

1951

N. J. Meagher v. Uintah Gas Company et al : Brief of Respondent N. J. Meagher

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Herbert Van Dam; Gilbert C. Wheat; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Meagher v. Uintah Gas Company*, No. 7723 (Utah Supreme Court, 1951).
https://digitalcommons.law.byu.edu/uofu_sc1/1570

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

CIVIL No. **7723**

In the Supreme Court
OF THE
State of Utah

N. J. MEAGHER,

Plaintiff and Respondent,

VS.

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

Defendants and Appellants.

BRIEF OF RESPONDENT N. J. MEAGHER.

FILED

OCT 30 1951

HERBERT VAN DAM,

Felt Building, Salt Lake City 1, Utah,

GILBERT C. WHEAT,

Clerk, Supreme Court, Utah
311 California Street, San Francisco 4, California,

Attorneys for Respondent

N. J. Meagher.

Topical Index

	Page
Introductory statement	1
Statement of facts	3
Statement of points	10
Argument	11
1. The court did not err in permitting Meagher to amend his reply to meet issues raised by defend- ants' pleadings	11
2. Meagher is the real party in interest for the pur- poses of this litigation	19
3. Meagher is neither guilty of laches nor is he es- topped to assert his interest in the leasehold	23
4. Meagher is guilty of no fraudulent conduct what- soever	39
5. The Stock to Meagher transfer is supported by a legal consideration	47
6. The Stock to Meagher transfer may not be rescinded on the ground of mistake	51
7. The Stock to Meagher transfer, viewed as a sur- render, is a valid relinquishment of Stock's interest in the lease to Meagher	57
(a) The transfer is not affected by the provisions of Exhibit A-5, the modification of the lease ..	59
(b) The transfer does not lack consideration	62
(c) Stock was fully empowered to surrender to the reversioner Meagher whatever interest he had in the leasehold	62
(d) Meagher was the owner of the reversionary rights in the property and as such was eligible to receive a surrender	63

	Page
8. The Stock to Meagher transfer, viewed as a conveyance, is effective to transfer Stock's interest in the lease to Meagher	69
9. Meagher's landowner's royalty interests can be adjudicated in this action	74
10. Stock is barred by laches from asserting rescission of his transfer to Meagher	81
Summary and conclusion	86
Appendices (following brief).	
"A". Extracts from unrecorded agreements disclosing the Stock-Hill-Juhan deal	i
"B". Extracts from testimony of Paul Stock	iv

Table of Authorities Cited

Cases	Pages
Adams v. Reed, 11 Utah 480, 40 Pac. 720, affirmed 168 U.S. 573	74
Allies Oil Co. v. Ayers, 152 La. 19, 92 So. 720	31
Barker v. Smythe (Wyo. 1944), 143 Pac. (2d) 565	50
Brigham City v. Chase, 30 Utah 410, 85 Pac. 436	19
Buchanan v. Jencks, 38 R. I. 443, 96 Atl. 307	30
Callender v. Crossfield Oil Syndicate (Mont. 1929), 275 Pac. 273	15
Christensen v. Nielsen, 73 Utah 603, 276 Pac. 645	58
Cleverdon v. Gray, 62 Cal. App. (2d) 612, 145 Pac. (2d) 95	20
Davis v. Byrd, 185 S.W. (2d) 866	31
DeLamar Mines of Montana v. Mackay (C.C.A. 9th), 104 Fed. (2d) 271	85
Denver Joint Stock Land Bank v. Dixon (Wyo.), 122 P. (2d) 842	77
Dunham v. Travis, 25 Utah 65, 69 Pac. 468	15
Evenson v. Webster (So. Dak.), 53 N.W. 747	74
Exeter Co. v. Samuel Martin, Ltd. (Wash. 1940), 105 Pac. (2d) 83	50
Field v. Colombet, 9 Fed. Cas. 12, Case No. 4764	73, 74
Firman v. Bateman, 2 Utah 268	19
Foster v. Cont. Nat. Bk. of Boston (1906), 76 N.E. 338	21
Frailay v. McGarry (Utah 1949), 211 Pac. (2d) 840....	84
Fraters G & P Southwestern C Co. (1930), 107 Cal. App. 1, 290 Pac. 45	52
Gordon v. Cadwalader, 172 Cal. 254, 156 Pac. 471	18
Hallam v. Commercial Mining & Realty Co. (C.C.A. 10, 1931), 49 Fed. (2d) 103, cert. den. 284 U.S. 643	50

