceeding survives or continues. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In the case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.”

The foregoing statute was in effect at the time of the quitclaim and at the time the matter was raised in a procedural way. The section has been re-written under our present *Utah Rules of Civil Procedure*, rule 25 (c), as follows:

“(c) In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the

person to whom the interest is transferred to be substituted in the action or joined with the original party * * *."

We believe that respondent contends Exhibit A-22 to be an effective document assigning, transferring and setting over unto his children, the grantees named therein, whatever interest he acquired from Stock through the medium of Exhibit A-30. Assuming, for the purpose of argument, but not conceding the efficiency of the document for the purpose stated, these appellants take the position that the plaintiff is not now the real party in interest nor has he been since the quitclaim in favor of his children, either under Section 104-3-1, *Utah Code Annotated 1943*, in effect at the time of the conveyance or under rule 17 (a), *Utah Rules of Civil Procedure*, now in effect, by which latter provision it is required that every action shall be prosecuted in the name of the real party in interest. The abatement statute or the statute or rule providing for the continuance of an action in the name of the original party, even though there is a transfer of interest *pendente lite*, can only apply to a matter then in litigation and cannot be applicable to a situation such as the one we have where the alleged right became vested in the transferror, the plaintiff in the action, after the commencement of the suit and was transferred by him prior to the amendment. Meagher did not acquire any right from Stock under any conceivable theory until October 21, 1944, nor did he assert the alleged right until his proposed third amended complaint on April 22, 1949.

In the meantime he quitclaimed to his children on January 27, 1948 and his children, as the record shows, claim to be the beneficial owners of the interest respondent claims to have obtained from Stock, yet they are not parties to this action.

The proposition that Meagher is not the real party in interest under the existing circumstances is well illustrated by the New York case of *Foster v. Central Nat. Bank of Boston et al.* (1906), 76 N. E. 338. Briefly stated, Foster in 1892 brought an action against the bank and others praying as relief that the enforcement of a judgment theretofore obtained in the United States Circuit Court be perpetually enjoined and restrained and also that the judgment be discharged and satisfied. On the 13th day of March, 1901, the action still pending, Foster served an amended complaint in which, instead of praying for injunctive relief, he demanded judgment for the recovery of sums paid by himself and another to certain certificate holders on account of the judgment in the United States Court. The answer of the defendant alleged, and the trial court found, that in 1896 the plaintiff Foster made a general assignment of his property for the benefit of his creditors to one Pell W. Foster and that on the 12th day of March, 1901, one day prior to the amended complaint, Pell W. Foster, the assignee, sold the claim, the subject of the amendment, to a third party. The trial court held that the plaintiff was not entitled to maintain the action and rendered a judgment dismissing the complaint.

The New York Court of Appeals called attention to the code of that state, which requires an action to be brought by the real party in interest, and to the code provision that "in case of a transfer of interest, or devolution of liability, the action may be continued, by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires." The court pointed out that the original cause of action and that presented by the amended complaint upon which the cause proceeded to trial were essentially different; the one being to restrain the enforcement of a judgment, and the other to recover monies paid. As to the situation, which we point out is strikingly in point with the case at bar, the court had the following to say:

"But granting the power of amendment to the greatest extent, that is to say, that a plaintiff by bringing an action on one claim may keep alive, despite any lapse of time, every other claim that he may have of the same character against a party, or if the claims be of a different character, on abandoning the first, he may substitute for it any other claim * * * there must be some limit to the doctrine. That limit is that at the time he seeks to bring in different causes of action he must be the owner of the causes of action. Any other rule would lead to injustice and gross inconsistency if not to absurd consequences. If one chooses to buy a claim in litigation he necessarily assumes the risk of such litigation. The Code allows him to come into the action and prosecute his rights. If

he fails to do so, and an adverse result is suffered through the neglect of his assignor, the fault is his own. But it would seem manifestly unjust that the purchaser of a chose in action, which is not in litigation, of which assignment he gives notice to the debtor, can be affected by the subsequent acts of his assignor. Take the present case. If the purchaser from the general assignee cannot be concluded by any decision on the merits in this suit, then the defendant should not be subjected to it. *On no theory can we justify the prosecution through the amendment of an existing suit of a claim in which, under the findings of the court, the plaintiff has no interest, and which, until the time of the amendment, was not in litigation.* The assertion of such a claim must be left exclusively to its owner, who may deal with it as he will." (Italics ours).

In the instant case the Stock release was not in existence at the time the action was commenced. A suit to quiet title and to remove as a cloud the lease of June 4, 1924 and the subsequent modification agreement is utterly inconsistent with the contention that Meagher is the owner of an interest in the leasehold estate through the medium of the Stock release. Then we add to this the quitclaim to the children, not parties to this action, which Meagher treats as an assignment of the interest that he says he obtained from Stock, to be followed a year or more later by the assertion of that claim for the first time in this action, which brings the case strictly within the rule in the Foster case. Meagher is attempting, through his amended reply in the present action, to assert a claim

which, until the time of the amendment, was not in litigation and which claim he had assigned, according to his own evidence, to his children prior to the amendment. As in the Foster case the assertion of such a claim, if any there be, must be left exclusively to its owners who may deal with it as they will.

At the time Meagher quitclaimed to his children on January 27, 1948 he was still asserting by his petition for rehearing pending in this court that a leasehold did not exist. He is hardly in a position to say that he anticipated an adverse ruling on his petition and that he had in mind an interest in the leasehold when he made the conveyance. The document itself, unorthodox in its form as a transfer of an oil and gas leasehold interest, made at the time it was, negatives an intent on the part of Meagher to transfer that which he later and on August 3, 1949 said existed. He made no mention of a leasehold interest. His intent evidenced by surrounding circumstances, (1) the failure to previously assert under the instrument of October 21, 1944, (2) the decision of this court in October 1947, (3) the filing of a petition for rehearing on the theory that a leasehold did not exist, and (4) the form of the instrument itself with the only chose in action excluded being that of a royalty, was not to transfer with the quitclaim an interest in the leasehold.

If we are correct in what has just been said, it might well be that this point, that Meagher is not the real party in interest, is not well taken. Furthermore, the technical

argument raised by point numbered 1 might well be resolved against us by our argument hereafter that Meagher is debarred by the doctrine of laches or estoppel to assert a leasehold estate arising before the quitclaim to the children, or by our further argument, as will appear, that the Stock instrument transferred nothing.

3. MEAGHER IS GUILTY OF LACHES AND IS OTHERWISE ESTOPPED BY HIS CONDUCT TO ASSERT AN INTEREST IN THE LEASEHOLD MINERAL ESTATE.

If Meagher had the right to amend his reply on August 3, 1949, almost eleven months after the discovery of oil, to allege the Stock instrument of October 21, 1944 as a transfer, he had the right to amend his pleadings immediately upon receiving the instrument, four days after the commencement of the action. Meagher remained silent from October 21, 1944 until August 3, 1949 in claiming that the instrument was effective for any purpose. As a matter of fact, he did not particularize as to his general allegations of transfer until October 17, 1949, the date of his reply to the answer and counterclaim of Stock (R. 107), when he attempted to earmark the Stock instrument as a quitclaim, assignment or transfer of interest in support of his previous general allegations. The assertion of interest is too late; it falls into the category of a stale demand.

On April 14, 1945 by a quitclaim deed and assignment, Exhibit A-19, recorded in the office of the County

Recorder, Uintah County, on April 25th of the same year, Stock repudiated A-30 as an instrument of conveyance. The quitclaim and assignment was in favor of Charles S. Hill and concerning which Meagher not only had constructive but actual knowledge. The fact that he had actual knowledge is evidenced by his letter to Stock under date of June 18, 1945, Exhibit A-39, wherein he says in part:

“I was surprised to find that you gave a quitclaim deed to one Chas. Hill of Denver for your interests in the 480 acres of land, which I own and have owned.”

Uintah County is a sparsely populated locality. It is a matter of general knowledge that the well drilled by Equity Oil Company on the property in question, ten miles southeast of Vernal, resulted in the first commercial discovery of oil in this state. The record shows the date to have been September 18, 1948. Meagher, a banker of Vernal, the county seat of Uintah County, with an admitted surface interest in the property, could hardly say that he was unaware of what was going on. He made no effort to explain the delay.

Meagher turned his back on the Stock instrument as a transfer or conveyance, or as a document effective for any purpose (1) when he failed to assert thereunder upon receipt of the same, four days after the commencement of this action, (2) when he took the position by his first reply, verified on September 1, 1945, that the oil and gas

lease had ceased to exist, was null and void and had been abandoned, (3) when he accepted the fruits of the first decree, which restrained and enjoined the appellants and those claiming under them, or any of them, from entering upon the property for the purpose of further drilling, (4) when he failed to timely assert under the said Stock document after the first opinion of this court, October 27, 1947, (5) when he quitclaimed to his children, and (6) when he permitted Equity Oil Company to go into possession on August 1, 1948, commence drilling operations on that day, successfully complete the well on the following September 18th, sitting by in silence, not only during the drilling operations but until August of 1949 after the enterprise had resulted in financial success, and, in the interim, avoiding the financial risks of the venture.

In a preliminary way, we remark that the burden was upon respondent to show excuse, if any he had, for his failure to assert his claim promptly. As is said in *30 C.J.S.*, Page 544, Article "Equity", Section 120:

"Where the delay is apparently unreasonable, the burden of showing an excuse therefor rests on plaintiff, the presumption being that the delay is inexcusable if the lapse of time is a long one, or if complainant does not avail himself of an opportunity to explain his unusual delay; * * *."

We must always keep in mind that *equity seeks to do justice and avoid injustice*, and acts only in accordance with good faith and fair dealing (*30 C.J.S.*, Page 456, Article "Equity", Section 89).

Laches, of course, is such delay in asserting one's rights as works disadvantage or prejudice to another. The reason for the equitable estoppel rule is much the same as laches. The facts here support both laches and equitable estoppel, and they are considered together. Equity demands of everyone the duty required of an honest man.

These appellants at every moment acted in good faith as reasonable men, willing to risk their money, their work and their skill in a speculative enterprise. They successfully defended their title against the attempt to destroy it. Relying upon that good title so won, they proceeded with development, the expensive and very risky drilling of a well, the wildest of wildcats, distant perhaps fifty miles from the nearest oil well in Colorado, and in a state and a large region where oil had never been found before. Yes, they knew of the so-called "Release" (Juhan and Equity had constructive knowledge by record), but they also knew that Stock, who executed this release, repudiated it on April 14, 1945 by his deed to Hill, and it was also repudiated by the subsequent transactions between these appellants, leading to the drilling of the well. They knew that Stock had given the instrument under misapprehension, that it was without consideration, that respondent in the long litigation concerning the title to the lease, never made the slightest claim under the same, and that though this court on October 27, 1947 decided against respondent on the question of the existence of the lease, respondent did not about

August 1, 1948, the day the well was started, and indeed not until more than a year thereafter had elapsed, assert any claim through the instrument. They also knew that respondent obtained the so-called "Release" on the premise that neither Stock nor Phebus had any title, a clear mistake, as later determined by this court. There is not a scintilla of evidence to put in question their good faith and honest purpose, and as well their large expenditures and the risks they faced.

As to respondent, he tries to gain something upon what was undoubtedly an afterthought, based on a writing almost forgotten, repudiated by respondent's efforts to procure title by an inconsistent position. Notwithstanding it was repudiated by Stock six months after it was obtained, still respondent made no complaint. It was a writing he had obtained gratuitously. It was obtained from Stock without the slightest consideration. From beginning to end respondent did not risk anything, he did not spend anything and is not prejudiced.

When Equity, Stock and Juhan took possession on August 1, 1948 and started the drilling of the well, they gave notice to all the world of all their claims, whether such claims be legal or equitable. See *Note 13 L.R.A.—N. S. 49*, quoted and approved in *105 A.L.R. 845*. Perhaps there was no occasion for respondent to assert his claim as again Hill immediately upon notice of the Hill deed. But when the parties took possession and started to drill, it became his positive duty to assert the same.

Respondent did not even assert his claim when the discovery well came in on September 18, 1948—not until August 3, 1949, presumably to be sure that by subsequent drilling and additional large expenditures by appellants, he would be sure to win a fabulous reward.

Respondent's conduct falls within the condemnation of every court. There can be nothing more abhorrent to *equity* than for a man to silently watch his neighbor drill an oil well on land claimed or owned by him, with the intent to claim the well as his if it is a producer; otherwise to continue silent. So to do is not honest as man to man. In equity, the doctrine of laches requires the man who has such a claim to assert it promptly, especially when the claim concerns speculative property being developed by the other party. There is no dissent whatever among the authorities as to the applicable rule.

In *Scott v. Crouch* (1902), 24 Utah 377, 67 P. 1068, it was held that equity will not aid stale demands or act without showing of conscience, good faith, and reasonable diligence. In *Ruthrauff et al. v. Silver King Western Min. & Mill. Co. et al.* (1938), 95 Utah 279, 80 P. 2d 338, this court again committed itself to the rule. The delay in this case has worked a disadvantage to these appellants. So far as the record is concerned Meagher makes no effort to justify his conduct or his delay and treats the situation as if he enjoyed, as a matter of right, the position of being able to say to the court at this late date

that not having succeeded on one theory in getting the whole apple he can turn around and succeed on an inconsistent theory and get half an apple.

In *Mary Jane Stevens Co. v. First Nat. Bldg. Co.* (1936), 89 Utah 456, 57 P. 2d 1099, this court said:

“Laches is usually not mere delay, but standing by watching one change his position *or delay for such length of time that it amounts to an acquiescence.*” (Italics ours).

In the instant case this court held against the contention originally made by Meagher when it held that the leasehold of June 4, 1924, as modified, was in full force and effect. Equity Oil Company was in possession of the land in question on August 1, 1948 when it commenced the discovery well, which resulted in commercial production of oil on September 18th of that year. The operating agreement, Exhibit A-25, was a matter of public record on January 6, 1949, the date of the recording thereof in Uintah County. Meagher’s prolonged silence was acquiescence to the adverse claims of Stock, Juhan, Weber and Equity Oil Company in and to the leasehold.

Meagher’s conduct comes clearly within the expression of the court in *Alexander v. Phillips Petroleum Co. et al.*, 130 F. 2d 593, 605, (10th C.C.A. 1942) :

“A person may not withhold his claim awaiting the outcome of a doubtful enterprise and, after the enterprise has resulted in financial success

favorable to the claimant, assert his interest, especially where he has thus avoided the risks of the enterprise. The injustice of permitting one, holding the right to assert an interest in property of a speculative character, to voluntarily await the event and then decide, when the danger is over and the risk has been that of another, to come in and share the profit, is obvious. In such circumstances, persons having claims to property are bound to use the utmost diligence in enforcing them.

A substantial increase in the value of the property involved, where the right could have been asserted before such increase and the granting of relief would work inequity, is a circumstance which may be considered in applying the doctrine of laches.

Where a plaintiff, with knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own, the court may presume assent to the adverse right, and the consequent waiver of the right sought to be enforced."

The Alexander case, *supra*, cites with approval the Tenth Circuit case of *Winn et al. v. Shugart et al.* (1940), 112 F. 2d 617:

"The duty to act with dispatch is especially imperative where one claims an interest in property that is highly speculative. One may not withhold his claim to a highly speculative venture, such as was involved in these wildcat oil and gas leases and permits, to await the outcome of an effort to develop them put forth by another, and then when

his efforts are crowned with apparent success, come in and claim the fruits thereof. Such a course does not commend itself to a court of equity.”

The recent decision of the Tenth Circuit in *Pfister et al. v. Cow Gulch Oil Co. et al.*, 189 F. 2d 311, decided May 18, 1951, is in point on the principle stated. The lessor stood by and watched the assignee of the lessee commence, drill and complete a valuable oil well without making objection or making any claim that the lease had terminated. After the well was completed as a producer the appellant, the lessor, asserted the claim of termination. The appellee claimed laches. *The delay was approximately three months.* While the court decided that the lease did not automatically terminate and, while the facts are somewhat different, the court, however, did say that laches depends upon the equities of the case and not merely on the lapse of time, stating in this particular:

“Silence under such circumstances when, according to the ordinary experience and habits of men, one would naturally speak if he did not consent, is evidence from which assent may be inferred. Where a plaintiff, with knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own, the court may presume assent to the adverse right, and the consequent waiver of the right sought to be enforced.”

This court in *Migliaccio v. Davis et al.*, 232 P. 2d 195 (Utah), decided June 8, 1951, voices its approval of the rule stated in *19 Am. Jur., Estoppel*, paragraph 133, page 787:

“Numerous decisions predicating the existence of an estoppel to assert an interest in real property have been based upon evidence which included the element of non-disclosure of an interest at the time when the contract for the conveyance of the property in question was being consummated *and also the element of a continued silence after the grantee had entered into possession of the property and expended money in improving it.* In most of the cases in which the doctrine of estoppel has been adopted, the money of the party alleging the estoppel has been applied to the making of tangible improvements; *and it is a rule almost of universal application that one who stands by and sees another purchase land or enter upon it under a claim of right and permits such other to make expenditures or improvements under circumstances which would call for notice or protest cannot afterward assert his own title against such person.* As some of the authorities broadly state the principle, one who knowingly and silently permits another to expend money on land under a belief that he had title will not be permitted to set up his own right to the exclusion of the rights of the one who made such improvements * * *.” (Italics ours).

In the *Migliaccio* case it is said that an “exception to this rule is applied to one who improves or expends the money when he is acquainted with the true character of his title or with the fact that he has none.” From this it may be argued that the Stock instrument was of record and that, if effective as a conveyance, appellants should have been aware of such construction. It must be borne in mind, however, that Meagher himself had placed no

such interpretation upon the document and that his assertion in that regard came long after the discovery of oil and after his disclaimer to his children by way of his quitclaim deed to them. Furthermore, as previously shown, Stock repudiated the so-called release, and of this, respondent had knowledge. Whether Stock was right or wrong, it cannot be said of Stock that he spent his share of money when he knew that he had no title. All the testimony in the case is convincing that not only Stock, but his associates, believed or had reason to believe that their title was good.

The court also said in the *Migliaccio* case :

“The general rule of equitable estoppel is set forth in the following language in 19 Am. Jur., page 634, Sec. 34: ‘* * * Equitable estoppel or estoppel in pais is the principal by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying or asserting the contrary of, any material fact, which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words and conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.’ ”

And further:

“In addition, it would appear contrary to common sense for respondent to invest in a mining venture without some memorandum in writing if he knew he had no interest on the claims.”

The case is also valuable because the court considered the argument that the party claiming estoppel had knowledge of a prior unrecorded deed, before he obtained his claimed interest in the property, and by reason of this knowledge as to the title situation, he is precluded from relying on the doctrine of estoppel. In spite of this argument, the court said:

“It ill behooves appellant to contend now that respondent should suffer the loss because he was inexcusably negligent in not ferreting out the undisclosed truth. If appellant knew of the deed in Hammond’s possession an honest disclosure of that fact by him at any time before August 9, 1948, might have permitted respondent to protect his investment by other methods.”

Another very recent case is by the Supreme Court of Colorado, *Johnson et al. v. Neel* (1951), 229 P. 2d 939. While the facts are not analogous, the statement of the rule certainly commends itself to the court.

Portions of the syllabi say:

“Doctrine of estoppel in pais is founded on principles of fair dealing and is designed to aid law in administration of justice where without its aid injustice might result.

* * * *

Generally, equitable estoppel is a rule of justice which in its proper field prevails over all other rules and doctrine may be invoked to cut off rights of privileges conferred by statute, and constitutional rights may be effectively waived by conduct consisting of action or failure to act.

* * * *

Parties who remain silent when they ought, in exercise of good faith, to speak, will not be heard to speak when in exercise of same good faith they ought to remain silent."

Perhaps the leading case by the United States Supreme Court is *Johnson v. Standard Mining Co.* (1893), 148 U. S. 360, 13 S. Ct. 360, 37 L. Ed. 480, where the court said:

"While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that where the question of laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.