TABLE OF AUTHORITIES CITED

	Pages
Harmon v. Yeager, 103 Utah 208, 134 Pac. (2d) 695.....	14
Juster v. Juster (N. Dak. 1949), 37 N.W. (2d) 879.....	15
La Laguna Ranch v. Dodge, 18 Cal. (2d) 132, 114 P. (2d) 351	77
Lortz v. Rose (Mo.), 145 S.W. (2d) 385	16
Lowell v. Parkinson, 4 Utah 64, 6 Pac. 58	19
Moreno Mut. Irr. Co. v. Beaumont Irr. Dist. (1949), 94 Cal. App. (2d) 766, 211 Pac. (2d) 928	52
Nadeau v. Texas Company (Mont. 1937), 69 Pac. (2d) 586	18
Norris v. United Mineral Products Co. (Wyo.), 158 Pac. (2d) 679	16
Oliver v. Dougherty (Ariz.), 68 P. 553	77
Olson v. Cornwell, 134 Cal. App. 419	74
Orloff v. Mosher (1944), 64 Cal. App. (2d) 6, 147 Pac. (2d) 675	14
Osburn v. Finkelstein, 189 Ind. 90, 126 N.E. 11	73
Pender v. Anderson (September 11, 1951), 235 Pac. (2d) 360	58
Perego v. Dodge, 9 Utah 3, 33 Pac. 221	15
Prairie Oil & Gas Co. v. Allen (C.C.A. 8th), 2 Fed. (2d) 566	30
Rowley v. Davis (1917), 34 Cal. App. 184, 167 Pac. 162	12
Rucker v. Jackson, 180 Ala. 109, 60 So. 139	16
Ruthrauff v. Silver King Co., 95 Utah 279, 80 Pac. (2d) 338	73
Smith Land Co. v. Johnson, 100 Utah 342, 107 Pac. (2d) 158	19
State v. Rolio, 71 Utah 91, 262 Pac. 987	18, 77
Tarpey v. Desert Salt Co., 5 Utah 205, 14 Pac. 338.....	18

TABLE OF AUTHORITIES CITED

v

	Page
Twin-Lick Oil Company v. Marbury, 91 U.S. 587, 23 L. Ed. 328	85
Van Vranken v. Granite County (Mont.), 90 P. 164	77
Veal v. Thomason (Tex.), 159 S.W. (2d) 472	78
Watkins v. Slaughter (Tex.), 189 S.W. (2d) 699	77
Williams' Administrator v. Union Bank & Trust Co. (Ky.), 143 S.W. (2d) 297	78

Codes

Utah Code Annotated, Section 104-3-19	19
---	----

Texts

30 C. J. S., p. 540	85
31 C. J. S., p. 267, par. 71	37
37 C. J. S., p. 215	40
Restatement, Contracts, Section 503	54

Rules

Utah Rules of Civil Procedure, Rule 25(c)	19
---	----

Civil No. 7723

In the Supreme Court

OF THE

State of Utah

N. J. MEAGHER,

Plaintiff and Respondent,

VS.

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

Defendants and Appellants.

BRIEF OF RESPONDENT N. J. MEAGHER.

INTRODUCTORY STATEMENT.

For the convenience of the court we have attached at the end of this brief a title chart. It is a reproduction of the illustrative chart submitted by respondent Meagher in the proceedings below and was identified as Exhibit A 57.

This action requires determination of the ownership of the lessees' rights under an oil and gas lease cover-

ing 480 acres of land. Respondent Meagher claims ownership of an undivided $\frac{1}{2}$ interest as to oil only in the lessees' rights in a 440-acre parcel of the above tract. In this phase of the controversy, appellants Juhan, Stock and Phebus are his adversaries. This brief is in answer to the brief filed by those appellants.

Respondent Meagher also claims ownership of all of the lessees' rights in the remaining 40 acres of the tract (known as the North Forty), and in that controversy only appellant Ashley Valley Oil Company has appealed. Appellant Ashley Valley Oil Company has filed a brief and respondent Meagher will file herewith a separate brief in answer thereto.

In view of the foregoing, unless otherwise specified, reference in this brief to the lands in litigation will refer to the 440-acre tract.

The basic theory of Meagher's case may be summarized thus: Meagher is the owner of the lands involved subject to a valid oil and gas lease¹ and subject to certain royalties. In October 1944 the lessees' rights to explore for and produce oil were owned by Stock and Phebus (an undivided $\frac{1}{2}$ each). At that time Meagher believed the lease to be forfeit and knew that no de-

¹Meagher, of course, recognizes and does not seek to circumvent in any way the previous ruling of this court on the first appeal which determined that the lease was not forfeit and had not been abandoned. However, the decision upon appeal did not purport to determine the ownership or quantum of the various outstanding interests in the property.

velopment for oil had been conducted during the preceding 15 years. He requested releases from the lessees. Stock did release, Phebus did not. Meagher thereby became entitled to an undivided $\frac{1}{2}$ of the lessees' rights, i.e., the interest which Stock released to Meagher.

At page 1 of appellants' brief the action is correctly described as involving "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."

STATEMENT OF FACTS.

Respondent reluctantly criticizes appellants' statement of facts. Except for a few conclusions motivated by the enthusiasm of advocacy, it is correct as far as it goes. But it definitely fails to state the whole truth and therefore casts the case in an inaccurate factual atmosphere.

This phase of the action is concerned with the right to explore for and produce oil only on a 440-acre parcel of land. That right is derivative from an oil and gas lease (A-1), executed in 1924.

By 1929 the lessee's right to explore for and produce oil had descended by mesne transfers to Stock and Phebus, each having acquired an undivided $\frac{1}{2}$ interest in the lessee's rights under the leasehold. We thus

have two lines of title to the lessee's right in oil; one is traceable to Stock, the other to Phebus.

The original lease, known as the Sheridan lease, was executed in June 1924 (A-1). The lessee's rights to explore for and produce oil and gas thereunder passed to Utah Oil Refining Company in 1924 (A-2). Exploration was conducted. Oil was not discovered in paying quantities but gas was produced. Utah Oil Refining Company operated the property until 1929, when that Company transferred its rights to Stock and Phebus (A-11). These men, through the Valley Fuel Supply Company (which they owned), operated the gas property until 1941. Then the equipment was sold to Juhan, the wells were dismembered and the gas operations ceased. In the sale of the equipment to Juhan the lessees' rights to explore for and produce gas were also transferred to him (A-17).

By 1927 respondent Meagher through several conveyances had acquired the fee to the lands in question subject to outstanding royalty interests and subject to the oil and gas lease (A-7-8-9-10).

In 1931, Stock and Phebus tried to get the Standard Oil Company of California to make further explorations. The leasehold was assigned to Standard for this purpose (A-12), which in turn assigned it to its operating subsidiary, The California Company (A-13). It remained in this status for three years and then Standard

and its subsidiary decided not to go forward and the lessee's rights were transferred back to Stock and Phebus in March of 1934 (A-14). *Ten more years elapsed.* By 1944 it was obvious that the property was not commercially attractive for gas production. Standard had declined development for oil and, except for the former gas operations, Stock and Phebus, who had held the lessee's rights, had not been able to do anything with the property over a period of 15 years.

Under these circumstances, the usual practice among reliable oil operators is to quitclaim the leasehold back to the landowner to clear his title. Note that this is what Standard and its subsidiary did when they decided not to carry on. Since these releases were not forthcoming, Meagher did what any landowner would do under the circumstances. He asked Stock and Phebus for releases.

Nearly a year went by from the time Meagher began to clear up his title, and finally, to bring the matter to a head, Meagher commenced this quiet title action in October of 1944. Four days after the action was commenced the release which Meagher had requested from Stock was executed and delivered. Meagher thereby acquired the undivided $\frac{1}{2}$ interest in the lessee's rights to oil which is the subject of this action. However, Phebus did not comply with Meagher's request and retained his $\frac{1}{2}$ interest. The release which Stock gave

Meagher at that time (A-30) is the document upon which this litigation hinges.