* * * *

The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. A property

which, in October, 1880, plaintiff sold to Chatfield upon the basis of \$4,800 for the whole mine is charged, in a bill filed October 21, 1887, to be worth \$1,000,000, exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights.* * *

The language of *Mr. Justice Miller* in *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 592, with regard to the fluctuating value of oil wells, is equally applicable to mining lodes: 'Property worth thousands to-day is worth nothing to-morrow; and that which to-day would sell for a thousand dollars, at its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.' "

As to equitable estoppel, relief is granted without any reference whatever as to time. As to laches, time is often an element. However, so far as this case is concerned, there is no difference in the equitable principles involved. In respect to laches, our case satisfies every possible time consideration. The delay in the assertion of

title was nearly five years. The delay during the period of actual well-drilling was approximately seven weeks.

Another case in which a claimant was silent and did not speak during the drilling of a well, where the drilling time was particularly short, was the case of *Merrill et al. v. Rocky Mountain Cattle Co. et al.* (1919), 181 P. 964 (Wyo.). In this case, the exact dates are not given, but the right accrued in August and oil was discovered in October. In that case the right of the plaintiffs accrued, if at all, in August 1914, and during August 1914 they made a demand upon defendants. The defendants did not accede to the demand but on the contrary, at about the same time, granted a lease to the Ohio Oil Company, which took possession of the disputed land, and placed casing thereon on September 21, 1914. They drilled a well which came in during October, 1914. Suit was brought February 13, 1915. In the Merrill case the drilling occupied about a month, whereas in the present case it continued about seven weeks. The court, in a learned opinion, held the short time element was not important in view of the fact that the adverse claimant did not assert any adverse claim during the period when the oil and gas lease was being developed at great expense.

Another important case is *Hertzel v. Weber*, 283 F. 921 (8th C.C.A. 1922), a decision by Judge Lewis. The essential facts are almost identical with the case at bar. The so-called grantee permitted another party to develop certain land without denying the other party's

right to do so. The property involved was an oil leasehold. It was not until after oil was discovered that the so-called grantee denied the other party's right to drill the land. Of course the so-called grantee was estopped. The following sentence from the opinion is important. Referring to the so-called grantee the court said:

"He knew from the beginning that Weber claimed to be in possession by right, operating the property under valid contracts with the lessees."

And again:

"There is no testimony showing that he notified Weber at any time until he brought this suit * * * that he claimed that Weber was in possession without right under void contracts, and that he intended to oust him. He sat by and permitted Weber to continue in the hazardous venture of mining operations, which may be profitable one day and disastrous the next. * * * After such conduct he should be estopped on familiar principles from thereafter asserting the contrary. * * * The doctrine of estoppel in pais 'proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent.' "

Another case is *Given v. Times-Republican Printing Co. et al.*, 114 F. 92, (8th C.C.A. 1902). This decision was by Judge Sanborn. In this case it was said:

"No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself or more salutary in its effects,

than that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial.”

In *Dickerson v. Colgrove et al.* (1880), 100 U. S. 578, 25 L. Ed. 618, the court said :

“The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice.”

Crane Co. v. James McHugh Sons, Inc., et al., 108 F. 2d 55 (10th C.C.A. 1939), a decision by Judge Phillips, where it is said that silence when according to the ordinary experience and habits of men, one would naturally speak out if he did not consent, is evidence from which consent may be inferred.

Another important case is *Transcontinental Oil Co. v. Spencer et al.*, 6 F. 2d 866 (5th C.C.A. 1925). This case involved the construction of an “unless” lease, al-

though in this case a well was commenced and drilled in time, and discovered gas in one sand and salt water in a deeper sand. The lessors claimed that thereafter lessee did not prosecute their work with diligence. The court said that the evidence disclosed that at least one of the lessors, with full knowledge of suspension of operations, stood by without raising any question as to the continued existence of the lease and of the lessee's rights thereunder, while the latter resumed operations and prosecuted them until they resulted in the bringing in of a paying gas well. The court held that a lessor is not entitled to occupy the inconsistent position of acquiescence in the lessee going on under the lease, and at the same time retaining the right to rescind for a known breach of a condition by the lessee.

Meagher has estopped himself by the record in this case to assert the Stock instrument as a conveyance. The reply that he verified on September 1, 1945 was a disclaimer of the Stock release as a conveyance because in the reply Meagher took the position that the lease did not exist.

Furthermore, Mrs. Ivers, then Katherine C. Meagher, acting on behalf of her father, by her letter of November 9, 1944 (R. 12), placed a construction upon the instrument as that of a release and not a conveyance and stated, in effect, that the release was but one of several to be obtained before the suit could be settled. Consistent with our theory, as will be hereinafter more particularly

pointed out, the Stock instrument was abortive for any purpose until the securing "of all the necessary releases of interest," the language used by Mrs. Ivers in the letter to the Judge of the Fourth Judicial Court under the date above indicated. Meagher is in no position to say that these appellants might have been acquainted with his claim of ownership of one-half of the oil mineral leasehold estate when he, himself, took no such position but, in fact, took the position of record that no lease existed—the extreme opposite.

That appellants Stock, Juhan and Weber changed their position by reason of the delay and the acts of Meagher, whose claim is now inconsistent with his former position, is obvious from the operating agreement, Exhibit A-25, where, as owners of the working interests, they obligated themselves in a number of particulars to Equity Oil Company, as operator, including the payment or reimbursement for all operating costs, 50% by Weber, 25% by Juhan and 25% by Stock. Operating expenses to May 31, 1950 were in excess of \$580,000.00 (R. 255-256). Furthermore, Stock obligated himself on July 9, 1948, Exhibit A-51, to pay Juhan \$19,500.00 for 3/16ths of the working interest in the leasehold, of which amount of money \$6,500.00 was to go to Phebus. On the same day Equity Oil Company committed itself to a joint venture agreement with Stock and Juhan to prospect and develop the property involved, Exhibit A-52.

The existence of the leasehold having been determined by this court in its opinion of October 27, 1947, the same having become final by the remittitur issued under date of March 16, 1948, and Meagher, in the meantime, having disclaimed further interest in the property by his quitclaim to his children on January 27, 1948, except for a royalty, and the Stock instrument not having been a previous issue in the case, and, so far as the record discloses, the Meagher children asserting no rights, all combine to reasonably suggest the course of action taken by Stock, Juhan, Weber and Equity Oil Company in the wildcat venture, making it inequitable for Meagher to now assert the contrary position, which is the basis of the doctrine of laches and estoppel.

The failure of Meagher to assert under the circumstances in this case, which would require the utmost diligence on his part in the enforcement of his alleged rights, presumes assent to the adverse right and the consequent waiver of the right sought to be enforced. Finding of Fact numbered 36 which negatives action or non-action attributable to Meagher, and Finding of Fact numbered 37 that neither drilling operations nor expenditures were induced by or were undertaken in reliance upon anything attributable to Meagher, and that Stock and all other parties to this action dealt with the property subject to the exigencies of this litigation, with full knowledge that Meagher's interests were substantially in conflict with the claims of each defendant, and Finding of Fact numbered 41 that there has been no undue or substantial de-

lay in the assertion of the Meagher claim, or in the prosecution of this litigation by him, are contrary to the fact and to the law, as is likewise Conclusion of Law numbered 15.

The laches and estoppel by conduct and silence disclosed by the record can be claimed by Phebus and Juhan and those claiming by, through and under them, as well as by Stock. As to Phebus and Juhan the matter of further pleading by them was brought to an end by Meagher's amended reply ordered filed August 3, 1949. Possession taken on August 1, 1948 and the recording of Exhibit A-25 on January 6, 1949 were notice to the world of the drilling operations, the continuity of possession and the basis of the claim thereof. Furthermore, actual knowledge is charged to Meagher, as stated above, by his letter to Stock of June 18, 1945, Exhibit A-39, pertaining to the Stock-Hill instrument, Exhibit A-19.

Meagher has not only barred himself by not having timely asserted his rights, if any, but to assert under the Stock instrument an interest in the leasehold constitutes a fraud, which brings us to the next point.

4. UNDER THE UNDISPUTED FACTS IN THE CASE THE ASSERTION OF THE STOCK RELEASE AS A CONVEYANCE OR TRANSFER OF INTEREST CONSTITUTES FRAUD.

Meagher did not take the witness stand nor did he in any way attempt to explain the clear import of written communications surrounding the execution of Exhibit

A-30. The writings are in evidence without objection and the problem of weight or credibility to be given oral testimony, so often found where there is an issue of fraud, is not present here.

On January 7, 1944, on the letterhead of Bank of Vernal, Vernal, Utah, Meagher wrote to Stock at Cody, Wyoming, Exhibit A-26, as follows:

“Dear Mr. Stock:

Years ago I bought all of the interests of M. P. Smith and others to the ‘Gas Well Ranch’—480 acres lying about ten miles SE of Vernal, subject to 12½% outstanding royalties and the lease that existed.

I find the records show the lease assignments running to you, then your agreement with the Standard of Calif. for a drilling operation. The Standard of Calif. re-assigned the lease to you and Ray Phebus, but Archie Lewies (Lewis) never recorded any instrument from you and Ray. He has abandoned the field,—gas exhausted,—and he sold the pipe, etc. to Jos. Juhan, who pulled the pipe and sold it.

My trouble is to clear the title of the lease and the records stop with the above. Archie Lewis says he got all of the interest you and Ray had, and he says he turned all to Juhan. I can get Archie to sign any instrument needed to clear my title, if necessary, but the record is what must be cleared.

I am writing Ray, addressing my letter to him to Thermopolis. I know he is not there, but

I am taking a chance it will be forwarded to him. Do you know his address? Will you please send it to me?

If you are willing to execute a release I shall have one prepared and submitted to you, and I will very much appreciate your help.

A very happy New Year to you and all my good wishes." (*Italics ours*).

On the same day Meagher wrote to Phebus, Exhibit A-31, at Thermopolis, Wyoming, as follows:

"Dear Mr. Phebus:

First of all let me wish you and Mrs. Phebus a very happy New Year. It is a long time since you both used to be in the 'Gas office' here,—a long time since I have seen you.

Perhaps you know that Archie Lewis no longer supplies gas to Vernal City,—on account of the field being exhausted,—and he sold the line, etc. to Jos. Juhan who pulled the pipe and sold it.

The object of my letter is to ask if you are willing to give a quit-claim deed or release or some instrument that is proper *to clear my title to the land. I own the land and bought from M. P. Smith years ago all interests*, subject to the lease and agreement,—except outstanding royalties totaling 12½%. These royalties remain. *All I want is a release from you and Paul Stock, Archie Lewis and Jos. Juhan,—successors to you.* The trouble is after you agreed with the Standard of California for a drilling operation, *which they surrendered* the assignment of the lease to you

remains of record for oil. You assigned for gas to the Ashley Valley Oil Co. or the Valley Fuel Supply Co., or some one of those companies with (which) Archie Lewis controlled. Archie is willing to do anything desired to clear my title. My attorney advises to clear it by a quiet-title suit, but that is not needed, if I can get quit-claim deeds he advises. If I shall have such instrument as is necessary prepared for this purpose are you willing to execute it? If so, I shall then have it prepared and submitted to you.

I am still holding down this corner and though not making money in banking at present still we are making a little progress one year after another.

Again my very best wishes to you." (Italics ours).

The letter that immediately preceded the signing of the Stock instrument was dated October 16, 1944, Exhibit A-27, directed to Stock at Cody, Wyoming, and signed by Katherine C. Meagher, the attorney daughter of N. J. Meagher, as follows:

"Dear Mr. Stock:

As attorney for my father, Mr. N. J. Meagher, I have started a quiet title suit in the district court of Uintah County, but I have been assured that you do not claim any interest of any sort in the Ashley Oil Field *and will sign a release of any interests you had in the past, so the release may be recorded.*

The *release* is enclosed, and would you mind please signing it and returning it to me by return mail?

Although I do not know you, Mr. Stock, I've heard so many nice things about both you and Mr. Phebus from my father that I almost feel as if you are an old friend of mine as well.

With kindest personal regards, I am," (*Italics ours*).

The construction that Meagher placed upon the entire situation is found in a letter, Exhibit A-28, on the stationery of Bank of Vernal, Vernal, Utah, November 9, 1944, directed to Phebus at Englewood, California, signed by N. J. Meagher, as follows:

"Dear Mr. Phebus:

I have been requested for a lease on the 480 acres of land which I own and which you will recollect as the place where you obtained gas for Vernal City. Archie Lewis was here for the past two weeks and he executed releases for the Uintah Gas Co. and Valley Fuel Supply Co. I also obtained a release from Paul Stock. All of these are recorded.

My daughter advised me that she heard from you, though I have not your letter, and that you wished to have the opinion of your attorney regarding the release. Of course, that is all right. *On the other hand your attorney may not be fully advised of the facts; that the lease carries requirements which have not been fulfilled; that no oil in commercial quantities was ever discovered there, and that only gas was developed and sold, but the two companies,—Valley Fuel Supply Co. and Uintah Gas Co.,—ceased their operations over two years ago. The gas line was sold to one Juhan, who pulled all the pipe from*

the wells to Vernal and pulled the connections into the homes here. The State Utilities Commission granted a permit to Arch Lewis to cease production there over two years ago and Arch Lewis got a decree of court dissolving both the corporations,—Uintah Gas Co. and Valley Fuel Supply Co. *There is also a requirement in the lease that on failure to do certain things the holder of the lease rights is required to release the land. Under these conditions* will you, therefore, kindly send in the release promptly, as *I have a possibility of getting the area drilled.* Any one shies from an area on which a lease is recorded as they do not care to have any mixup or possibility of a mixup if production were obtained.

I believe you know I would not ask for surrender of anybody's rights without payment, but in this instance actually no rights exist for anybody through that old lease of 1924. I would therefore appreciate your kind consideration of my request and send the release to me or to my daughter as soon as possible. If your attorney has not returned the release to you I shall have another made, exactly as Paul Stock signed or as Arch Lewis signed, except that yours is individual and Arch's is for the corporations. There is no responsibility attached to your giving the release; it is merely that you have no interest in it and any interest you had may have been assigned, but in your releasing no instrument that you gave of conveyance is affected. *It is like giving a quit-claim deed (not a warranty of title) which indicates you have no interest in it.* Of course, you consulted your attorney whose advice it is proper to follow, *if he has the facts* on which to base his decision.

Ray, have you got an abstract to that property? I have only a partial one. I wonder if you furnished an abstract to the Standard of Calif. Those leases and assignments are quite lengthy and they clutter up the title a lot, so if there is an abstract that I can obtain without having the expense of that history in full, I should like to obtain it.

I see you are enjoying a better climate than we usually have, but I cannot object to the kind of weather we have had during the past few months,—just grand.

If you ever drive through this way do not pass me by. I am at the same old stand and I shall always be very glad to see you.

My best wishes to you always.” (*Italics ours*).

Stock first met Meagher at Vernal in 1928 when Phebus and Stock were building a gas line. During that time both Phebus and Stock were in and out of Vernal, and then after leaving Vernal they would see Meagher on occasional visits to that part of the country. Stock knew Meagher to be a banker of repute in that vicinity and had never had occasion until after October of 1944 to question anything that Meagher might have represented to be a fact (R. 293-294).

The letter that Meagher wrote to Stock on January 7, 1944 was answered on Stock's behalf under date of January 17th of that year, Exhibit A-32. Confusing a royalty situation with Meagher's request for a release, L. G. Hinkley, who wrote the letter to Meagher on behalf of Stock, stated the following:

"Dear Mr. Meagher:

Receipt is acknowledged of your letter of January 7 addressed to Mr. Paul Stock at Cody, Wyoming. This letter has been handed to me for reply.

Mr. Stock advises that if you will prepare the necessary instrument *to clear the outstanding royalties* on the lease mentioned in your letter that he will sign this instrument and return the same to you which will enable you to record same and clear the title. I would suggest that the instrument be prepared for the signature of Paul Stock only, as Ray Phebus is not in this part of the Country. I believe his address is somewhere in Illinois.

If you will write to Mr. Robert Connaghan, Cheyenne, Wyoming, I am sure he will be able to give you Mr. Phebus' correct address." (*Italics ours*).

The Hinkley letter is consistent with Stock's uncontradicted testimony on direct-examination when called as a witness for Meagher:

"Q (By Mr. Wheat) Now when you signed this release, this Exhibit A-30, did you understand it to be a release of all of your interests in the oil lease covering the lands involved in this suit?

A No, sir. (R. 262).

Q. (By Mr. Wheat) Now Mr. Stock, tell us in your own words what your understanding was with respect to that document. (R. 264).

A I thought that I was releasing to Mr. Meagher a royalty that we had obtained from him to

drill a well. There was some overriding royalty and we wanted to reduce the royalty, which we did do. And this, the overriding royalty, amounted to so much, and if we didn't drill the well, we had—I don't know whether we legally give it back, we intended to give him back his royalty if we didn't drill the well, but we did later drill the well.

Q (By Mr. Wheat) But in any event, the state of your mind at the time you executed that document was that you were giving back to Meagher the royalties he had transferred to you and Mr. Phebus in order to cut down the outstanding royalties at the time you transferred the lease to the Standard Oil Company, isn't that right?

A That was right." (R. 265).

The recitals contained in Exhibit A-30, the Stock release, are consistent with the representations made by Meagher in his correspondence. Divorcing for the moment any question of mistake of either fact or law, or both, we have a clear continuity of representation by Meagher that no interest existed and that nothing was asked for by way of interest, all coupled with the statement that the requested document was contractually required for the purpose of removing a cloud upon a title that Meagher represented as already owning. It was under those circumstances, and without consideration, that the release was executed. Meagher's position as a banker in Uintah County, respected by Stock, put him into the position of being able to assert, as a fact,

that Stock had no interest and that he, Meagher, had the right to require of Stock something by way of contract. This is clearly stated in the release, a document prepared by Meagher's daughter (R. 297), as follows:

“Whereas the lessee and his assigns agreed that upon failure to fulfill the terms of the lease, ‘The lessee hereby agrees to relinquish, cancel and surrender the same to the lessors and to clear the record title of said lands from the lien or burden of said lease by making, executing, acknowledging and delivering a proper conveyance or release thereof and causing the same to be recorded in the office of the County Clerk and Recorder of the County where the said lands are situated, without expense to the lessors.’ ”

Meagher, as one of the holders of a royalty, consented to the modification agreement of May 21, 1927, Exhibit A-5, and is presumed to have known the contents thereof. The modification agreement of the date mentioned, by its express terms, paragraph III thereof, “fully discharged, superseded and replaced” the portion of the lease of June 4, 1924 quoted in the above recital. The release is so drafted that, by even the most casual inspection, one could not say other than that the release was required from Stock as a matter of contractual stipulation, when in truth and in fact such did not exist. Meagher took further advantage in purposely stating by the additional recital:

“Whereas, Paul Stock derived his interests by virtue of an assignment of the rights under this original lease;”

without making any reference to the modification agreement, knowing, or being in a position where he should have known, that Stock, a remote assignee of the rights existent by virtue of the modification agreement, was not under the recited contractual disability of the original R. C. Hill lease of June 4, 1924.

Thus, Meagher secured the execution of the Stock release under date of October 21, 1944, and he now, in the face of the record and the uncontroverted documentary evidence, claims the same as a conveyance or transfer of one-half of the oil mineral estate under the lease, as modified—after this court has held the leasehold to exist. The position of Meagher is unconscionable and his assertion spells fraud. The relationship of the parties, the lack of any consideration, the overreaching and the misstatement of the factual situation can mean nothing else.