Meanwhile, Juhan, who had acquired the lessee's rights to gas at the time the gas equipment was junked, proceeded to interest himself in the property for further exploration. He apparently thought that the proper way to acquire the right to explore for oil would be to obtain a lease from Meagher. He asked Meagher for such a lease and was turned down. Then he decided that perhaps there was vitality in the old lease held by Stock and Phebus. He made a deal with Phebus by which he acquired the $\frac{1}{2}$ interest Phebus had. Then he sent his man around to Stock for the same purpose, but Stock told Juhan's representative that he had already released back to Meagher.

Now we come to the key to the "equities" in this case. Did Stock at this time ask Meagher for a rescission of the release he had given? No. Did Stock request an opportunity to reinstate his position as a former lessee? No. Did Stock claim any mistake of fact or of law? Not at all. He merely gave Juhan's man, one Charles S. Hill, a quitclaim of his (Stock's) interest (A-19). The entire transaction was made expressly subject to two unrecorded written understandings designated "declaration of trust" (A-48), (A-49) (Appendix A *infra*), which recognized that Meagher claimed an adverse interest and provided that if Juhan could overcome Meagher's claims Stock would partici-

pate in the victory to the extent of one-eighth, but if Meagher should prevail Stock would get nothing.

The above is not a recital of fact based on surmise or circumstantial evidence. It is admitted in the testimony of Stock and is established by written documents which were produced only after contested discovery proceedings during the pretrial hearings.

In other words, less than six months after Stock had released to Meagher, he tried to transfer the same interest to Juhan through Charles S. Hill under a deal by which he could benefit only if the release he had given to Meagher could be avoided! Stock made no demands whatsoever upon Meagher. In fact after Meagher learned of the quitclaim from Stock to Hill he wrote to Stock about it and questioned his motives. *Stock received this letter but did not answer it.*

No oil had been discovered at the time. Meagher's suit to quiet title had already been filed. Stock was named as a defendant in that suit. After the suit was commenced he executed his release in Meagher's favor. Yet Stock, while plotting with Juhan to avoid his own release, sat by in silence even after inquiry from Meagher.

The first overt action by Stock addressed to Meagher by which Meagher could know Stock's true position was not taken until August 16, 1949. This consisted of Stock's voluntary appearance in the quiet title

suit. Prior to that, jurisdiction over Stock, a nonresident, had not been perfected. This appearance consisted of an answer and counter-claim in which Stock belatedly sought to rescind his own release. This pleading was filed four years and ten months after Stock had given his release to Meagher, and nearly one year *after* oil had been discovered.

It is significant that this pleading filed in Stock's behalf was prepared by Juhan's counsel and up to the day of the trial (March 6, 1951) Stock *had never read it.*²

These are some of the facts which appellants have seen fit to omit in their recital. There are others.

Appellants have suggested to this court that Stock has made financial contributions or commitments toward the expenses of drilling. So far as concerns any interest Stock may claim traceable back to his own former one-half interest in the lease, this is not the case. The true situation is that Stock and Juhan agreed that Juhan would do what he could to squeeze out Meagher and Stock would get one-eighth of whatever Juhan could develop out of Stock's former one-half interest. Stock made no financial commitment in connection with that transaction.

²This is not set forth to reflect upon Juhan's counsel. It is significant, however, that Stock looked entirely to Juhan to overcome Meagher's claim and has not to this day personally espoused the elaborate legal theories upon which Juhan seeks to overthrow Stock's release to Meagher.

The facts behind Stock's investment are these: Long after Stock quitclaimed to Juhan the privilege of litigating with Meagher, he did purchase from Juhan a new participation in the deal. This occurred in July of 1948. But that acquisition was limited to the one-half interest owned by Phebus. Stock himself testified that purchase was designed to get him an interest, "win, lose or draw" in the litigation with Meagher. Stock did pay money to Juhan for that participation, but the Phebus line of title to one half of the lessee's rights is not under attack by Meagher and any expenditure of Stock for a portion thereof has no bearing whatsoever upon the present ownership of the one-half interest with which this litigation is concerned; the one-half interest formerly owned by Stock and transferred to Meagher by Stock.

The foregoing facts take on substantial stature when one considers the pious plea for "equity" which has been made in this case in Stock's behalf.

In view of the numerous points raised by appellants in their brief, respondent Meagher requests the court's indulgence if the recital of additional factual matters is set forth in connection with the argument of the particular legal points to which they are relevant.

STATEMENT OF POINTS.

To enable the court to readily locate Meagher's comments with respect to the nine points raised by appellants, each is set forth below, and in the argument, in the order presented by appellants. The tenth point hereunder is raised by respondent:

1. The court did not err in permitting Meagher to amend his reply to meet issues raised by defendants' pleadings.
2. Meagher is the real party in interest for the purposes of this litigation.
3. Meagher is neither guilty of laches nor is he estopped to assert his interest in the leasehold.
4. Meagher is guilty of no fraudulent conduct whatsoever.
5. The Stock to Meagher transfer is supported by a legal consideration.
6. The Stock to Meagher transfer may not be rescinded on the ground of mistake.
7. The Stock to Meagher transfer, viewed as a surrender, is a valid relinquishment of Stock's interest in the lease to Meagher.
 - (a) The transfer is not affected by the provisions of Exhibit A 5, the modification of the lease.
 - (b) The transfer does not lack consideration.

- (c) Stock was fully empowered to surrender to the reversioner, Meagher, whatever interest he had in the leasehold.
- (d) Meagher was the owner of the reversionary rights in the property and as such was eligible to receive a surrender.
- 8. The Stock to Meagher transfer, viewed as a conveyance, is effective to transfer Stock's interest in the lease to Meagher.
- 9. Meagher's landowner's royalty interest can be adjudicated in this action.
- 10. Stock is barred by laches from asserting rescission of his transfer to Meagher.

ARGUMENT.

1. **THE COURT DID NOT ERR IN PERMITTING MEAGHER TO AMEND HIS REPLY TO MEET ISSUES RAISED BY DEFENDANTS' PLEADINGS.**

It is correct that when this quiet title action was commenced on October 17, 1944, Stock had not then transferred his one-half interest to Meagher. This was done on October 21, 1944, four days after the complaint was filed.

It is also true that Phebus had not then transferred his one-half interest in the lease to Juhan. This trans-

fer to Juhan (A-18) was not given until January 19, 1945. Also, Stock had not then made his second transfer of his one-half interest (A-19) to Juhan's man Charles Hill. This occurred on April 14, 1945.

However, before Juhan answered, these two documents, upon which his claims depend, had been executed. His answer asserts *all* lessee's rights in the lease and asks the court to affirmatively declare his interests to be superior to any claim of Meagher.

In this situation Juhan's answer becomes an affirmative pleading seeking to quiet a title acquired by him subsequent to the filing of the complaint. In reply to such a pleading, Meagher is entitled to set forth any title he acquired prior to the filing of Juhan's pleading. This issue was argued and briefed before the trial court, and neither in the court below nor here have appellants met the authorities submitted in support of Meagher's position. We will briefly summarize them here:

Where the defendant in a quiet title suit seeks affirmative relief and raises issue of title acquired by him after commencement of the suit, the plaintiff can meet such issues by proof of title acquired by him after suit is filed and prior to the time of filing defendant's pleading.

Rowley v. Davis (1917), 34 Cal. App. 184, 167 Pac. 162.

In the above case, a suit to quiet title, defendant set up a record title claim and sought affirmative relief. The plaintiff was permitted to resist the defendant's affirmative claims by proof of title acquired by plaintiff *subsequent* to filing the complaint but *prior* to the filing of defendant's pleading. The decision in favor of plaintiff was affirmed by the appellate court and a petition for hearing in the Supreme Court was denied. The appellate opinion contains the following explanation of the rule and the reasons for it:

“Referring to the record thus presented, appellant insists that the judgment should be reversed because the action must be determined upon the facts as they existed at the time of the commencement of the suit, ‘Rowley not having pleaded any after-acquired title.’ It is true that the plaintiff did not attempt to supplement his complaint by a statement showing title acquired after the action was commenced. Also it is the law that he would not have a right to file a supplemental complaint showing after-acquired title, if in fact he had not title at the commencement of the action. (Citing cases.) But the cross-complaint of the defendant Davis was not filed until after plaintiff Rowley had acquired the title of the defendant and cross-defendant Alice Huse. By filing that cross-complaint the cross-complainant tendered new issues whereby he set up a cause of action which relates to the date of filing the cross-complaint. This he had the right to do. (Citing cases.) The fact that Rowley had at that time acquired the title of