What has been said with reference to point 3, as to change of position and the specific findings of fact and conclusions of law in connection therewith, are equally applicable to this point. Furthermore, Finding of Fact numbered 38, as follows:

“Meagher did not defraud or deceive Stock by previously asserting that the lease was cancelled and that Stock had no interest therein, although Meagher now claims an interest in the lessee’s rights and contends that he acquired an interest in the lessee’s rights from Stock. The aforesaid erroneous assertion by Meagher was not

made with the intent to deceive or mislead Stock, and did not deceive or mislead Stock, nor did Stock rely thereon. No facts have been proved upon which any fraudulent or deceitful conduct can be attributed to Meagher with respect to Stock or any other party to this action.”,

and that portion of Finding of Fact numbered 39, as follows:

“The recitals in A30 are attributable to Meagher, but none were made with the intent to deceive or mislead Stock, and said recitals did not deceive or mislead Stock, and were not relied upon by Stock.”,

are not supported by the evidence but are contrary to the evidence and to law. Likewise is Conclusion of Law numbered 16 to the effect that neither Stock nor any other defendant is entitled to rescind the alleged transfer from Stock to Meagher, document A-30, on any basis. The recitals in A-30 are, in and of themselves, evidence of fraud and certainly in the more charitable vein clearly indicative of mistake.

The court in its memorandum decision considered the question of recitals as an aid to interpretation—something which we will discuss later—but did not consider them as evidence of mistake or fraud in the inducement of the making of the instrument. While no cases have come to our attention like this one on their facts, some statements of general principles in certain decided cases, and the tacit treatment of a recital in at least one case, may be of some assistance.

In considering the effect of a recital in an action brought upon mistake of law or fact, the nature of recitals, and their purpose, should not be overlooked.

In 2 *Devlin on Real Estate (3rd Ed.)*, Section 992, it is said:

“Recitals are introduced for the purpose of explaining why the deed is executed, or of showing circumstances which preserve the connection in the chain of title, and are considered as being of two kinds, particular and general.”

In *Jones Legal Forms (Annotated)*, Chapter 22, Form 22-4, it is said:

“A brief statement of the circumstances giving rise to the agreement will often serve to clarify otherwise doubtful provisions. Such statements are usually made in a preamble, introduced by the word ‘whereas.’ ”

And see 3 *Nichols Cyclopedia of Legal Forms, Contracts*, Section 3.14:

“It is often advisable to begin the contract, after its formal commencement, with recitals preceded by the words ‘whereas’, to show the exact condition of the parties, the subject matter, the purpose of the contract, etc.”

As said in 4 *Nichols Cyclopedia of Legal Forms, Deeds*, page 66, n. 74:

“Recitals in a deed are often included to show the reason for the conveyance, to further identify the parties, to explain the grantor’s claim of title, etc. They are for the purpose of

explaining why the deed is executed or of showing circumstances which preserve the connection in the chain of title."

And in *6 Thompson on Real Property*, Section 3186, page 346, it is said:

"The office of narrative recitals is to state the facts and instruments through which the grantor's title is deduced; and the office of introductory recitals is to explain the motive of the grantor in making the conveyance."

The authorities above quoted indicate that a recital is often used to show the motive (i.e. inducement) of a transaction. In basing a case upon mistake or misrepresentation it, of course, must be shown that the grantor was mistaken as to a fact, and that the fact induced the contract or whatever we have here. That the facts were not true, we have a Supreme Court decision, the law of the case, to show this. But is the judge justified in finding that the mistake did not induce the transaction?

Wigmore, in speaking of the difference between contracts or transactions which are void, and those which are voidable, in *IX Wigmore on Evidence* (3rd Ed.) Section 2423, says:

"So far, then, as an act is held to be voidable, it must be for some other reason than one of the foregoing elements, that is, some reason which concedes that the act is jural and lawful in its subject, intelligible and definite in its terms,

and final in its utterance, and that in all these respects there existed in the actor an intention to do the act, or a volition having consequences equivalent to intention.

The inquiry, therefore, is, *What is the distinction between these elements*, the lack of which leaves the act *void*, and *those other elements* which merely make the act *voidable*?

The other elements are all reducible finally to a single consideration, namely, that of *motive*, —i.e. the relation between the actor's state of mind and some fact *external* to himself and his act. This consideration of Motive falls under three general heads:

1. When the fact creating the motive is somewhere mentioned in the *terms of the act*, it is commonly spoken of as a *Condition*, i.e. a reservation of an option to annul. Conditions may be established by *express stipulation* in the act, or by *implication* of law. Of the latter sort may be, for example, in contracts, a description of a horse's pedigree; in deeds, a description of land as containing specified buildings; in wills, a recital (incorrectly) of the death of an elder son as the reason for devising to a younger one. * * *

A statement which seems to fit in with the general discussion here is that found in *Holmes, The Common Law*, page 326:

“It is not then true, as it is sometimes said, that the law does not concern itself with the motives for making contracts. On the contrary, the whole scope of fraud outside the contract is the creation of false motives and the removal of

true ones. And this consideration will afford a reasonable test of the cases in which fraud will warrant rescission. It is said that a fraudulent representation must be material to have that effect. But how are we to decide whether it is material or not? If the above argument is correct it must be by an appeal to ordinary experience to decide whether a belief that the fact was as represented would naturally have led to, or a contrary belief would naturally have prevented, the making of the contract."

In *Adamson et ux. v. Brockbank et al.* (1947), 112 Utah 52, 185 P. 2d 264, one of the Brockbanks importuned respondents to sign a quitclaim deed, after repeatedly informing them that the sole purpose of the deed was to clear up a discrepancy in the boundary line between appellants' and respondents' property. In order to finance a construction program originating with the Brockbanks, who with others were appellants, it was necessary to secure title insurance which could not be done until the title to the strip in dispute was cleared. One of the appellants, repeatedly informed respondents that the sole purpose of the deed was to clear up the discrepancy in the boundary and thereupon respondents executed the deed. No consideration was paid for the deed and no discussion was had with respect to releasing respondents' rights to the use of a ditch, the subject of the action, and for the destruction of which the respondents were seeking damages against the ap-

pellants as well as cancellation of the quitclaim. As to Brockbank's (one of the grantors) intention, the court said:

“Appellant Brockbank never considered that respondents had quitclaimed their right to the use of the ditch until he discussed it with his attorney, and if Alan E. Brockbank intended to obtain more than a correction of an erroneous description, then he misrepresented his intentions to respondents.”

The court points out that respondents did not understand that their rights to the use of the ditch were included in the deed and that they relied on the statements of the appellant Brockbank to the effect that the deed was only for the purpose of clearing up the discrepancy; further, Brockbank, one of the appellants, had knowledge of the existence of the easement and he knew that his representations as to the purpose and effect of the quitclaim were not true. The trial court set aside the deed and this court sustained the ruling.

On the question raised by appellants that the alleged fraud and misrepresentation did not support the action of the trial court this court said:

“* * * appellant Brockbank made a representation of a material fact in that he represented that the purpose of the deed was solely to clear up the discrepancy in the boundaries. That such representation was false is amply supported by the acts and conduct of appellant Brockbank. He was in the real estate business, had handled many conveyances of property, was familiar with

the legal effect of deeds, prepared the deed so it covered more property than was intended, denied he intended to include the rights to the use of the ditch, and yet later insisted that the deed has extinguished respondents' rights. The court found that during the time Brockbank was negotiating with respondents for this quitclaim deed he had knowledge of the existence of the easement, and although he testified to the contrary, the court was fully justified in disbelieving his testimony. * * * When Brockbank made the statement to respondents that the only effect of the deed was to clear up the existing discrepancy in the boundary lines, he did not actually believe, upon reasonable grounds, that the representation was true. The representation was made with intention that it would be acted upon, and was acted upon by respondents to their detriment. Furthermore, respondents were obviously ignorant of its falsity, yet reasonably believed it to be true. These facts, under the rules of law previously announced by this court, clearly makes out a case of fraud and misrepresentation."

The case of *Burton v. Haden et al.* (1908), 60 S.E. 736 (Va.), is an oft-cited case in the field of restitution. The action was one to set aside and annul a conveyance of real property because of the mutual mistake as to the interest and title of the grantor in the tract conveyed. In discussing the question of mistake the court said:

"It appears from the deed itself that the grantor was of opinion that she had title to only an undivided one-third interest, and that E. H. Burton, the grantee, already had title to the remaining two-thirds interest."

The defense was that the deed was a compromise of doubtful rights and that the mistake, if any, was one of law. Said the court:

“We do not think the claim that the deed was the result of compromise of doubtful rights can be maintained. It presents none of the elements of a compromise. The grantee claimed a two-thirds interest in this tract of land, and obtained the whole of it. The grantor, under a mistake as to her rights, undertook to convey an undivided one-third interest, for which she received rather more than half of its value. It is true that the language of the deed is very clear: ‘It is conceded by said Eugenia L. Haden, party of the first part, that said E. H. Burton has title to an undivided two-thirds interest in the above-described property. And the said Eugenia L. Haden hereby disclaims any interest or claim to the said undivided two-thirds hereby admitted to be vested in said E. H. Burton.’ That is not the language of the compromise of a doubtful right; but is the recognition of an undisputed right which she, acting under a mistake as to her title, was of opinion had already vested in her grantee, and in which she, therefore, had no interest, and over which she had no control. It is true that the deed continues: ‘But whatever be the interest of the said Eugenia L. Haden in and to said tract of land, it is the intent of this deed to convey the whole of her said interest, be the same one-third or more, to the said E. H. Burton.’ But the deed is to be construed as a whole; *and it is inconceivable that the grantee, with knowledge as to the condition of*

her title, and that she was the owner in fee simple of the entire tract, would have parted with it for the consideration named in the deed.” (Italics ours).

In the present case it is inconceivable that Stock, knowing that Meagher had no right to a release or surrender, and knowing that he was under no obligation to release and of the construction now placed upon the instrument, would have transferred or conveyed his rights without consideration. In *Burton v. Haden*, supra, the court recognized the rule that a mistake of an antecedent legal right is ground for relief in equity and cancelled the instrument.

The cases dealing with the evidential value of recitals are important read in the light of purposes of recitals. The recitals in the instrument are attributable to Meagher, he having prepared the same. He put words into Stock's mouth, in effect: "I am under duty to give you this release, therefore, I am giving it."

The Wigmore quotations, supra, come close to what we have here, namely: a motive mentioned in the *terms of the act*. Showing that the condition failed to exist as a fact, that Stock was not under duty to release to Meagher, renders the act at least voidable if not void. Meagher was responsible for creating in Stock the mental attitude shown by the recitals in A-30. The motive expressed as a condition, proven to be wrong and shown

to have originated with Meagher, the thing itself, A-30, is void. Whether it be called fraud or mistake is of little consequence—the result is the same.

There was no thought in Stock's mind, and this is supported by the recitals, that anything of virility was passing from him to Meagher. Meagher, the scrivener of the release, by its mere presentation to Stock, said, in effect, that nothing of virility existed. For Meagher to turn around now and say, in the face of the recitals and his letters, that he, Meagher, had a different intention, would be to permit the perpetration of a fraud. That is true if the law *does* concern itself with the motives for making contracts and if "the whole scope of fraud outside the contract is the creation of false motives and the removal of true ones" as stated by *Holmes, The Common Law*, *supra*.

In the case of *Adamson v. Brockbank*, *supra*, this court said:

"To insist that respondents conveyed away a right as valuable as the one herein involved, without consideration, shocks one's sense of justice, and the court should scrutinize all the facts to determine whether the conveyance was obtained by fraud, misrepresentation, or trickery."

The principle apparent from the record in our case is parallel with several of the principles announced in the *Brockbank* case, including the expression of the court therein, as follows:

"In considering the last of the principles above quoted, it is sufficient to state that appellant Brockbank, by virtue of his superior knowledge; by his act of taking respondents to the courthouse and pointing out the plats which revealed the existing discrepancy; by assuring respondents he would satisfy their mortgagee that the quitclaim deed was only for the purpose of clearing up the discrepancy; by obtaining clearances from the mortgagee of respondents' property; and by having a representative of the title insurance company further assure them of the necessity and purpose of the deed; all these were such circumstances as justified respondents in relying on Brockbank's representations without making an independent investigation."

Just as in the *Brockbank* case we have a situation here where

"* * * we are not concerned with the rights of bona fide purchasers; we are only concerned with the rights between the parties to the transaction."

The letters from Meagher and his daughter, the release pointing out in its recitals the book and page in the recorder's office of that portion of the June 4, 1924 lease, later abrogated, no reference made to the modification of May 21, 1927, the position of Meagher in the community, his immediate access to the county records and Stock's presence at Cody, Wyoming, many miles distant, make a striking parallel to the portions of the *Brockbank* case quoted above, and also the further expression of this court in that case as follows:

“In the situation confronting us we have other circumstances and conditions. We need not go into these, as the representation here was one of fact, i.e., that the purpose and effect of the deed was only to fix the boundary. *If appellant, Alan Brockbank, was falsely intending to obtain more under the deed, then this was a misrepresentation as to his intentions. This is the case of a grantee inducing the grantor to execute a deed which, unbeknown to the grantor because of his ignorance of such matters, conveyed much more than the grantor intended it to convey.*” (Italics ours).

5. EXHIBIT A-30 LACKS CONSIDERATION.

Finding of Fact numbered 42 as follows :

“In consideration of the transfer A30 from Stock to Meagher, Meagher relinquished his right to require Stock to perform the obligations of the lessee which Stock was bound to perform previous to Meagher’s acceptance of said transfer.”,

is the only finding of consideration. This finding, we contend, is not supported by, but contrary to, the evidence and law. There was no consideration for the so-called release, A-30.

The court does not point out the obligations of the lessee which Stock was allegedly bound to perform previous to Meagher’s acceptance of A-30, nor what Meagher relinquished by way of right against Stock. It must be borne in mind that the lease, as modified,

is a unit so far as performance is concerned. Meagher could not relinquish a portion of performance any more than Stock could effectively relinquish a portion of the lease. This court has said, in effect, in its former decision, that the consideration for the lease had been earned long prior to A-30.

If Meagher was in the position of the landlord, which he was not, he still would have had to contend with Juhan, the owner of all of the gas mineral leasehold estate, and with Phebus, the owner of one-half of the oil mineral estate. There was no obligation singled out for Stock to perform that Meagher could waive or forego by way of consideration. There was no privity between Meagher and Phebus, or between Meagher and Juhan. They, and particularly Juhan, had the right to the enjoyment of their respective mineral estates irrespective of Meagher. Carried to the extreme, the finding treats the situation as if Stock were the sole lessee and under obligation to Meagher the landlord in the matter of performance and as if Meagher had released Stock of his obligations. None of these things existed nor was such bargained for.

In a pretrial conference held at Vernal on November 12, 1949, (p. 50, A-58), counsel for Meagher stipulated that there was no cash or money paid for the document of October 21, 1944. On page 94 of the exhibit counsel states, in effect, the substance of the above finding and said in part:

“I am not trying to assert at this time that there was a violation of those things to do by Stock, but most any lessee, as long as he is a lessee, is subjected to obligations. And when he surrenders and the landlord accepts the surrender he is freed of those obligations, and from time immemorial that has been considered sufficient legal consideration to support a surrender even though no money or other things of value are involved.”

The foregoing might well be true if Stock was the owner of the entire oil and gas mineral estate. But this was not the fact. Some argument might be made if there was an obligation of performance for which Stock could singly be made accountable, but such is not the case. The contention is confused with the normal surrender clause where the surrender is made by the lessee holding the entire mineral estate to a landlord who is entitled to receive the same, resulting in a merger of title. The idea of consideration, as expressed by counsel and as reflected in the above finding, is but a play upon words because there was, in fact, no consideration. The document recites no consideration. It is conceded that no money or cash was paid for the same and Meagher, in his letter to Phebus on November 9, 1944, said “*I believe you know I would not ask for surrender of anybody’s rights without payment, but in this instance actually no rights exist for anybody through that old lease of 1924.*” (Italics ours).

Gross crude oil sales from the property amounted to more than \$672,000.00 from September 18, 1948 up to and including May 31, 1950 (R. 255). Meagher would contend that the nebulous theory of consideration, as outlined above, supports A-30 as a transfer or conveyance of one-half of values immediate and prospective as so indicated, less royalty. Inadequacy of consideration may be so gross as to shock the conscience and common sense of all men and may amount both at law and in equity to proof of fraud. This was the statement of the Washington court in *Sova v. First Nat. Bank of Ferndale* (1943), 138 P. 2d 181, 190, where it is stated:

“And in 12 Am. Jur. p. 617, section 122, appears the following text: ‘* * * Doubtless, however, the inadequacy may be so flagrant as of itself to afford a presumption of fraud, as, for instance, if the contract is, in the language of Lord Hardwicke, such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept on the other.’”

In the instant case we go even further. There was no consideration. There was no bargain for an interest and nothing intended to be conveyed or transferred. There was no donative intent so a gift cannot be spelled out of the transaction. Divorcing from the transaction reflected by A-30, the construction that Meagher, sheerly out of self-interest, would now place upon the same, the situation resolves itself into the simple equation—Meagher represented and Stock believed as shown by

his signature to the document that the lease of June 4, 1924 was cancelled by termination of production of oil and gas "in accordance with the terms of the lease," and that Stock was contractually bound under the circumstances to execute the release. Both of these propositions were untrue. The contractual stipulation found in the lease of June 4, 1924 had been annulled and abrogated by the modification agreement of May 21, 1927 and Stock was *not* under a contractual duty to release. The lease of June 4, 1924, as modified by the agreement of May 21, 1927, was *not* cancelled by termination of production of oil and gas, or otherwise, as decided by this court in its decision of October 27, 1947. To make a transfer or conveyance out of the instrument is as unrealistic as finding numbered 42, which reaches out into thin air to find a consideration to support such theory. For convenience we quote the entire release, Exhibit A-30, omitting the acknowledgment and recording data, as follows:

"RELEASE

Whereas, a certain oil and gas lease dated the 4th day of June, 1924, given by James Wash Sheridan and Iva H. Sheridan, his wife, and Francis Hamilton Sheridan, lessors, to R. C. Hill, lessee, and covering the following described land in the County of Uintah, and State of Utah, to-wit:

Section 15—E $\frac{1}{2}$ of SE $\frac{1}{4}$; Section 22—E $\frac{1}{2}$ of NE $\frac{1}{4}$; NE $\frac{1}{4}$ of SE $\frac{1}{4}$; Section 23—NW $\frac{1}{4}$ of

NW $\frac{1}{4}$; S $\frac{1}{2}$ of NW $\frac{1}{4}$; N $\frac{1}{2}$ of SW $\frac{1}{4}$; SW $\frac{1}{4}$ of NE $\frac{1}{4}$; NW $\frac{1}{4}$ of SE $\frac{1}{4}$, all in Township 5 South, Range 22 East, Salt Lake Meridian.

was recorded on the 25th day of July, 1924, in Book 3 of Miscellaneous Records at pages 313-318, of the records in the office of the County Recorder of Uintah County, Utah, and

Whereas the lessee and his assigns agreed that upon failure to fulfill the terms of the lease, 'The lessee hereby agrees to relinquish, cancel and surrender the same to the lessors and to clear the record title of said lands from the lien or burden of said lease by making, executing, acknowledging and delivering a proper conveyance or release thereof and causing the same to be recorded in the office of the County Clerk and Recorder of the County where the said lands are situated, without expense to the lessors.' (P. 317, Book 3, Miscellaneous records);

Whereas, Paul Stock derived his interests by virtue of an assignment of the rights under this original lease;

Whereas, the said lease and all rights thereto or incidental thereto are now owned by N. J. Meagher by virtue of cancellation of the lease by termination of production of oil and gas in accordance with the terms of the lease;

Now, therefore, know all men by these presents, that Paul Stock does hereby cancel, release, relinquish and surrender to N. J. Meagher, his heirs and assigns, all of his right, title and interest in and to the said oil and gas lease, and all of his right, title and interest in and to the

said oil and gas lease in so far as it conveys the lands above described.

In Witness Whereof, the said Paul Stock has set his hand this 21st day of October, 1944.

Paul Stock.”

By reason of the so-called release Meagher is claiming one-half of the oil rights in property unproductive, so far as the oil mineral estate is concerned, until September 1948, but which produced, after the expenditure of substantial risk capital in a locality previously unproductive of oil, more than \$672,000.00 from September 18, 1948 to and including May 31, 1950 and in the potentialities of future earnings indicated by such a production record. The fact that Meagher paid nothing for the interest that he claims was transferred by the foregoing instrument does indeed shock the conscience of all fair-minded men and is in and of itself sufficient to compel the intervention of a court of equity. The lack of consideration is evidence of the fraud heretofore said to have been perpetrated. In this connection we again quote from *Adamson v. Brockbank*, supra, as follows:

“The testimony indicates there was no consideration for the deed. This is at variance with the stated consideration of \$10; however, no United States revenue stamps appear on the deed, and this is consistent with no consideration. 16 Am. Jur. p. 456 sets forth the general rule with respect to the effect of inadequacy or want

of consideration. The text states: “* * * However, if the inadequacy of consideration is so glaring as to stamp the transaction with fraud and to shock the common sense of honesty, a court of equity will intervene. If the consideration is grossly inadequate, equity in any case will lay hold of slight circumstances of oppression, fraud, or duress, in order to rescind the conveyance. Inadequacy of consideration tends to show fraud, where other circumstances point to misrepresentation, imposition, undue influence, oppression, abuse of a confidential relationship, etc. * * *

Granted that a quitclaim deed given to correct a boundary discrepancy may recite a nominal consideration and yet be legally effective; *however, when, as here, a party claims a valuable and additional right* was released or quitclaimed, then the adequacy of the consideration becomes important.” (Italics ours).

6. A-30 SHOULD BE CANCELLED ON THE GROUND OF MISTAKE.

We take the position that the so-called Stock release was not effective for any purpose. Assuming, for the purpose of argument, that the instrument had some vitality, which, of course, we do not admit, it is obvious that the same was executed by Stock under a mistake as to his preexisting right. Meagher now takes the position, after the decision of this court, that he was also mistaken as to the existence of the lease, as modified. He says that, notwithstanding his previous assertion of record that the lease had ceased to exist, he can

say that he was mistaken as to the fact and as to the law, or either, and adopt a construction as best serves his purpose.

In light of all of the circumstances it is clearly evident that Stock was mistaken as to the contractual obligation to release as was Meagher, unless, of course, Meagher acted fraudulently. The authorities that follow demonstrate the proposition that the release should be cancelled whether the mistake of the preexisting right be one of fact or one of law :

Restatement, Restitution, Section 18:

“A person who has entered into a contract binding upon him and has paid money to the other party thereto under an erroneous belief induced by a mistake of fact that the terms of the contract required such payment, is entitled to restitution from the other, except where the mistake is only as to the time of payment.

Comment a. The rule stated in this Section applies to situations where the contract is completely effective but where an event or condition upon which payment was to be made by the terms of the contract has not happened or does not exist. It is applicable, not only where there has been a failure of performance by the payee, but also where a condition precedent to payment, although not part of the payee's performance, has not occurred. It is applicable also to situations where an initial liability to pay has terminated and where payment is made because of a supposed but non-existent breach of contract by the payor.”

The above section deals with the payment of money. But section 39 of the Restatement ties section 18 in with the transfer of other things. Under section 18 it can be argued that Stock was mistaken as to the occurrence of a condition precedent to his duty to perform, i.e., the failure to drill for oil. It can also be asserted that an initial liability had terminated because of the fulfillment of all promises in the amended lease.

Restatement, Restitution, Section 39:

“Except as stated in sections 41 and 42, a person is entitled to restitution from another because of mistake of fact if he has transferred to the other land, chattels, negotiable instruments or choses in action under such circumstances that, had he paid money to the other, he would have been entitled to restitution.”

This section would bring the instant case within the rule of section 18.

Restatement, Restitution, Section 59:

“A person who has conferred a benefit upon another by mistake is not precluded from maintaining an action for restitution by the fact that the mistake was due to his lack of care.”

Tuttle v. Doty (1918), 168 N.W. 990 (Mich.):

A mother believed that stock certificates had been stolen by her grandson. Because of this belief she made out to her daughter a transfer of her interest in the stock, the daughter to have complete title when the

stock was found or the transfer completed on the company books. The grandson had not stolen the stock. It appeared that the mother had delivered the stock to her daughter to keep for her, a fact that both the mother and daughter had forgotten. The court held that but for the mistake of the mother as to the whereabouts of the stock the transfer would not have been made. Rescission was allowed. Here there was no contract, but a gift which was motivated by a mistake of fact.

Johnson v. Saum (1904), 98 N.W. 599 (Iowa) :

In consideration of defendant's becoming a surety for him, plaintiff gave defendant a promissory note secured by a chattel mortgage. Defendant sold the mortgaged property and paid plaintiff's obligation. There were further dealings between the parties and plaintiff came to owe some more money to the defendant. The defendant presented a bill to plaintiff demanding \$500—which sum included the debt already satisfied. In settlement of the claim the plaintiff delivered a horse to the defendant. The court held that the plaintiff was entitled to restitution of the amount paid twice to the defendant.

Restatement, Restitution, Section 49, paragraph (1) :

“A person is entitled to restitution from another to whom gratuitously and induced thereto by a mistake of law he has given land or other things or has surrendered a claim if the mistake

(a) Was caused by fraud or material misrepresentation, or

(b) Was as to the identity or relationship of the donee or was some other basic mistake, or

(c) Caused the donor to give other or more than he intended to.”

Restatement, Restitution, Section 50:

“If a person has transferred to another his interest in property in the performance of an agreement based upon an assumption that the transferror’s interest was smaller than it was, the assumption being due to a mistake of law either shared by both parties or known to the grantee, he is entitled to restitution upon the return of what he has received, or to restitution of the excess, or to other relief, as the equities of the situation may require.”

Our situation seems to come within the idea of both of the above sections.

Renard v. Clink (1892), 51 N.W. 692, (Mich.):

An assignee of a mortgagee had brought action to foreclose a mortgage, and in the action had received a deed. The foreclosure action, however, was legally ineffectual. Thereafter the mortgagor tendered to the assignee the amount due on the mortgage, but not including the costs of the former suit. The rule of law was that refusal of a tender without good excuse discharged the mortgage. Under this rule the mortgagor asserted that the refusal of the tender extinguished the rights of the mortgagee’s assignee in the mortgaged property. The

court held that the assignee's mistake as to the legal effect of the first foreclosure relieved him of the result of the refusal of tender, although his mistake was based upon a mistake of law. It was said that relief is granted where a mistake of law is with respect to one's "own antecedent and existing private legal rights."

Gerdine v. Menage (1889), 43 N.W. 91 (Minn.):

This was an action to set aside foreclosure proceedings. The defendant had attempted to foreclose certain mortgages and, thinking he had complied with the law, and that he had become owner of the mortgaged premises, recorded a satisfaction of the mortgages. In this action the mistake was pleaded and the appellate court directed that the satisfaction be purged from the records. Although the mistake was as to the lawfulness of the prior procedure, the court said:

"Such mistakes are classed with mistakes of fact, and are frequently relieved from, where the equity is clear. They are to be distinguished from mistakes or ignorance of general rules of law, and from cases where the parties mistake the legal effect of a contract or transaction they have made or entered into, of the terms or particulars of which there is no misunderstanding. A person may be ignorant or mistaken as to his own antecedent legal rights or interests, while he clearly understands the scope of the transaction into which he enters."

Swedesboro Loan & Bldg. Assn. v. Gans (1903), 55 Atl. 82 (N.J.Eq.):

Mortgagor died. The mortgagee, believing that property descended to the father of a decedent, obtained a deed from the mortgagor's father, along with a release of dower by the decedent's wife. Under statutes of descent and distribution property did not descend to fathers. But the mortgagee, believing upon the advice of a scrivener that he had acquired the equity of redemption, cancelled the mortgage. In this action the court reinstated the mortgage and allowed a foreclosure against the heirs of the mortgagor, although the mortgage was cancelled because of a mistake of law.

This case contains a review of earlier English authorities allowing cancellation for mistake of law. Any dicta in the case to the effect that negligence of the grantor or releasor may prevent relief in equity is clarified by *Restatement*, Section 59, *supra*.

Peter v. Peter (1931), 175 N.E. 846, 75 A.L.R. 890 (Ill.):

Wife of deceased failed to have will probated because of a belief that she had acquired good title to the same property by way of a warranty deed given by her husband prior to his death. The deed was not valid. The court in this action held that this mistake as to the validity of the deed was sufficient to allow relief in equity, and a reopening of probate for the benefit of successors to the wife—although the mistake was one of law. The court said (75 A.L.R. 893 et seq.):

"Counsel for appellees argue that, though the widow was mistaken in believing that the deeds from her husband vested the property in her, her mistake was one of law, and that equity will not relieve against a mistake of law. While it has been stated as a general rule that a mistake of law pure and simple is not adequate ground for relief in equity, yet, even when the mistake is one of law, equity sometimes intervenes. *Moore v. Shook*, 276 Ill. 47, 114 N.E. 592. Courts of equity have aided mistaken parties because of the demands of justice. Private legal rights, interests, duties, or liabilities are always more or less complex, particularly to the layman. They depend upon conditions of fact as well as rules of law, and a concrete notion of a private legal right, interest, or liability is not readily separated from the facts on which it depends. Such mistakes may therefore be, and frequently are, properly considered as mistakes of fact. There is no fact relating to private rights, interests, estates, or liabilities that does not more or less involve rules of law, as where A proves that he is the owner of certain real estate. Such is proved as a fact; yet this fact rests upon the law relating to the sufficiency of the conveyance, the competency of the grantor to convey, and in some instances the form of the instrument, but A does not the less prove a fact because that fact involves some relation of law. To say that because it involves a legal relation it is not a fact would seem to arise from a confusion of ideas. One may be ignorant or mistaken as to his own antecedent legal existing rights, interests, duties, or liabilities though he accurately understands the legal scope of the transaction into which he enters and its effect upon his rights and liabilities. There are many well-considered

decisions in which relief has been awarded against mistakes pure and simple of this character, though not always based on the ground that equity will relieve against a mistake of law."

Following this case there is an *Annotation* in 75 *A.L.R.* 896, in which the cases predominantly support the view that mistakes of law of this type may be the ground for relief in equity.

Freeman v. Curtis (1862), 51 Me. 140:

The defendant told the plaintiffs that there was some question concerning the distribution of decedent's property—whether it would go to the cousins or to plaintiffs, an uncle and aunt. The rule of descent was that the property would go to uncle and aunt. The defendant asserted that he intended to contest a will; and showed to the plaintiffs deeds of release from the cousins of decedent. The defendant then promised to give to plaintiff's 1/12 of all the property recovered from the estate in consideration of the plaintiffs deeding to him all their interest in the estate. In this action the defendant was ordered to convey to the plaintiffs all he had received. The court said:

"And whenever *money* can be recovered back *at law*, on the ground that it has been paid by mistake, *other property* may be recovered back *at law*, or *in equity*."

The court recognized the rule that relief may sometimes be grounded on a mistake of law, and said:

“If the defendant was as ignorant as the plaintiffs, the mistake was mutual. If he was not ignorant, then he knowingly took advantage of their ignorance, and obtained the deeds fraudulently.” (Italics ours).

Goff v. Gott (1858), 5 Sneed 562, 37 Tenn. 294:

Defendant had been defrauded of a horse by a third person who had in turn sold the horse to plaintiff, a bona fide purchaser for value without notice. When defendant learned of the fraud he demanded the return of the horse by plaintiff who, thinking that the defendant had a right to it, gave it up. In an action of detinue the plaintiff was allowed to recover. The court discounted the defenses of (1) gift; and (2) mistake of law. Quoting from *Story, Eq. Jur.* Vol. I, Section 122, the court said:

“‘Where the party acts upon the misapprehension, that he has no title at all in the property, it seems to involve, in some measure, a mistake of fact, that is, of the fact of ownership, arising from a mistake of law.’”

Barnett v. Kunkle, 256 Fed. 644 (8th C.C.A. 1919):

Barnett conveyed an entire parcel by warranty deed, believing (1) that the deed was only for $\frac{1}{2}$ (he couldn't read English), and (2) that he owned only $\frac{1}{2}$ of the property. His belief as to his ownership was based upon a mistake as to the devolution of property by inheritance in Oklahoma. The court held he was entitled to relief from the instrument on either of three grounds: (1) The deed was given under a material mistake as to the extent of the grantor's interest in the land; or (2) The deed

was given under a mistake of Barnett's which was "aided and confirmed by the statement of Moore that Barnett owned only a $\frac{1}{2}$ interest." or (3) Both parties believed Barnett only owned a $\frac{1}{2}$ interest, and that was all intended to be conveyed. Thus the deed did not express the intent of the parties.

Bronson v. Leibold (1913), 87 Atl. 979 (Conn.):

Defendant was purchasing real estate under a conditional sales contract from the plaintiff. He fell in arrears in his payments and, thinking that his rights had been forfeited because of his defaults, he executed a quitclaim deed to the plaintiff vendor. He later consulted an attorney and learned that foreclosure was necessary in such a contract, and that his rights had not been forfeited. Thereafter he tendered the amount due under the contract and demanded a deed. The plaintiff refused. The vendor later brought this action for rent and defendant counterclaimed for cancellation of the quitclaim deed and for a reconveyance of the property to him. The plaintiff pleaded that the mistake was not (1) material; (2) mutual, or (3) one of fact—but of law. Said the court:

"The defendant believed that he had lost his rights in this property, and as a consequence that the plaintiff would eject him. He did not know he had the right to tender the amount of his debt and demand a deed which the plaintiff must give. The plaintiff and his attorneys entertained a similar belief that the defendant had forfeited his rights under the contract, and they confirmed

the defendant in this belief. No fraud was practiced and none was necessary to be alleged or proved to secure the relief sought. The mutual mistake was as to the legal rights of the defendant arising out of the contract.

* * *

Though this were held to be purely a mistake of law, the defendant would not, under the circumstances of the case, be denied relief upon that ground."

In the case last cited both parties did what they thought they were obligated to do. As in the case at bar, if there was a mistake it was "confirmed" by the other party. The Meagher letters show that.

In *Love et al. v. Phillips et al.* (1922), 60 Utah 329, 208 P. 882, it was held that equity had jurisdiction to grant relief from the consequences of mistake as to antecedent existing legal rights. The trial court was of the opinion that the fact that the plaintiffs were mistaken as to the legal effect of certain deeds did not entitle them to any relief. This was on the theory, as the trial court conceived it, that a mistake must be a mutual mistake or the acts induced by fraud on the part of the party against whom relief is sought. This court on the appeal of the case held otherwise, stating:

"We are thoroughly convinced that the plaintiffs executed the quitclaim deeds in 1907 under a misapprehension or mistake as to their legal rights in the property of their father's estate.

The question for determination is: Has a court of equity, by reason of such facts as appear in this record, power or authority to grant relief? We are of opinion that it has, and, further, that it is the duty of such court to grant the parties relief. There was no consideration for the execution of any of the quitclaim deeds except the release or conveyance by the other heirs to the parties executing such quitclaim deeds of their interest in the lands belonging to the father's estate. *This is therefore a case in which a court can, without injury to others, relieve the parties from their mistake and therefore do justice to all concerned.*" (Italics ours).

This court quoted with approval from 2 *Pomeroy Eq. Jur.* (3d Ed.), Section 849 as follows:

" 'I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. The number of decisions which support it, and which it explains, is very great. Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such *assumed* rights, interests, or relations, or of carrying out such *assumed* duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact.' " (Italics ours).

On the related subject of fraud, related by the circumstances of the transaction as in the case at bar, the court said:

“If the parties had voluntarily entered into an agreement, uninfluenced by the father’s deeds, for a division of the property left by the father, then a different question would be presented. Clearly such was not the intent of any of the parties in making or receiving the quitclaim deeds. The plaintiffs, believing that their rights were fixed by the deeds of the parents, were to that extent at least mistaken as to their legal rights. If the defendants were advised and knew that the deeds of the parents were invalid and conveyed no title and at the same time knew or had reason to believe that the plaintiffs were ignorant of such fact, then failure on the part of defendants to disclose and make known the rights of plaintiffs would be actual fraud.”

In *Adamson v. Brockbank*, supra, this court again recognized the principle laid down in the Love case that a court of equity can set aside a deed where there has been mutual mistake as to the interest of the grantor in the property conveyed, whether it be a mistake of fact or law. At pretrial, page 32, Exhibit A-58, Meagher readily conceded that in the “early phases” of this trial he asserted that the oil and gas lease was of no force and effect, having been abandoned. He conceded that he “was wrong on that point.” The so-called release was obtained four days after the commencement of the action, by which document Stock also said that the lease had

been cancelled, but assigned as the reason "termination of production of oil and gas in accordance with the terms of the lease." Meagher was urging his contention of abandonment and termination of the lease, not only in the "early phases" of the case commencing in October 1944 but also until after the decision of this court in October 1947 when he filed a petition for rehearing, which was not overruled and denied until the following March.

While we assert that self-interest prompted the change of heart on the part of Meagher after he was ruled out by the decision of this court, nevertheless, it is obvious that both Meagher and Stock were mistaken at the time of the release as to the existence and vitality of the June 4, 1924 lease and the modification agreement of May 21, 1927. Whether the mistake be one of fact or one of law is of no consequence as equity will afford relief under both conditions under the circumstances of this case. Going back to the Brockbank case, and in this connection, the court said:

"The trial court could have resolved this question against the appellants on one of two grounds: Firstly, if the court found that appellant, Brockbank, had no knowledge of the existence of the ditch and none of the parties to the deed had any intention of dealing with the rights to the ditch, then it would have been a case of mutual mistake as to the extent of the property conveyed. A court of equity can set aside a deed where there has been mutual mistake as to the interest of the grantor in the property conveyed,

whether it be a mistake of fact or law. (See 26 C.J.S., Deeds, Section 55, page 272). As said in 16 Am. Jur. 466: 'in other words, if a deed does not express the agreement of the parties to it, if there is such an agreement, it is immaterial whether a mistake therein made is one of law or fact.' ”

In Finding of Fact numbered 36, referring to the document A-30, the court finds “nor did any defendant take, or refrain from taking, any action due to any misconception of fact or of law.” In Conclusion of Law numbered 14 the court concludes that the document A-30 “is sufficient to transfer to Meagher all of the said lessee’s rights then owned by Stock,” and in Conclusion of Law numbered 16 that “Neither Stock nor any other defendant is entitled to rescind the transfer from Stock to Meagher, document A-30, on any basis, * * *.” We have demonstrated the incorrectness of the specific findings and conclusions.

Either Meagher defrauded Stock or there was a mutual mistake of fact in one or more particulars, viz., (a) that termination of production of oil and gas cancelled the lease, (b) that Stock was under contractual obligation to relinquish, (c) that Stock derived his interest by virtue of an assignment of the rights under the lease of June 4, 1924, and (d) that the modification agreement of May 21, 1927 was not controlling (it was not mentioned or referred to in the release); or there was a mistake of law as to Stock’s antecedent legal rights. There being a total lack of consideration and Meagher

not having, by the record, changed his position or given up anything to Stock by reason of A-30, there was nothing that Stock could do by way of tender back. Therefore, every element necessary for rescission and cancellation of the instrument of October 21, 1944 exists, all as prayed for by the counterclaim of Stock.

The defenses of fraud, mistake, lack of consideration, laches and estoppel, clearly shown by the record, are properly urged, at the same time, by Juhan and Phebus, as well as Stock, and those claiming by, through or under them. The negative findings and conclusions should be rejected and, as pointed out above, the Stock instrument, A-30, should be cancelled and annulled of record, the proper findings and conclusions being directed for that purpose.

Aside from the affirmative defenses so indicated, and the Stock counterclaim, Meagher, in order to prevail, must persuade this court that document A-30 is in and of itself a transfer, assignment or conveyance, the theory upon which the findings are drawn, or a surrender, the theory upon which the trial court's fifty-five page memorandum decision was based; therefore, the next point.

7. A-30 IS ABORTIVE AS A SURRENDER OR RELINQUISHMENT.

The so-called Stock release purports to "cancel, release, relinquish and surrender to N. J. Meagher, his heirs and assigns, all of his (Stock's) right, title and interest in and to the said oil and gas lease, and all of his

right, title and interest in and to the said oil and gas lease in so far as it conveys the lands above described.” Finding of Fact numbered 35 finds that by the document A-30 Stock *transferred* to Meagher an undivided one-half interest in the lessee’s right with respect to oil in the 440 acre parcel. The word “transferred” is also found in Findings 39, 40 and 42. In Finding of Fact numbered 43 it is stated, more as a conclusion, that it is not necessary to determine “whether document A-30 constituted an assignment or surrender of Stock’s interests in the lessee’s rights, since in either event, as between Stock and Meagher, it was a transfer to Meagher of all interest in the lessee’s rights owned by Stock.” Conclusion of Law numbered 14 is that the granting clause contained in document A-30 is sufficient to transfer to Meagher all of the lessee’s rights then owned by Stock.

The trial court’s extended memorandum decision, with some inconsistencies, divided the lease in half so far as oil is concerned, excepting only so-called land-owners royalties and gave the Stock portion, as so divided, to Meagher. The court premised its decision upon a “surrender” effective as against even one-half of the overriding royalty, originally 6%, in favor of Ashley Valley Oil Company. Note particularly R. 173.

When objections were urged that Meagher’s proposed findings, later adopted, were inconsistent with the memorandum decision, the inconsistency was conceded

by counsel (R. 327, 331). The whole matter was thereafter resolved, at least to the trial court's satisfaction, by its supplemental decision to the effect that it makes no difference whether A-30 is a "surrender" or a "conveyance," stating:

"The question, as the Court conceived it and now conceives it, is as to whether, under any theory, A-30 was sufficient to take from Stock and place in Meagher what rights Stock then had under A-1 - A-5. The Court felt, and now feels, that it has that effect, whether it is a conveyance or is merely a surrender. The Findings of Fact, paragraphs 35, 39, 40, 42, at least, describe it as a 'transfer' of Stock's interest to Meagher. That expression is sufficiently specific in the Court's judgment without designating whether such transfer resulted from a conveyance or a surrender." (R. 197-198).

While we are convinced that this court will readily discern the distinction and marked difference between "surrender," as that term is contractually used in the controlling documents, and "transfer," as the term is used in the findings and conclusions, we, nevertheless, feel it important to analyze the document A-30 from both viewpoints, if only to more clearly point out, if possible, the error upon which the trial court predicates the taking from Stock and placing in Meagher the rights that Stock had under A-1 - A-5 "under any theory," which is practically tantamount to saying "no matter upon what theory."

We have attempted to epitomize the modification agreement of May 21, 1927, Exhibit A-5, in what is denominated as Appendix "A" attached to this brief, with emphasis upon paragraphs 20 and 28 thereof, which give the lessee a limited right of surrender. By referring to the specific paragraphs and to the exhibit itself, A-5, it will be noted that a surrender can only be made after the Sundance formation has been pierced, as provided by paragraph 4 of the agreement, and then only to the whole leasehold interest, unless the lessee desires to surrender the *whole* oil mineral leasehold estate, retaining the gas rights. He can thereafter surrender the *whole* of the gas mineral leasehold estate.

The consent of the royalty owners holding 11½% is attached to the modification agreement, A-5. By stipulation (R. 256) it was agreed that Lucius A. Dick and J. N. Wyman by separate documents consented to and ratified each and all of the terms and provisions of Exhibit A-5, accounting for all of the outstanding royalty interests at the date thereof. Omitting signatures, including that of N. J. Meagher, the consent is as follows:

"CONSENT OF ROYALTY OWNERS

For a good and valuable consideration, receipt whereof from the parties to the above agreement is hereby acknowledged, we the undersigned owners of royalties on production from the lands the subject of the foregoing agreement, do hereby approve of and consent to said agreement and all of the terms thereof.

Dated June, 1927."

At this point it should be noted from the decision in *Meagher v. Uintah Gas Co.*, supra, that the lessee had complied with the specific provisions of the lease, the “consideration” for the right to the continuing interest in the oil and gas mineral estates, and that the “Sundance formation” was penetrated by operations under the lease with no condition arising subsequent to that time that called for further exploration for oil. Furthermore, as pointed out in the former opinion, gas in commercial quantities had been discovered upon the land at the time of the execution of Exhibit A-5.

We again invite attention to the fact that the quoted portion of the R. C. Hill lease of June 4, 1924, as found in the second “whereas” clause of the release, A-30, the same language with but one minor exception, commencing about the middle of the fifth line from the end of paragraph numbered 21 of the June 4, 1924 lease, A-1, is not found in A-5, the same having been superseded and replaced by paragraphs numbered 2 to 29 thereof, both inclusive.

(a) THE PURPORTED SURRENDER IS NOT TO ALL OF THE OIL MINERAL ESTATE AS REQUIRED BY A-5.

Briefly stated the *lessee* had the privilege under A-5 of surrendering, after piercing the Sundance formation, (a) the entire oil and gas mineral estate and other matters incident to the lease, or (b) the entire oil mineral estate and (c) after having pierced the Sundance formation and having surrendered the whole oil mineral estate to surrender the whole gas mineral estate.

In the former decision of this court, *Meagher v. Uintah Gas Co.*, supra, speaking of the modification agreement, it was said:

“We are called upon to interpret a contract. That contract bears the name of an ‘oil and gas lease.’ However, such nomenclature should not induce us consciously or unconsciously to unduly restrict its interpretation within pre-conceived classification limits.”

The parties having contracted on the subject of surrender, the surrender must be in accordance with the contractual stipulations. There is ample authority to that effect.

In 2 *Summers on Oil and Gas* (Perm. Ed.), Section 336, page 209, the author states:

“The manner in which a lessee may exercise the power to surrender depends upon the provisions of the lease. Where a lease expressly provides for the manner in which surrender is to be made by the lessee, the surrender cannot be made in any other manner, without the consent of the lessor.”

To the same effect are: *Benson v. Nyman* (1932), 16 P. 2d 963 (Kan.); *McKee v. Grimm et al.* (1925), 238 P. 835 (Okl.); *Cohn v. Clark* (1915), 150 P. 467 (Okl.); *Lamar v. Farmer* (1915), 109 N.E. 791 (Ind.); *McKee v. Grimm* (1916), 157 P. 308 (Okl.); *Roberts v. Bettman* (1898), 30 S.E. 95 (W. Va.); *Ardizzone et al. v. Archer* (1916), 160 P. 446 (Okl.); *White v. United States Fidelity & Guaranty Co.* (1932), 13 P. 2d 186 (Okl.); and

Ward et ux. v. Tripple State Natural Gas Co. (1909), 115 S.W. 819 (Ky.). In the last case the court said:

“There must be a surrender in fact, a giving up of the premises for every purpose for which they were used under the lease. The lessor and the lessee must, after the surrender, occupy towards the leased premises the same relation they did before the lease was entered into. *Richardson v. Chenault*, 31 S.W. 143, 17 Ky. Law Rep. 372; *Ormsby Coal Company v. Bestwick*, 129 Pa. 592, 18 Atl. 538.”

These cases hold that the Stock instrument did not have the effect of terminating the lease. The lease provided the manner in which surrender might be made. The instrument executed by Stock was just one of the steps necessary to be performed before the lessee could be relieved of his obligations under the lease. The lease itself as modified provides that the “surrender shall not become effective until the Lessee shall have delivered” all necessary instruments of transfer. A partial release or surrender, by the very terms of the contract, could not be made.

If it can be said that surrender may be made other than as provided in the lease if there is a consent to such arrangement, then it would follow that a surrender not according to the provisions of the lease cannot be unilateral. The consent of the lessor must be shown. The only act of Meagher, in this case, upon receiving the instrument is the recording of it. This does not show

consent when his conduct is examined in the light of the surrender provisions of the lease. The letters explain his conduct and would indicate that he was proceeding to obtain all necessary instruments of transfer—which he failed to do. There is nothing to show that he bargained away any right to enforce covenants and conditions against the lessees. If this were an action for rent or to force the lessees to pay taxes on the property, it is doubtful that Stock would be relieved because of the execution of the instrument in question.

There was no surrender under the surrender provision of the lease because the purported surrender was not in accordance with its terms and there was no agreement to accept a surrender from one of the co-lessees in a manner other than that provided in the lease.

(b) THE PURPORTED SURRENDER LACKS CONSIDERATION

The trial court, in its memorandum decision, apparently takes the position that the holder of the reversion could bargain with one of the lessees or sub-assignees to modify the terms of the lease and thus bargain away the right to insist upon the execution of all necessary instruments to give the rights of exclusive possession and control. But there is no evidence of any bargain in the record. In *Restatement, Contracts*, Section 75, it is said that nothing is ever consideration, either sufficient or insufficient, unless it is bargained for by the promisor as exchange for his promise. *Holmes, The Common Law*, page 293, states:

“It is said that consideration must not be confounded with motive. It is true that it must not be confounded with what may be the prevailing or chief motive in actual fact. A man may promise to paint a picture for five hundred dollars, while his chief motive may be his desire for fame. A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding. But, nevertheless, it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the move or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.”

In *1 Corbin on Contracts*, Section 132, page 408, the writer says:

“Of course, the surrender of a right, or the extinguishment of any other beneficial legal relation, is a sufficient consideration *when bargained for by the promisor.*” (Italics ours).

In *Smith v. Brown* (1917), 50 Utah 27, 165 P. 468, it is said:

“As a matter of law, therefore, he could not impose new conditions upon the defendant. It is elementary that where a party is already bound to do a particular thing, but refuses to do it until the adverse party enters into a new promise without any additional independent consideration, the latter promise is not binding, since it is without consideration.”

The expressions in the Brown case are but another way of stating the doctrine of *Foakes v. Beer*, 9 App. Cas. 605 (Eng.), decided by the House of Lords in 1884, a leading case on the proposition that payment by the debtor of a sum less than the whole amount of the debt will not extinguish the debt, there being no consideration other than the performance of a portion of a pre-existing duty. The Stock instrument fell far short of what Stock was required to do, if he elected to surrender under the terms of A-5. Furthermore, there was no bargain or new consideration for Stock to do less than he was contractually required to do, leaving Meagher in a position to still look to Stock for performance, assuming, only for the purpose of argument and not conceding such to be the fact, Meagher to be the reversioner. What has been said about the case of *Adamson v. Brockbank*, *supra*, is equally applicable here.

- (c) STOCK DID NOT HAVE THE POWER TO SURRENDER A PORTION OF THE OIL MINERAL LEASEHOLD ESTATE, EVEN IF THAT WAS HIS INTENTION.

The general rule relating to who may surrender is found in most standard texts on real property. In 4 *Tiffany on Real Property* (3rd Ed.), Section 960, page 17, it is said:

“In order that a surrender may be effected the estate surrendered must be no greater in quantum than the estate of the surrenderee, since otherwise it can’t merge therein. And furthermore it must immediately precede the latter estate as

regards the right of possession, with no vested estate intervening. Consequently, if A leases to B for years and B leases to C, the subtenant C cannot surrender to A, and if property is devised to A for life, with remainder to B for life, with remainder to C in fee, A cannot, though B can, surrender to C. * * *

And it is said in *Woodfall's Law of Landlord and Tenant* (19th Ed.), page 347:

“In order to make a good surrender of lands by deed, and to make them pass by such surrender, these things are requisite:—1. That the surrenderor be a person able to surrender, and that he have an estate in possession of the thing surrendered at the time of the surrender made. 2. That the surrender be to him who has the next immediate estate in remainder or reversion, and that there be no intervening estate coming between. 3. That there be a privity of estate between the surrenderor and the surrenderee. * * *

The point that we make here is that the Ashley Valley Oil Company-Utah Oil Refining Company modification agreement of June 9, 1927, Exhibit A-6, is in reality a sublease and that between the estate of Stock, an assignee of Utah Oil Refining Company, Exhibit A-11, and Meagher there is an intervening estate, namely: that of Ashley Valley Oil Company.

In *32 Am. Jur.*, Landlord and Tenant, Section 314, it is said:

“The distinction between an assignment of a lease and the subletting of the premises lies in the quantity of interest that passes by the transfer,

and not upon the extent of the premises involved. Primarily, the test is whether, by the transaction, the lessee conveys his entire term or retains a reversionary interest, however small."

This problem is also treated in an *Annotation* in 82 A.L.R. 1273. There the annotator refers to *Sunburst Oil & Ref. Co. v. Callender* (1929), 274 P. 834 (Mont.), for the proposition that:

"* * * an assignment of a lease signifies a parting with the whole term, which includes not only the whole of the unexpired term, but also the whole estate of the assignor,—all his interest in the lease. Anything short of this is not an assignment, but a sublease; also *McNamer Realty Co. v. Sunburst Oil & Gas Co.* (1926), 76 Mont. 332, 247 Pac. 166, defining an assignment to be a transfer of title or interest by writing as of a lease, bond, note, or bill of exchange, carrying the whole interest of the assignor. An assignment of the lease signifies a parting with the whole term; whereas no matter by what name it is called, if, by an instrument in writing, a lessee grants an interest less than his own, retaining for himself a reversion, it is a sub-lease, and not an assignment of his lease."

The Montana Court in *Sunburst Oil & Ref. Co. v. Callender* and *McNamer Realty Co. v. Sunburst Oil & Gas Co.*, supra, took the view that reservation of an overriding royalty interest in the original lessee makes the subordinate grant a sublease instead of an assignment.

In Exhibit A-6 by paragraph numbered 7, there is reserved a royalty of 6% of the value of all oil and gas

produced from the 440 acre tract. This override is in addition to the royalties required to be paid by paragraphs 11 and 12 of the modification agreement, Smith-Ashley Valley Oil Company of May 21, 1927, referred to as Exhibit "A" in A-6. This is specifically provided for by paragraphs 6 and 7 of A-6.

Paragraph 10 of A-6 requires Utah Oil, in the event of its election to relinquish or surrender, to give Ashley Valley "reasonable notice" of such intention in order that Ashley Valley may have an opportunity of saving to itself the rights which Utah Oil is desirous of relinquishing. This is in the nature of an option so far as Ashley Valley is concerned.

Paragraph 11 of A-6 makes the terms, provisions and conditions thereof binding upon the respective successors and assigns of the parties. Stock is one of the assignees of Utah Oil, Exhibit A-11, by the terms of which (paragraph numbered 1) he agreed to save Utah Oil harmless in language:

"* * * to keep and perform any and all of the terms and/or covenants of any of said agreements, as to the above described lands; second parties, (Stock and Phebus) however, as to the lands last above described (440 acres), to have the right to avail themselves of any right or privilege which said Utah Oil Refining Company could or might have availed itself of if this assignment had not been made."

And in paragraph numbered 4 of A-11 Stock and Phebus expressly covenanted and agreed to fulfill and perform all of the covenants and agreements contained in the Ashley-Utah Oil modification agreement, A-6, which Utah Oil would be required to perform if the assignment were not made, and accepted the assignment subject to all of the terms, conditions and obligations thereof. Exhibit A-11 was recorded May 13, 1929 in the office of the County Recorder, Uintah County, Utah, which recording charges Meagher with notice of the intervening estate of Ashley Valley Oil Company and its right to protect its override in the event of an attempted surrender.

The reservation of the override and the option in favor of Ashley Valley to reacquire the lease rights make Stock a sublessee and a surrender by him, without previous notice to Ashley Valley, an impossibility. There is nothing in the record to show compliance with the legal and contractual rights in favor of Ashley Valley. Stock did not have, under the circumstances, the power to surrender.

The trial court's fifty-five page memorandum decision ignores the record and the contractual commitments with respect to surrender and would permit Stock to wipe out the intervening estate in favor of Ashley Valley by dealing direct with Meagher. The expressions of the trial court in those particulars, announcing a principle so completely in disharmony with the law pertain-

ing to intervening estates, and to the express commitments of the parties themselves, must have motivated counsel in submitting findings resulting in the decree, from which this appeal is taken, on the theory that A-30 was a transfer rather than a surrender—a position not taken by the trial court.

The Ashley Valley-Utah Oil instrument requires that the lessor could not be revested with full ownership without giving to Ashley Valley the first right to exercise its option to take up the interest of Utah Oil. This is the way Ashley Valley contracted to save its override, which royalty was dependent upon the continued existence of the lease. The lower court recognized this, but held it to be a mere personal covenant not binding upon Meagher, even though the instrument was recorded. Yet the right of Ashley Valley cannot be disregarded.

In *1 Corbin on Contracts*, Section 272, it is said:

“But as against a third person who is not an innocent purchaser for value, the option holder should have exactly the same rights and remedies as has any other person who has a contract to buy the land; the existence of the ‘option’—the privilege to perform or not to perform the conditions—should make no difference. This is supported by the greater number of decisions. The reason is not that the option holder has an ‘interest’ in the land, but because he has contract rights that ought to be respected by third persons. It is as a result of this and not as a reason

for it, that we may properly say that the option contract has created an equitable interest in the land.” (*Italics ours*).

Meagher is seeking equitable relief in his action to quiet title and should not be allowed an equitable decree based upon his own violation of the rights of a third person.

1 Corbin on Contracts, page 910 states:

“If the option contract is properly recorded, the recording statutes make such record constructive notice to all subsequent purchasers, so that the rights of the option holder are superior to those of such a purchaser even though he paid value and did not know of the option.”

In the present case Meagher neither paid value, nor did he take the Stock instrument without notice of the rights of Ashley Valley.

We again refer to the position taken by the trial court in its supplemental memorandum decision, wherein it is stated, in effect, that A-30 was sufficient to take from Stock and place in Meagher what rights Stock then had under A-1 - A-5, whether “it is a conveyance or is merely a surrender,” and that the word *transfer* “is sufficiently specific in the Court’s judgment without designating whether such transfer resulted from a conveyance or a surrender.” The solemnity of contract cannot be so abruptly brushed aside.

(d) MEAGHER IS NOT A REVERSIONER OF THE OIL OR GAS
MINERAL ESTATE.

The trial court's memorandum was erroneously premised, we believe, upon the proposition that Meagher stood in the shoes of M. P. Smith as being the one entitled to receive a surrender. It will be noted that in paragraphs 20 and 28 of the modification agreement, Exhibit A-5, repeated reference is made to "M. P. Smith or to said Smith's nominees," and that the surrender should not become effective until the lessee shall have delivered "to said M. P. Smith or his order properly executed all necessary instruments of transfer and do all necessary things in order to fully vest said Smith or his nominees" with all of the rights and privileges so surrendered.

In the chain of title passing to Meagher, and which we concede to be surface rights excluding the mineral estate, and which surface rights are in turn encumbered by the leasehold as it affects the use of the surface, there appears the two quitclaims, Exhibits A-7 and A-8. A-7 is of a four-fifths interest to Meagher and A-8 is of a one-fifth interest to Alexander. Both documents are dated December 19, 1927 and are virtually identical, except as to the percentage of interest and the names of the grantees. We will treat them as one with emphasis upon A-7. We briefly summarize the same as follows:

1. The grantors (Smith and wife) for the sum of \$1.00 "and the covenants, agreements, stipulations and conditions hereinafter set forth to be duly paid, kept and performed" by Meagher, his heirs, personal representatives and assigns, and for other good and valuable consideration "do, subject however to the exceptions, reservations and conditions hereinafter contained" quitclaim the entire 480 acres.

2. The grantors expressly save, except and reserve from and out of the grant the oil, gas and casing head gas in said lands contained by whomsoever thereafter produced therefrom by virtue of the agreements thereafter in the instrument described, to which agreements the grant is expressly made subject.

3. The instruments except from the grant, by specific reference, the June 4, 1924 oil and gas lease, the various royalty assignments totaling 12½% and the modification agreement of May 21, 1927, all separately set forth and referred to in subparagraphs designated (a) to (i), both inclusive.

4. Meagher, Exhibit A-7, and Alexander, Exhibit A-8, entered into covenants or warranties with Smith and his assigns of quiet or peaceable possession and enjoyment of the estates created by the several excepted documents, in language, using A-7 as the example, as follows:

“And I, the undersigned, said N. J. Meagher, grantee herein, in consideration of the above and of the execution and delivery hereof by said M. P. Smith and Ellen M. Smith, and for other good and valuable considerations, do hereby, for myself, my heirs, executors, administrators and assigns, assume and agree to perform and/or pay Four-fifths of all the joint and/or several obligations of said M. P. Smith and Ellen M. Smith by them and/or either of the (m), undertaking and/or for which they are and/or each of them is legally liable, under and by virtue of every and all the instruments hereinabove in subparagraphs ‘(a)’, ‘(b)’, ‘(c)’, ‘(d)’, ‘(e)’, ‘(f)’, ‘(g)’, ‘(h)’ and ‘(i)’ described, and covenant and agree with said M. P. Smith and Ellen M. Smith and with each of them, to save, keep and hold them and each of them, their respective heirs, executors, and administrators and their joint and several assigns harmless from, and to indemnify them and each of them for, four-fifths of any and all loss and/or damage by reason of every and all default in the performance of said joint and/or several obligations of said M. P. Smith and Ellen M. Smith and/or any thereof.”

The date of the death of M. P. Smith is not in the record but his widow, Ellen M. Smith, and others conveyed whatever interest they or their ancestor might have had in the property to Clyde S. Johnson, Exhibit A-60. Clyde S. Johnson in turn conveyed to Edward F. Richards, Exhibit A-61. The granting clause after the description of the entire 480 acres contained the following:

“Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property, as well in law as in equity, of the said grantors, * * *.”

Not only did the trial court consider Meagher to be the reversioner so as to receive the purported surrender from Stock, but the last paragraph of Finding of Fact numbered 22, the last paragraph of Finding of Fact numbered 23, the last sentence of Finding of Fact numbered 27, paragraph numbered 3 of paragraph A of the Conclusions of Law, paragraph numbered 11 thereof and paragraph numbered 1 of the Judgment and Decree are all on the theory that Meagher was and is the reversioner—none supported by the record and all contrary to law.

It having been held and it being the law of the case that the lease, as modified, is in existence and not cancelled or abandoned, the technical question of reversion seems to us to be moot.

This court, in its former opinion, has held the lease, as modified, to be in full force and effect, and that there has been no violation on the part of the lessee of any provision of the lease, upon which termination of the lease might be founded nor has any notice of termination been given by the lessors in an effort to accomplish such a termination of the lease in accordance with its terms. Furthermore, the idea of reversion in favor of Meagher

applying to the North Forty, as well as to the 440 acres, is prompted by self-interest after the decision of this court in 1947. And still further the lease of June 4, 1924, with its terms, provisions, covenants, agreements, stipulations and conditions, whether of forfeiture, surrender or otherwise, was excluded from Smith's grants to Meagher and Alexander, A-7 and A-8. Meagher, by his consent to the modification agreement, A-5, approved of and consented to all of the terms thereof, which consent and approval estops him to say that *the lands the subject of this agreement* mean anything less than the 480 acres specifically described therein, which includes the North Forty.

There has been no reversion to any part of the 480 acre tract nor does Meagher stand in the shoes of Smith by any possible construction of being his nominee so as to receive a surrender no matter how imperfectly made. The North Forty is included in the modification so far as Meagher and those claiming or to claim under him are concerned. Ashley Valley, in any event, perfected its title by the Watson deed of October 30, 1930, Exhibit A-16, Watson acting as trustee, successor to R. C. Hill, and no question being raised as to his power to convey, page 8, Exhibit A-58.

Meagher's letters to Stock and Phebus, already referred to, his letter to Juhan, Exhibit A-34, the letter from Katherine Meagher Ivers to the judge of the court (R. 12), the recitals in the so-called Stock release, A-30,

with Meagher's knowledge, as indicated, that the oil and gas mineral estates had been separated and were separately held, the provision of A-5, to which Meagher committed himself, making the 480 acres "the subject of this agreement" and by the terms thereof making the Stock instrument ineffective as a surrender, if in fact one was elected to be made, the complete lack of any consideration for surrender, the intervening estate in favor of Ashley Valley, which company, by privity of contract it was Stock's duty to recognize before dealing with Meagher, and the fact that Meagher was not the reversioner and entitled to receive surrender as such, all combined are, or each of said items when considered separately and regardless of any other factor is, sufficient to sustain the point that, in any event, A-30 is abortive as a surrender or relinquishment.

8. A-30 IS NOT EFFECTIVE AS A TRANSFER.

The Stock "release" uses the words "does hereby cancel, release, relinquish and surrender to N. J. Meagher, his heirs and assigns, all of his right, title and interest in and to the said oil and gas lease, and all of his right, title and interest in and to the said oil and gas lease in so far as it conveys the lands above described." The trial court held that these words were sufficient to operate as a conveyance or transfer. The circumstances surrounding the use of the particular words are conclusive to the effect that there was no intention to

convey anything to Meagher. The circumstances, as heretofore pointed out, surrounding the making of the instrument cannot be disregarded.

In *3 Corbin on Contracts*, Section 536, page 19, the author says:

“In view of all this, it can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances, that the meaning of such terms and sentences consists of the ideas that they induce in the mind of some individual person who uses or hears or reads them, and that seldom in a litigated case do the words of a contract convey one identical meaning to the two contracting parties or to third persons. Therefore, it is invariably necessary, before a court can give any meaning to the words of a contract and can select one meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence shall be heard to make the court aware of the ‘surrounding circumstances,’ including the persons, objects, and events to which the words can be applied and which caused the words to be used. This is true, whether the court is trying to discover the meaning that the user of the words gave them, or the meaning that some hearer or reader gave them in the past, or the meaning that ‘a normal speaker of English’ would have given them, or the meaning that a reasonable and prudent and intelligent man would have given them.”

Meagher now asserts that the meaning of the instrument was to convey to him an interest in the leasehold, but all of the surrounding circumstances indicate that this was not his original position. Originally he asserted that his only purpose was to clear up the record title. This is demonstrated by: (a) the letters from Meagher to Stock and others, (b) the recitals in the instrument, (c) the fact that there had been no oil or gas production on the premises for some time, and (d) the disclaimer of any leasehold by Meagher's quitclaim to his children on January 27, 1948.

Among the letters referred to above is Exhibit A-28, the letter from Meagher to Phebus under date of November 9, 1944. The date of the letter to Phebus is so close to the Stock instrument of October 21, 1944 as to make any expression therein evidence of Meagher's state of mind not only when he obtained the Stock instrument but when he had it in his possession and recorded it on November 3, 1944. To Phebus on November 9, 1944 he said in part:

"I have been requested for a lease on the 480 acres of land which I own * * * I believe you know I would not ask for surrender of anybody's rights without payment, but in this instance actually no rights exist for anybody through that old lease of 1924."

The implication of the above cannot be denied or brushed aside. Meagher was not asking for a transfer of interest

nor did he believe the Stock instrument, which he had placed of record six days before, to be a transfer or a surrender.

The point at issue is the state of Meagher's mind in obtaining the Stock release of October 21, 1944. The state of a man's mind is as much a question of fact as the state of his digestion. The state of Meagher's mind at this time is unequivocally demonstrated by the words he used in his letter to Phebus quoted above, and conclusively demonstrates that he had no intention during any of this time of acquiring either a transfer or a surrender of any portion of the leasehold estate. His only purpose at that time was to clear the title of what he thought to be dead timber.

It is our contention that the thought of a transfer or a surrender of a portion of the leasehold estate never occurred to Meagher until on or about April 22, 1949 when he proposed his third amended complaint. Certainly the change in Meagher's state of mind, prompted by self-interest and after the discovery of oil, could not change the legal effect of or give added weight to a writing which he acquired almost five years before in October of 1944, at which time, by language, he characterized his own purpose and intent to the contrary of what he now claims.

3 Corbin on Contracts, Section 539 says :

“The courts do not love an ‘objective’ theory of contract or apply it in the process of interpretation merely because it is ‘objective.’ They apply

it only when they find in fact that one of the parties understood the words of agreement in harmony with such an interpretation and that the other party had reason to know that he did. Indeed, the court may be convinced that both parties so understood the words and that subsequently discovered *self-interest* has caused one of them to assert a different meaning.* * *” (Italics ours).

In view of the facts and circumstances and the recitals included in the instrument, the court may construe the recitals as conditions and hold that the conditions were not met—rendering the instrument ineffective.

Another thing equally indicative that there was no intention to convey anything by the Stock instrument is the practical construction given by the parties.

In 3 *Corbin on Contracts*, Section 558, page 141, we find:

“The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. In cases so numerous as to be impossible of full citation here, the courts have held that evidence of practical inter-

pretation and construction by the parties is admissible to aid in choosing the meaning to which legal effect will be given."

To the same effect, see *Restatement, Contracts*, Section 235 (e). In *Lawrence National Bank v. Rice*, 82 F. 2d 28 (10th C.C.A. 1936), a case unrelated on its facts, the court quotes from *Brooklyn Life Insurance Company v. Dutcher*, 95 U. S. 269, 273, 24 L.Ed. 410, as follows:

"There is no surer way to find out what parties meant, than to see what they have done. *Self-interest* stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to.' " (Italics ours.)

During the first trial Meagher based his claim only upon the forfeiture provision in the lease. Stock and his successors in interest defended only on the ground that there had been no forfeiture. Was there any reason why Meagher could not have used the Stock instrument as a separate count at the outset if he thought he had gained an interest through that instrument?

Another point by which we assert that the instrument should not be interpreted as a conveyance is the doctrine that in interpreting the meaning of a word or words a meaning should be given which is the less favorable in its legal effect to the party who chose the words. (Meagher prepared the release.) 3 *Corbin on Contracts*, Section 559; *Restatement, Contracts*, Section 236(d).

Another factor is that the type of instrument signed by Stock is not of a type which is usually used to transfer oil and gas leasehold rights.

24 Am. Jur., Gas and Oil, Section 87 :

“While the contents of an assignment or a sublease necessarily depend upon the desires and necessities of the parties, it seems that most such instruments specify the nature and amount of the consideration to be paid by the transferee, outline any developmental duties that may have been imposed upon him, and require him to keep and perform the covenants of the lease. Thus, a grant of this kind may accord the grantor an overriding royalty, consisting of a designated fraction or percentage of the ‘working interest’ or of the ‘total production,’ or it may require the grantee to pay a designated sum in cash and another out of the proceeds of production. Not infrequently it calls upon him to drill one or more wells. Other provisions met with from time to time include a forfeiture clause, a provision for liquidated damages, and a warranty of title by the grantor.”

In addition this court is now called upon to determine the effect of the instrument by the sheer weight of its words. Was it a release or surrender which failed because of the absence of an immediate estate in the surrenderee, or was it a transfer of the subleasehold interest of Stock, creating a new tenancy, with Meagher becoming the tenant of Ashley Valley?

It is true that the courts are not generally concerned with the technical wording in instruments and that they will sometimes give effect to an instrument in some manner other than intended where it is not effective because of a technical defect. What the courts are trying to ascertain, of course, is the intention of the parties. The words used are very strong evidence of intention. Our basic question is whether this instrument shows any intention on the part of Stock to create a new interest in Meagher by assigning to him an interest in the oil mineral estate.

The words used are "cancel, release, relinquish and surrender." What is the natural and ordinary meaning of these words?

In *Clegg v. Schvaneveldt* (1932), 79 Utah 195, 8 P. 2d 620, 621, the court in defining the word "canceled" said:

"The word 'canceled' means to make void or invalid. It is synonymous with annul, abolish, revoke, abrogate, repeal, make void, do away with, set aside, etc."

See also 6 *Words and Phrases* (Perm. Ed.) 33, 12 C.J.S. 936.

In 3 *Bouvier's Law Dictionary* (Rawle's 3rd Rev.) 2863, 2864, we find the following concerning the word "release":

"The giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced.

Releases may either give up, discharge, or abandon a right of action, or convey a man's interest or right to another who has possession of it or some estate in the same. Shepp. Touchst. 320; Littleton 444. In the former class a mere right is surrendered; in the other not only a right is given up, but an interest in the estate is conveyed and becomes vested in the release (sic.).

* * *

In general, the words of a release will be restrained by the particular occasion of giving it; T. Raym. 399. It cannot apply to circumstances of which the party had no knowledge at the time he executed it; and if it be so general as to include matters never contemplated, the party will be entitled to relief; 6 H. & N. 347. (Italics ours.)

* * *

In estates. The conveyance of a man's interest or right which he hath unto a thing to another that hath the possession thereof or some estate therein. Shepp. Touchst. 320. The relinquishment of some right or benefit to a person who has already some interest in the tenement, and such interest as qualifies him for receiving or availing himself of the right or benefit so relinquished. Burton, R. P. 15*."

See also *36 Words and Phrases* (Perm. Ed.) 760.

Relinquishment is defined by *Bouvier* (Id. 2869) as "a forsaking, abandoning, or giving over of a right." And in *3 Bouvier's Law Dictionary* (Rawle's 3rd Rev.) 3211, we find that "surrender" means:

"A yielding up of an estate for life or years to him who has an immediate estate in reversion

or remainder, by which the lesser estate is merged in the greater by mutual agreement. Co. Litt. 337b. See *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145."

For additional definitions of "relinquish" and "surrender" see *36 Words and Phrases* (Perm. Ed.) 797, and *40 Words and Phrases* (Perm. Ed.) 873.

All of these words give the impression of a "letting go" of rights already had against the person to whom the instrument was addressed. None of them, alone or together, tend to show an intention to *transfer* interests of the signer, either by way of quitclaim deed or assignment.

In connection with the above the definitions of cancel, surrender, release and relinquish, the case of *Benton et al. v. Jones et al.*, 220 S.W. 193 (Tex. Civ. App. 1920), should be mentioned. In this case there was an issue as to the effect of an instrument which purported to "bargain, sell, and release and quitclaim" certain interests of the signer. In construing the instrument, the court said:

"It is manifest this is simply a release. While it proposes to convey an interest, yet its evident meaning is to release liens held by the grantor. *Every part of the instrument must be taken to ascertain the intention of the parties to it. The form used will not so much control as the relation of the parties at the time and their intention.* As said by Judge Williams in the case of *Sanborn v. Crowdus*, 100 Tex. 605, 102 S.W. 719:

'An intention to convey land which had not been before sold and conveyed could not be gathered from a reading of this release. Such a meaning would never be imputed to it by any one looking alone to its terms. * * * Nowhere does an intention appear to make a new grant of anything. * * * But by its recitals it connects itself with the former conveyance recited, and the two are thus made the complements of each other. * * * The two are to be construed together.'"
 (Italics ours.)

The words, taken as they appear in the instrument are not words of conveyance. It is provided by statute that a quitclaim deed when executed as required by law shall have the effect of a conveyance of all right, title, interest and estate of the grantor in and to the premises described in the deed. Section 78-1-12, *Utah Code Annotated 1943*. The instrument involved in the present case is not in the form prescribed by the statute, so we have a question as to whether it is effective as a quitclaim. This court held in *Ruthrauff v. Silver King Western Min. & Mill. Co.*, supra, that the words of the statute are permissive only and that it is not necessary to use the statutory form in order to convey property by quitclaim deed.

We can concede that any one of the words used in the present instrument might be sufficient to operate by way of quitclaim if the proper intention appeared. For instance, if it appeared that Meagher was a stranger to the title, and that he paid to Stock a valuable consideration for the instrument, we might well find that

there was an intention to convey property. And there is no reason why such an intention should not be given effect by the courts. If the instrument does not operate under the statute it still might operate by the common law. What are the requisites for such operation? What factors must be present in order to give to an instrument the effect of a conveyance when it fails as a surrender or release?

This problem has been considered by the courts of New Jersey, a state in which there has been no statutory regulation of conveyance by quitclaim deed. In *Havens et al. v. Sea-Shore Land Co.* (1890), 20 A. 497 (N. J. Eq.), the court, in discussing the problem of giving the effect of a conveyance to a release, said:

“* * * a deed which has failed of effect as a release, for want of an estate in possession in the releasee, may, if it is founded on a valuable consideration, be given effect as a bargain and sale.”

The court in *Meeks v. Bickford* (1924), 125 A. 15 (N. J. Eq.), states:

“* * * equity will interfere and give the effect of a bargain and sale deed to one of quitclaim where it appears that the releasor had an interest in the land and intended to convey such interest to the releasee. This interest may be a contingent one. But there must be an interest which the releasor may lawfully convey and it must also appear that a valuable consideration was paid therefor.”

See also *Merrill et al. v. Peterson* (1931), 154 A. 9 (N. J. Eq.).

As before shown, there was an intervening estate between that of the releasor and the releasee (Ashley Valley) and, therefore, the instrument must fail as a release or surrender of the premises unless the surrender is consented to by the owner of the intervening estate. The cases above cited indicate that this is not a situation in which an instrument, failing as a surrender, will be given effect as a conveyance. This because there was (1) no intention to convey, as shown by the recitals and the operative words used; and (2) there was no consideration for the instrument; and certainly no valuable consideration.

Assuming, for the purposes of argument, that the instrument is effective, either as a release, surrender, or quitclaim, there is still a question of construction as to just what interest was surrendered. The "release" signed by Stock refers in the recitals to an oil and gas lease dated the 4th day of June 1924, and to the pages of the county records in which the instrument was recorded. There is no reference to the modification agreement of May 21, 1927, nor to its place of record. Because of the wording in the recitals and the reference in the operative clause to "said lease", a question is raised as to just what interest was "surrendered," if any. Even though a quitclaim deed, or release, contains general

words of grant these words may be limited by other portions of the deed if it appears that there was no intention to quitclaim *all* rights in given property. This is indicated by a number of cases.

Allen v. Hall (1903), 73 P. 844 (Colo.):

In this case the plaintiff had taken a deed from the defendant of certain real property as security for a loan. Thereafter the plaintiff executed to defendant a quitclaim deed which recited, in substance, after the general statement, that the grantor conveyed all her right, title, and interest in such premises; that it was given to the grantee for the sole purpose of surrendering to the grantee the same title plaintiff had acquired from the defendant in the security transaction. In holding that the plaintiff did not convey *all* of her right, title, and interest in the land, but only the security interest, the plaintiff having prior to the making of the deed obtained another conveyance of the land, the court said:

“According to the plain language of the deed which the plaintiff gave to the defendant, the plaintiff only conveyed that title which she had obtained through the conveyance of the defendant to her. The intention of parties to a conveyance, as gathered from the whole instrument, will control, so that a general description of title, followed by a clause stating the intention of the parties as to the particular title conveyed, controls the prior recitations on the subject. (Citing case.) Plaintiff only purported to convey the title which she had received from the defendant;

consequently, whatever other title may have been vested in her at the time of that transfer was not affected by the one given defendant."

Plummer v. Gould, et al. (1892), 52 N.W. 146 (Mich.):

Defendants conveyed to plaintiff all their right, title and interest in all the lands in certain counties. A subsequent clause in the deed recited:

" 'The purpose and intent of this deed being to convey to the said second parties all and each of the right, title, claim, and interest, either in possession or expectancy, of the said first parties, of, in, and to the above-described premises by virtue of certain deeds of conveyance to the said John F. Driggs, deceased, viz.: * * * (describing grantors of conveyance referred to).' "

The facts showed that none of the described grants had been effective to convey any interest to the defendants and that, therefore, the plaintiff would take nothing if the grant were limited to the interests described. The court said:

"The intention of the parties, as gathered from the whole instrument, will control; and in case of a general description followed by a clause summing up the intention of the parties as to the premises conveyed, it has a controlling effect upon all the prior phrases used in the description (citing cases)."

In *Haynes v. Hunt et al.* (1939), 96 Utah 348, 85 P. 2d 861, construing a deed, the court adopts the general rule that the intention must be found from a reading of the whole instrument. The issue was the nature of the estate created, whether a grant or a license. The court says:

“‘When the intention of the parties to a deed or contract can be ascertained from it, such intention will prevail, unless in contravention of some rule of law; and, when such intention can be ascertained, arbitrary rules of law are not to be invoked, and will not control the construction of the instrument.’ *Kirwin v. Farr*, 17 Utah 1, at page 5, 53 P. 608, at page 609; *Coltharp v. Coltharp*, 48 Utah 389, 160 P. 121.”

In the instrument executed by Stock reference was made only to a lease of 1924, and the operative words of the “release” referred only to that lease. Should this be construed to release or surrender rights in an instrument of 1927 which is not referred to and not contemplated by the parties? This may depend upon whether the parties regarded the instrument of 1927 a “new lease” or merely an amendment of the old one.

It is true that the 1927 document was titled “Modification Agreement,” but the nature of instruments is generally the guide as to what they are. What they are called is not controlling. The modification agreement of 1927 is a lengthy document providing in great detail the duties and rights of the lessees thereunder. It abro-

gated virtually every provision which was contained in the lease of 1924. This being true, what was its effect?

In *Peterson et ux. v. Betts et al.* (1946), 165 P. 2d 95 (Wash.), the court was called upon to determine whether a new agreement between landlord and tenant was a continuation of the old lease or was in effect a new lease. Said the court:

“The April lease is for enlarged premises, for enlarged term, for a very different rental, and whereas the January lease provided for certain alterations, the April lease did not, but, on the other hand, specifically provided that the lessor should not be responsible for repairs. It then went on and repeated, word for word, all the general provisions of the January lease, such as, guaranteeing the lessee first chance of a further lease, the first option to buy in case of sale, the right of lessor to reenter in case of lessee’s failure to pay rent, covenant against assignment or subletting without lessor’s written consent, and lessee’s covenant to surrender the premises upon expiration of the lease in as good repair as they are now, any ordinary wear and tear and damages by fire excepted. In other words, it was in every way a complete lease, effective as of April 1st, and lessor (sic) accepted the premises ‘in the condition as is of this date.’ That date, it seems to us, can only be taken to be April 1st.

But what the parties intended in this respect was not a question for the jury, nor is it open to the court to speculate as to their intent. The instrument being a complete lease, the law

says that it superseded the January lease, and, although there was no physical surrender of the premises covered by that lease, that there was, nevertheless, in law, a surrender and a new entry on April 1st."

And see *Diamanti et al. v. Aubert et al.* (1926), 68 Utah 582, 251 P. 373, wherein the court announces the general rule that the execution of a new lease to one of the original tenants, and its part performance, amounts to a surrender of the old lease by operation of law.

The letters from Meagher, the recitals in the Stock instrument, all indicated that Meagher intended to obtain no interest by the Stock instrument, and that Stock had no interest to convey. If the language of the Stock "release" is taken to refer only to the 1924 lease, Meagher will have received exactly what he wanted—nothing.

There certainly was no donative intent to transfer from Stock to Meagher one-half of the oil mineral estate, nor do we think that such will be argued or contended for by respondent. Meagher himself stated that he would not expect a transfer of interest without consideration, Exhibit A-28. A consideration is not stated in the release. There being no consideration, the inadequacy of the situation is apparent. Under the circumstances of this case and as in the rule announced in *Halloran-Judge Trust Co. et al. v. Carr et ux.* (1923), 62 Utah 10, 218 P. 138, the release, as a conveyance or transfer, should be set aside:

“The remaining question is as to inadequacy of the consideration. The general rule is that a conveyance based on an inadequate consideration will not be canceled or set aside for that reason alone unless the inadequacy is so great as to shock the conscience and furnish of itself evidence of fraud. 1 Black on Rescission and Cancellation, Sections 169 and 175; 9 C. J. Section 35, p. 1174; Bruner v. Cobb, 37 Okl. 228, 131 Pac. 165, L.R.A. 1916D, 377, and annotations.”

That there must be a consideration for a deed is the implication of the recent statement of this court in *Williams et al. v. Barney et al.* (1950), 224 P. 2d. 1042:

“There is however a presumption of consideration, 16 Am. Jur. p. 653, and there appears in the record not one word refuting the adequacy of the consideration. The deeds, making plaintiffs’ chain of title including this one, were admitted in evidence without objection, and the question of adequacy of consideration, or that the instrument was other than a deed was never raised.”

In the instant case a presumption of consideration is dissipated by the Meagher letters and the recitals of the so-called release. That a consideration was thought to be necessary is the statement of the same by counsel in the pretrial hearing at Vernal, hereinbefore referred to, and of Finding of Fact numbered 42, also previously referred to, both of which, the assertion on the one hand and the finding on the other, have been conclusively

shown not to be supported in fact or in law. Any ambiguity in the release itself is resolved against Meagher and answered by the positive testimony of Stock that he did not intend to transfer any leasehold interest (R. 262-266).

9. MEAGHER'S ALLEGED OIL ROYALTY INTEREST CANNOT BE ADJUDICATED IN THIS ACTION.

By amendment to the second amended complaint, made at the time of trial June 26, 1950 (R. 230), a new issue was injected into the case, respondent fearing that he might be subjected to res judicata on the issue of whether Meagher is entitled to 2% or to 1-1/3% of the so-called landowners or oil royalty interest (R. 233). It was stipulated that appellants, without the necessity of amendment or further pleading, should be deemed to have controverted the allegation (R. 232). The issue is concerned primarily with Exhibit A-40, a photostat of a recorded agreement, whereby, and under date of October 11, 1930, Meagher divested himself of one-third of his oil royalty interest with the understanding that if a test well was not drilled upon the Ashley Valley structure, as specified in the agreement, Stock and Phebus, to whom the interest was sold, would "reconvey" the same to Meagher.

The oil royalty interest originally assigned by Smith, 1% to Meagher, Exhibit A-46, and 1% by Smith to Alexander and from Alexander to Meagher, Exhibit A-55, while carved out of the normal landowners royalty,

is, nevertheless, a covenant running with the land or a chose in action. A-46, and similar language in A-55, requires the holder of the oil lease or the purchasers of the oil produced from the leased lands to pay the holder of the royalty interest a percentage based upon the value of the oil produced and saved, thus creating a covenant for the payment of money rather than a setting apart of the oil itself. It is fair to say that the holder of the oil royalty interest does not have an interest in the oil in place or the oil produced, except the percentage in money of the value of the oil calculated as in the assignment and agreement specified. Furthermore, the assignment and agreement acts in the nature of a division order requiring production of the instrument or a certified copy thereof to enforce recovery from the holder of the lease or the purchaser of the oil, with the assignment and agreement expressly being made assignable by the so-called grantee therein.

The $\frac{1}{3}$ of 2% oil royalty interest follows the same chain of title as does the interest in the leasehold as it affects the oil mineral estate, i.e., Stock and Phebus transferred to the Standard Oil Company of California, Exhibit A-12, which company transferred to The California Company, Exhibit A-13. The California Company transferred back to Stock and Phebus, Exhibit A-14, the latter instrument being dated March 21, 1934. So far as the record discloses, Meagher made no attempt

to obtain a reconveyance at any time prior to the amendment in June of 1950, assuming the amendment to be deemed such an attempt.

After March 21, 1934, one-half of the one-third of 2% oil royalty interest was transferred by Phebus to Juhan and the other one-half of the same by Stock, through mesne conveyances and assignments, to Juhan. From Juhan the interest is traced in part back to Stock, in part to Weber Oil Company through Equity Oil Company and then deemed merged in the working interest owners, Juhan, Stock and Weber, with Equity Oil Company the operator, by the operating agreement of December 30, 1948, Exhibit A-25.

A cause of action accrued in favor of Meagher not later than, and probably before, March 21, 1934, when The California Company transferred back to Stock and Phebus. Giving Meagher the benefit of the most extreme point of time, approximately three months short of sixteen years elapsed between the transfer back and Meagher's assertion by the amendment. His action would, therefore, be barred by subsection 2, Section 104-2-22, *Utah Code Annotated 1943*, requiring an action upon a written contract within six years from the accrual of the cause of action.

The amendment was made approximately one year and nine months after the discovery of oil on September 18, 1948. On the face of the record and under the con-

ditions indicated, Meagher is guilty of laches in asserting an obviously stale demand. The defenses of laches and the statute of limitations arise on the face of the record, and, in accordance with the stipulation above referred to, were not required to be pleaded.

Exhibit A-40, by which Meagher divested himself of one-third of the 2% oil royalty interest, on its face is promissory as it pertains to a *reconveyance* and cannot be construed as a conditional divestiture.

In the case of *Pfister et al. v. Cow Gulch Oil Co. et al.*, supra, the Tenth Circuit Court of Appeals held, under circumstances in point with the case at bar, where Pfister assigned a lease to the Cow Gulch Oil Company with a provision that unless Cow Gulch discovered oil on or before August 2, 1945 it should surrender the lease and assign it back to Pfister, there was no automatic termination of the assignment on the failure to discover oil within the stipulated period. The court said:

“It is too plain to require further exposition that under no theory of termination could the rights of Atlantic in the new lease, which was lawfully acquired by Cow Gulch and which had lawfully passed to Atlantic by assignment, become vested in Pfister.”

There being no evidence of a reconveyance, the obligation to pay the royalty interest to the record owner is still outstanding. Finding of Fact numbered 59 is inconsistent with Conclusion of Law numbered 3 of B, which

in turn is unsupported in fact or in law and likewise unsupported is that portion of the decree to the effect that Meagher is the owner of an oil royalty interest of 2%. The record title is uncontroverted to the effect that Meagher cannot claim, under any circumstance, more than two-thirds of 2% of the oil royalty interest. He effectively transferred, assigned and divested himself of one-third of his former 2% oil royalty interest by A-40.

As the record stands, Equity Oil Company is in possession of the property and is extracting and selling the oil. It is not a party to this suit nor is Weber Oil Company. The trial court, in its memorandum decision, stated that its holding in favor of Meagher could not become *res judicata* as to Equity Oil Company nor Weber Oil Company, the holding being somewhat diluted by Conclusion of Law numbered 13, wherein it is concluded that the conclusions are not *res judicata* with respect to Weber Oil Company. In any event, Meagher's action, as it concerns the agreement to *reconvey* the oil royalty interest of which he divested himself on October 11, 1930, is one in *personam* and not *in rem*. Meagher is fully aware, by the record, of the fact that the oil is being produced and sold by a party or parties not before the court. The contract, Exhibit A-40, speaks for itself and, whether Meagher's action be one to enforce a covenant running with the land or one for breach of contract, it cannot be enforced in a suit to quiet title and in the absence of the necessary parties.

At this point it is interesting to observe that the findings, conclusions and decree do not proceed on the theory that at least one-half of the one-third of 2% oil royalty interest passed by the release, A-30, through which Meagher claims a transfer or an assignment of a leasehold interest, likewise a chose in action. The trial court's fifty-five page memorandum decision, cutting the lease in half on the theory of surrender, would seem to arrive at that point, but not so when the theory was reversed by the findings, conclusions and decree submitted by counsel, and later adopted by the court, with the simple expression that it makes no difference whether the Stock instrument of October 21, 1944 be denominated a surrender or a transfer.

CONCLUSION

It is not our purpose nor intent to burden this brief with a restatement of the several points which, we believe, in the mere statement of the same most thoroughly and cogently demonstrate the fallacy of the decree appealed from. At this point, however, we feel that it is appropriate and pertinent to point out a very striking and incongruous fact.

The trial was in a court of equity. And yet, by the decree appealed from, the greatest inequity has been done. Respondent, Meagher, has been awarded far more

than he could have ever obtained even upon the assumption that he owned the fee title together with all mineral rights in the property.

Meagher is a banker. He is not an oil man and, so far as the record shows, has never had any oil business experience. Upon the assumption that Meagher was the unquestioned owner of the fee title, together with all mineral interests thereunto appertaining, not even burdened by the previous landowners royalty or the covenants created by Smith, and that he might deal with the property as he saw fit, the very best thing he could have hoped to accomplish would have been to induce some qualified oil company to undertake a prodigious gamble in a territory never before explored and lying at a remote distance from any actual oil production. If Meagher had been able to induce some qualified oil company to undertake this grossly speculative venture, the very best that Meagher could have received, as land and mineral owner, would have been the usual and prevailing one-eighth landowners royalty interest in accordance with the custom, usage and practice of the oil business.

Thus, had Meagher been the unquestioned fee and mineral interest owner, he could have obtained no better than a one-eighth royalty interest.

Yet by a decree in a court of equity Meagher was awarded an undivided one-half interest in a now fully developed and producing, multi-million dollar oil field

toward which he contributed not one cent; for which he risked absolutely nothing; and during the development of which he sat silently by speculating upon the outcome.

Is it to be believed that if the result had produced a "dry hole" that Mr. Meagher would have rushed in and offered his 50% contribution of the costs in a failure?

We think not.

The very result obtained by Meagher, under all the circumstances, is on its face so grossly inequitable as to be unconscionable. This result in itself gives immediate pause to a careful and critical consideration and inspection of the facts and circumstances by which such an anomalous conclusion could have been reached. The result is so inequitable and unfair that it immediately condemns and contaminates the foundations and the structure upon which it rests. Meagher paid nothing for the instrument nor did he forego anything. His position was not changed by reason of it and to cancel the document would not take away anything that he had before its delivery. On the other hand, to give vitality to the instrument one would have to ignore the purposes for which it was given; the total lack of consideration; Meagher's lack of diligence; the contrary construction that he placed upon it by his own words and conduct; the language of the instrument; and would permit him

to perpetrate a fraud. There is nothing in Meagher's conduct that commends itself to the court even if he had a legal position, which he has not. The equities are, without exception, in favor of these appellants.

It is not necessary to remind this court that this is perhaps the first case of consequence in this state and in this court dealing with the problems pointed out as affecting oil and gas leases. Of the several problems affecting these appellants is the matter of maintaining a continuity of leasehold interest when, after the leasehold has been broken up into fractions, an extension, renewal or rewriting in favor of one fractional interest holder inures to the benefit of the entire leasehold. While we cannot claim, as stated at the outset, any interest by conveyance or assignment in the North Forty, nevertheless, it is a part of a leasehold purposely recognized as such by respondent when he, with the other royalty holders, joined in and approved of the modification agreement of May 21, 1927, committing himself to the lands, the subject of said agreement, as being the entire 480 acres.

So far as these appellants are concerned the working or leasehold interests in 440 acres of the tract are held 50% by Weber, 25% by Stock and 25% by Juhan as reflected by the operating agreement of December 30, 1948. So far as Ashley Valley Oil Company is con-

cerned, and as against Meagher and those claiming under him, the working interests or operating rights in the remaining acreage, or the North Forty, is held by it.

We submit that for all the reasons hereinbefore stated the decision of the trial court should be reversed.

Respectfully submitted,

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APPENDIX "A"

Outline analysis of Smith-Ashley Valley modification agreement, A-5, giving lessee the limited privilege of surrender.

RECITALS:

(1) Sheridan to Hill lease, June 4, 1924, Exhibit A-1, to 480 acres.

(2) Grant by Hill to Utah Oil Refining Company, October 30, 1924, Exhibit A-2, of exclusive right of possession and occupancy during the life of lease of June 4, 1924 of all but the North Forty.

(3) "Assignment", Hill to Ashley Valley Oil Company, November 10, 1924, Exhibit A-3, of all Hill's rights in the above Hill-Utah Oil Refining Company agreement.

(4) Ashley Valley Oil Company represents that as of the date of A-5 it is the owner of the rights, property and interests acquired under A-3, the "assignment" Hill to Ashley Valley Oil Company, insofar as the same pertains to the 440 acres.

(5) Warranty Deed, November 14, 1924, Exhibit A-4, Sheridan et al. to M. P. Smith of fee title, including mineral estate, subject to R. C. Hill lease of June 4, 1924.

(6) Grants of royalty interests by Smith, (a) to Sheridans 3%, (b) to Dick $\frac{1}{2}$ of 1%, (c) to N. J. Meagher 1%, to W. N. Preas 1%, to T. G. Alexander 1%, to

Columbia Trust Company 4%, and to W. H. Lovesy 2%; in all totaling 12½% and having to do with the entire 480 acres.

(7) The desire of the parties (Smith-Ashley Valley Oil Company) “insofar as they have the legal right and power so to do, to change and modify the terms” of June 4, 1924, R. C. Hill lease.

OPERATIVE PARAGRAPHS:

I. Defines “the lands the subject of this agreement” as meaning and applying to the entire 480 acres.

II. Defines the term “R. C. Hill Lease” to mean the lease of June 4, 1924.

III. That insofar as the lands “the subject of this agreement” are concerned paragraphs numbered 2 to 22, both inclusive, of the R. C. Hill Lease at all times from and after the date of Exhibit A-5, “do and shall have no further application, force and/or effect, but, for all purposes are hereby fully discharged, superseded and replaced by the following paragraphs numbered 2 to, both inclusive, to-wit: * * *”. (The Hill lease, Exhibit A-1, contains 22 numbered paragraphs with all before paragraph numbered 2 being the formal statement of the date, the parties, the consideration, the grant and the description of the land, including the 480 acres. Land outside of the property herein involved is also included in the original Hill lease.)

AMENDING PARAGRAPHS:

2. The lease to remain in effect so long as the lessee complies with the "obligations" of A-5.

3. Promise of lessee to endeavor to secure profitable market for gas encountered in the test well on Section 23 and for other gas that may be found, subject to the right of surrender and agreeing to market and produce gas regardless of whether oil is encountered.

4. On or before September 1, 1927 to commence or cause to be commenced the drilling of an oil well to be continuously drilled, with certain exceptions, until the Sundance formation has been drilled through, unless there shall have been encountered within the Sundance formation oil in commercial quantity, as in said paragraph defined. The drilling to be "upon the geologic structure upon which the lands the subject of this agreement are located, * * *".

4a. Lessee may use either oil or gas developed on the property for development or production operations and shall not be chargeable for unavoidable loss or held responsible for unavoidable delays.

5. If well is drilled upon lands other than the lands "the subject of this agreement", resulting in commercial discovery of oil, lessee, subject to the right of surrender, shall commence or cause to be commenced, the drilling of an oil well at some point to be selected by the lessee "upon the lands the subject of this agreement", or to deepen a test well previously commenced, if any, subject

to the right of surrender, all in order to adequately and thoroughly test for oil, the horizon in which oil might have been discovered by the lessee outside of the lands subject to the agreement, with exceptions excusing drilling when igneous rock or other geologic formations or conditions might prevent.

6. Provisions for further drilling if oil in commercial quantities, as in said paragraph defined, is encountered in any geological horizon deeper than the Sundance in any well by whomsoever drilled in the Vernal, Utah District, or in Northwestern Colorado, and if such deeper horizon lies within a depth of 3500 feet beneath the surface of any portion of the lands located upon the geological structure upon which the lands the subject of this agreement are located, subject to the right of surrender.

7. Provision for arbitration if parties cannot agree as to whether igneous or other geological formations or conditions have been encountered preventing further drilling or whether a deeper horizon than the Sundance lies within a depth of 3500 feet beneath the surface.

8. Lessee to offset any commercially producing well upon other lands located within 300 feet of the exterior boundaries of the lands "the subject of this agreement".

9. Provisions with respect to testing upon encountering oil in any appreciable quantity and subject to the right of surrender to develop the lands consistently with the current prevailing condition of the market for the products thereof.

10. Provisions for the diameter and other specifications of wells and for adequate drilling rigs and equipment.

11. Provisions for the payment of $12\frac{1}{2}\%$ of the value of all oil and/or gas produced, with certain exceptions.

12. Provisions for the payment of a royalty of $12\frac{1}{2}\%$ of the net proceeds realized from the sale or other disposal of gasoline manufactured from casing-head gas produced, with certain qualifications.

13. Royalties provided by paragraphs 11 and 12 shall be paid in cash on the 20th day of each calendar month upon production or net proceeds, as the case may be, for the preceding calendar month, it being agreed that the royalties in paragraphs 11 and 12 "are the same identical royalties upon production from the lands the subject of this agreement which are by the terms of said Oil and Gas Lease of June 4th, 1924, provided to be paid by the Lessee to the Lessors" and not in addition thereto.

14. The lessee shall pay all taxes, including severance or production taxes, except upon production belonging to the lessors; provided, that, if the lessee shall exercise his right to surrender, his obligation to pay taxes shall be reduced to correspond with retained rights, if any.

15. Lessee to keep records of production and sales.

16. Lessee to keep record and log of wells.

17. Lessors have right to inspect records.

18. Indemnification of lessors for damages, mechanics' liens, debts etc., and lessee to comply with laws regulating insurance of employees.

19. Lessors to defend title; lessee to have the right to redeem mortgages or other liens against the property and be subrogated to the rights of the holders.

20. With subparagraphs (a) and (b), this numbered paragraph contains specific rights of surrender to be exercised by the lessee. Under subparagraph (a) he can surrender to Smith or to Smith's nominees all of the lessee's rights and privileges under the lease and be relieved and released of all obligations thereafter accruing. Under subparagraph (b) he can surrender to M. P. Smith or to said Smith's nominees all the lessee's rights and privileges under the lease in and to any and all *oil* which may be contained in the lands "the subject of this agreement" and retain the right to prospect for and produce gas and all portions of the lease consistent with the retained rights. A proviso is contained in each of subparagraphs (a) and (b) substantially the same as the hereinafter quoted portion of paragraph 28, with the necessary changes being made applicable under (a) when the surrender is to the entire lease and under (b) when the surrender is limited to the oil mineral estate.

21. Right of M. P. Smith to purchase casing at fair cash market value in the event of surrender by the lessee under subparagraph (a) of 20; right of M. P. Smith to purchase rigs and related equipment, and provision for arbitration in the event of surrender by the lessee under subparagraph (b) of 20.

22. After completion of drilling requirements in paragraph 4, and provided he is not then in default, subject to the rights of Smith to purchase as in paragraph 21 provided, lessee shall have the right to remove tools, machinery etc., with provisions for Smith in case of default by the lessee in the drilling obligations of paragraph 4, at his election, to have limited right, rent free for six months, to use rigs, tools etc.

23. Smith has the right to exhibit to the lessee bona fide written offer or proposition to drill a well to any horizon deeper than completed drilling under paragraph 4 in the event oil in commercial quantity is not found; lessee has ninety days from notice to commence or continue upon the lands the subject of this agreement the actual drilling of an oil well to the depth specified in such offer; upon lessee's failure so to do all of the rights of the lessee in and to "oil" shall automatically cease and terminate.

24. If within thirty days after receipt by the lessee from Smith of written notice of default, specifying in detail the default complained of and the lessee shall

fail to correct or repair such default, then at Smith's election, if the default is in the lessee's drilling obligations under paragraph 4, all rights of the lessee in both oil and gas shall automatically cease and terminate.

25. Provisions for easements and rights of way.

26. Provisions for reciprocal rights of possession and control in the event of the forfeiture, cancellation, surrender, or other termination for any cause, of the lessee's rights to drill for or produce oil so far as rights of way upon, under and through the lands are concerned; provision for reciprocal rights of possession and control relating to rights of way etc., if the gas rights are retained by the lessee.

27. If the lessors drill a well for oil but find gas in commercial quantities, the lessee having retained the gas rights, then the gas shall belong to the lessee, provided the lessee, within the time specified, shall reimburse the lessors in cash for one-half of the fair value of the casing in the well and for one-half of the actual cost of drilling, the latter to be paid for by delivering to the lessors the total value at the well of all commercial production of gas therefrom until one-half of the actual cost of drilling said well has in this manner been paid; the lessee has the same or reciprocal rights if drilling for gas and encountering oil when he does

not have the oil rights; provisions for a completed well drilled upon the lands by either party while the other party has oil or gas rights only and there is encountered both oil and gas in commercial quantities; protection of well by party drilling from entry of water and other damage.

28. Right of lessee to surrender gas rights after oil rights have been surrendered under paragraph 20, providing lessee is not in default under paragraph 4; the surrender to be made to M. P. Smith or to said Smith's nominees of all the lessee's rights and privileges in and to all gas which may be contained in the lands the subject of this agreement, with the further provision:

“* * * that said such surrender shall not become effective until the Lessee shall have delivered to said M. P. Smith or his order properly executed all necessary instruments of transfer and do all necessary things in order to fully vest said Smith and/or his nominees with all the rights and privileges so surrendered and with such rights of exclusive possession and control of all of the lands the subject of this agreement as may be necessary for the full enjoyment and exercise by said Smith or his nominees of said such rights and privileges so surrendered.”

29. Stipulation that lease shall be binding upon and inure to the benefit of the respective heirs, legal representatives or assigns of the parties thereto.

FURTHER OPERATIVE PARAGRAPHS:~

IV. It is agreed that in all particulars said Oil and Gas Lease of June 4th, 1924, insofar as same relates or pertains to the lands the subject of this agreement, shall remain in full force and effect in accordance with the terms thereof, except as herein in this Modification Agreement same is modified and/or changed.

V. That the parties hereto shall co-operate in an effort to procure the written approval of this agreement by all owners of royalty interests in the lands the subject of this agreement.

VI. Agreement binding upon the heirs, legal representatives or assigns of the parties.

APPENDIX "B"

Chronology of Significant Events

Date	Exhibit number or Record page
June 4, 1924	Sheridan et al.-R. C. Hill O&G Lease "A 1"
October 30, 1924	R. C. Hill, Trustee, Assign- ment to Utah Oil Refining Company "A 2"
November 10, 1924	R. C. Hill Assignment to Ashley Valley Oil Company "A 3"
November 14, 1924	Warranty Deed from Sher- idan et al. to M. P. Smith "A 4"
February 3, 1925	Assignment from M. P. Smith and Ellen M. Smith, his wife, in favor of N. J. Meagher 1% Royalty In- terest "A 46"
April 20, 1925	Warranty Deed — 1/5 in- terest, T. G. Alexander and wife to N. J. Meagher "A 9"
May 21, 1927	Modification Agreement be- tween M. P. Smith and wife and Ashley Valley Oil Company "A 5"
June 9, 1927	Modification Agreement Af- fecting So-Called Sheridan Lands between Ashley Val- ley Oil Company and Utah Oil Refining Company "A 6"

November 19, 1927	Assignment of 1% Royalty Interest, T. G. Alexander and wife in favor of N. J. Meagher	"A 55"
December 19, 1927	Quitclaim Deed—4/5 interest—with reservations and exceptions, M. P. Smith and wife to N. J. Meagher	"A 7"
December 19, 1927	Quitclaim Deed — 1/5 interest — with reservations and exceptions, M. P. Smith and wife to T. G. Alexander	"A 8"
April 24, 1929	Assignment Agreement of Utah Oil Refining Company to Ray Phebus and Paul Stock	"A 11"
May 13, 1929	Exhibit A-11 recorded, Uintah Co.	
May 29, 1929	Ray Phebus and Paul Stock Assignment to Valley Fuel Supply Company (gas rights)	"A 15"
October 11, 1930	Assignment of Royalty Interests, N. J. Meagher et al. to Paul Stock and Ray Phebus (reduction of outstanding royalties by one-third)	"A 40"
October 30, 1930	Assignment of Edward Watson, Trustee (successor to R. C. Hill), to Ashley Valley Oil Company (NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 15, the North Forty)	"A 16"

April 30, 1931	Contract (Assignment) between Ray Phebus, Paul Stock and Standard Oil Company of California	"A 12"
May 28, 1931	Quitclaim Deed—1/5 interest—T. G. Alexander and wife to N. J. Meagher	"A 10"
December 31, 1931	Standard Oil Company of California Assignment to The California Company	"A 13"
October 31, 1932	Assignment of Right to Purchase Gas signed by Ray Phebus and Paul Stock in favor of Valley Fuel Supply Company	"A 41"
March 21, 1934	Agreement (Assignment) between Paul Stock, Ray Phebus and The California Company	"A 14"
November 7, 1941	Valley Fuel Supply Company Assignment to Joe T. Juhan (gas rights)	"A 17"
January 7, 1944	Letter to Paul Stock signed by N. J. Meagher	"A 26"
January 7, 1944	Letter to Ray Phebus from N. J. Meagher	"A 31"
January 17, 1944	Letter to N. J. Meagher signed by L. G. Hinkley on behalf of Stock	"A 32"
January 25, 1944	Letter to N. J. Meagher signed by Ray Phebus	"A 33"

March 21, 1944	Letter to Joe T. Juhan signed by N. J. Meagher	"A 34"
October 11, 1944	Affidavit of Attorney for Publication of Summons	R. 10
October 16, 1944	Letter to Paul Stock signed by Katherine C. Meagher	"A 27"
October 16, 1944	Letter to Ray Phebus signed by Katherine C. Meagher	"A 35"
October 16, 1944	Letter to Jos. T. Juhan signed by Katherine C. Meagher	"A 56"
October 17, 1944	Complaint filed	R. 1
October 17, 1944	Order for Publication of Summons	R. 11
October 21, 1944	Release—Paul Stock to N. J. Meagher	"A 30"
October 31, 1944	Letter to Katherine C. Meagher signed by Ray Phebus	"A 36"
November 9, 1944	Letter to Ray Phebus signed by N. J. Meagher	"A 28"
November 13, 1944	Letter to N. J. Meagher signed by Ray Phebus	"A 37"
November 18, 1944	Letter to Ray Phebus signed by N. J. Meagher	"A 38"
January 4, 1945	First Publication of Sum- mons	R. 13
January 8, 1945	Declaration of Trust signed by Joe T. Juhan in favor of Ray Phebus	"A 47"

January 19, 1945	Quitclaim Deed and Assignment, Ray Phebus and wife to Joe T. Juhan	"A 18"
February 1, 1945	Last Publication of Summons	R. 13
February 19, 1945	Amended Complaint filed	R. 14
April 14, 1945	Quitclaim Deed and Assignment, Paul Stock to Charles S. Hill	"A 19"
April 14, 1945	Declaration of Trust signed by Charles S. Hill in favor of Paul Stock	"A 48"
April 18, 1945	Second Amended Complaint filed (Stock omitted in caption)	R. 17
May 4, 1945	Lis Pendens	"A 42"
May 7, 1945	Filed Answer of Juhan to Plaintiff's Second Amended Complaint	R. 20
May 22, 1945	Filed Answer of the Defendant Ashley Valley Oil Company	R. 37
June 18, 1945	Letter to Paul Stock signed by N. J. Meagher	"A 39"
September 1, 1945	Reply of N. J. Meagher verified (denying leasehold)	R. 41
January 5, 1946	Quitclaim Deed and Assignment, Charles S. Hill and wife to Joe T. Juhan	"A 20"

January 5, 1946	Declaration of Trust signed by Joe T. Juhan in favor of Charles S. Hill	"A 49"
January 8, 1946	Phebus adopts Answer of Juhan	R. 43
January 11, 1946	Quitclaim Deed and Assignment, Juhan and wife to Equity Oil Company	"A 21"
October 27, 1947	Decision of Supreme Court	R. 57
December 30, 1947	Quitclaim Deed and Assignment, Equity Oil Company to Weber Oil Company	"A 24"
January 27, 1948	Quitclaim Deed, N. J. Meagher to his children	"A 22"
March 15, 1948	Petition for Rehearing denied	R. 56
March 16, 1948	Remittitur issued	R. 56
June 29, 1948	Release signed by Ray Phebus and Ella G. Phebus in favor of Joe T. Juhan confirming quitclaim previously executed by Phebus and wife in favor of Juhan	"A 50"
July 9, 1948	Letter Agreement written by Joe T. Juhan, approved by Paul Stock	"A 51"

July 9, 1948	Letter Agreement signed by J. L. Dougan as President of Equity Oil Company and approved by Paul Stock and Joe T. Juhan	"A 52"
July 10, 1948	Paul Stock-Charles S. Hill, Release confirming quitclaim previously executed by Hill and wife in favor of Joe T. Juhan	"A 53"
July 12, 1948	Quitclaim Deed, Joe T. Juhan and wife to Paul Stock	"A 23"
July 13, 1948	Charles S. Hill and wife—Joe T. Juhan, Release confirming previous quitclaim deed by Hill and wife in favor of Juhan	"A 54"
August 1, 1948	Equity Oil commenced drilling operations	"A 25"
September 11, 1948	Deed, Ellen M. Smith et al. to Clyde S. Johnson	"A 60"
September 14, 1948	Deed, Clyde S. Johnson and wife to Edward F. Richards	"A 61"
September 18, 1948	Discovery of oil in commercial quantities	R. 255
December 30, 1948	Operating Agreement between Equity Oil Company, Weber Oil Company, Joe T. Juhan and Paul Stock	"A 25"

April 22, 1949	Third Amended Complaint proposed	R. 67
May 9, 1949	Filed Objections to filing Third Amended Complaint	R. 78
June 10, 1949	Filed Withdrawal of Motion to file Third Amended Complaint	R. 80
June 10, 1949	Filed Motion for Order authorizing filing of Amended Reply to defendants' Answers	R. 81
June 10, 1949	Filed proposed Amended Reply	R. 87
August 3, 1949	Filed Objections to plaintiff's Motion to file Amended Reply (asserting leasehold)	R. 83
August 3, 1949	Order authorizing filing of Amended Reply (Stock reappears in caption)	R. 85
August 17, 1949	Filed Answer and Counterclaim of Paul Stock	R. 92
October 15, 1949	Served Reply to Answer and Counterclaim of Paul Stock	R. 107
<hr/>	Amendment to Answer and Reply to the Counterclaim of Paul Stock	R. 115
November 12, 1949	Pretrial proceedings at Vernal, Utah	"A 58"

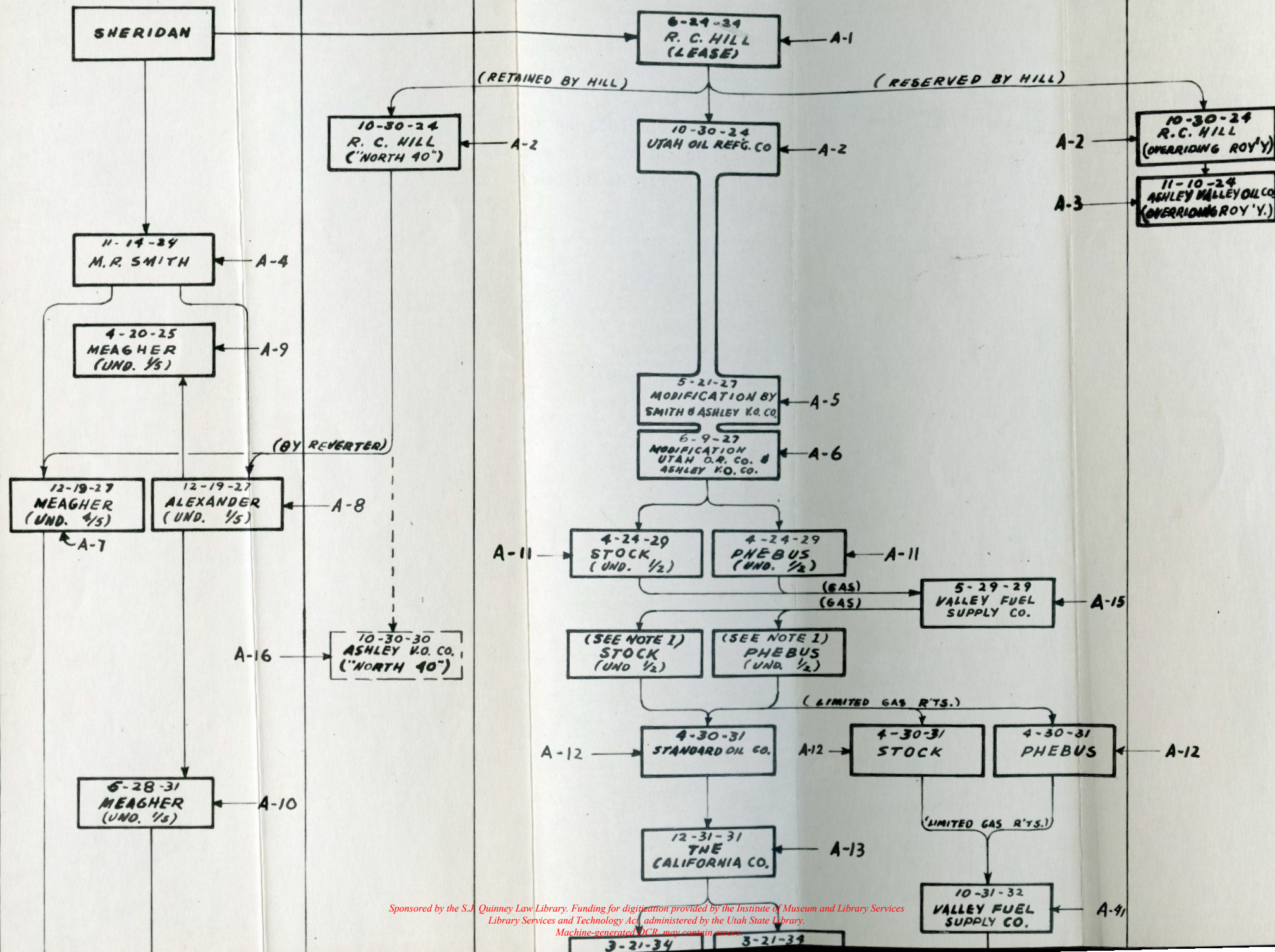
November 26, 1949	Filed Second Amended Reply to the Answer of Juhan and Phebus	R. 121
February 25, 1950	Pretrial proceedings at Provo, Utah	"A 59"
June 26, 1950	Second trial held at Provo, Utah	R. 135
June 26, 1950	Second Amended Complaint amended to include oil royalty issued involving 1/3 of 2%	R. 230
March 6, 1951	Trial Court's Memorandum Decision	R. 140-194
April 14, 1951	Filed Objections to Proposed Findings	R. 196
June 4, 1951	Trial Court's Supplemental Memorandum	R. 197-198
June 8, 1951	Filed Findings of Fact and Conclusions of Law	R. 200-219
June 8, 1951	Filed Judgment and Decree	R. 220-224
July 7, 1951	Filed Notice of Appeal	R. 342-343
July 17, 1951	Filed Appellants' Designation of Record on Appeal	R. 347-350
July 17, 1951	Filed Stipulation on Designation of Record	R. 344-346
_____	Chart of Chain of Title, excluding landowners royalties	"A 57"
_____	Chart, Chain of Title with reference to Exhibit numbers	"A 62"

FEE and REVERSION

("NORTH 40")

LESSEE'S RIGHTS

OVERRIDING ROYALTY



FEE TITLE
SHERIDAN - ET AL.

1924
OIL & GAS LEASE
R. C. HILL - LESSEE

A4

NOV. 14, 1924
WARRANTY DEED
- TO -
M. P. SMITH

A5

MAY 21, 1927
MODIFICATION
AGREEMENT

A3

NOV. 10, 1924
ASSIGNMENT
- TO -
ASHLEY VALLEY OIL CO.

A16

OCT. 30, 1930
ASSIGNMENT
EDWARD WATSON, TRUSTEE
SUCCESSOR TO R. C. HILL
- TO -
ASHLEY VALLEY OIL CO.
(N.E. 1/4 SE. 1/4 SEC. 15)

A8

DEC. 19, 1927
QUIT CLAIM - 1/5 INTEREST
- TO -
T. G. ALEXANDER
(EXCEPTIONS - RESERVATIONS)

A9

APRIL 20, 1925
WARRANTY DEED
- TO -
N. J. MEAGHER

A10

MAY 28, 1931
QUIT CLAIM DEED
- TO -
N. J. MEAGHER

A7

DEC. 19, 1927
QUIT CLAIM - 4/5 INTEREST
- TO -
N. J. MEAGHER
(EXCEPTIONS - RESERVATIONS)

A12

JAN. 27, 1940
QUIT CLAIM DEED
- TO -
N. J. MEAGHER, JR. ET AL.

A13

JULY 12, 1940
QUIT CLAIM DEED
(UND. 1/4 INTEREST)
- TO -
PAUL STOCK