Mrs. Huse was available to him as a defense to the cross-action and was provable under his claim of ownership as pleaded by his answer to the cross-complaint. If this were not so, a defendant by filing a cross-complaint would be able to prevent the plaintiff from dismissing an action which had been prematurely brought, and might thereby obtain 'on the merits' a judgment which possibly would permanently cut out the just rights of the plaintiff by preventing him from thereafter litigating the title with the cross-complainant. We therefore are of the opinion that the judgment should be sustained, if the evidence is sufficient to support Rowley's title as existing at the time of filing the cross-complaint."

Also see *Orloff v. Mosher* (1944), 64 Cal. App. (2d) 6, 147 Pac. (2d) 675, holding that if one of the defendants conveys his interest to plaintiff pending suit, and another defendant files a pleading seeking to quiet his title, the court will test the plaintiff's title as of the time of filing the latter pleading.

There can be no question that defendant Juhan has sought affirmative relief in this action even though his pleading is not designated as a counter-claim.

In *Harmon v. Yeager*, 103 Utah 208, 134 Pac. (2d) 695, it was held that if defendant files a pleading which contains the essential allegations of a cause of action it will be treated as a counter-claim no matter how designated and plaintiff will be obliged to reply to it.

Also in *Perego v. Dodge*, 9 Utah 3, 33 Pac. 221, it was held in a quiet title action that if defendants deny the material allegations of the complaint, claim title in themselves and pray that it be quieted as against plaintiffs, they may recover upon proof of such allegations regardless of how their pleading is designated.

Also see:

Dunham v. Travis, 25 Utah 65, 69 Pac. 468;

Callender v. Crossfield Oil Syndicate (Mont. 1929), 275 Pac. 273;

Juster v. Juster (N. Dak. 1949), 37 N.W. (2d) 879.

Turning to Juhan's answer, we find the affirmative allegation that he owns all of the lessee's rights in the lease and prays that his interests be ratified, confirmed and declared valid. It is significant that Juhan had no interest in the lease so far as concerns oil when the complaint was filed or until January 19, 1945, when he acquired the Phebus one-half interest (A-18). Then on April 14, 1945, his representative Hill acquired the abortive quitclaim from Stock (A-19). These are the two documents upon which Juhan must rest his claims to any interest in the lease so far as concerns oil. One deals with the Phebus line of title which respondent Meagher does not oppose, the other seeks to revive the Stock line of title which, however, had previously been interrupted by Stock's transfer to Meagher of October, 1944 (A-30).

Meagher does not object to the fact that Juhan in his answer sets forth titles acquired by him subsequent to commencement of the action. The authorities support a defendant's right to do this.

Rucker v. Jackson, 180 Ala. 109, 60 So. 139;

Norris v. United Mineral Products Co. (Wyo.), 158 Pac. (2d) 679;

Lortz v. Rose (Mo.), 145 S.W. (2d) 385.

In *Norris v. United Mineral Products, Co.*, *supra*, an action to quiet title, defendant had acquired rights in the property after the complaint was filed but prior to filing answer. The court considered the rule in ejectment where this procedure is available to a defendant and said:

“If a new title acquired during the pendency of an ejectment action may be interposed by the defendant as a defense to that action, it is difficult to perceive why it may not be done in a suit to quiet title. * * * The law does not look with approval upon a multiplicity of suits and where all matters in controversy between the parties as to the title or possession of real property may well be concluded in one action that should be done.”

The above authorities merely show that Juhan was entitled to bring into this action the interests he claimed in the lease even though acquired after complaint was filed. Under such circumstances, it must follow that Meagher can plead anything which will defeat or minimize Juhan's claim to an after-acquired title. Meagher's first reply denied *any* validity to

Juhan's claim. His ultimate reply merely alleged that Juhan's rights were *of lesser extent* than the interests asserted.

Our comments with respect to Juhan also apply to Phebus.³

So far as concerns Stock, there can be no dispute. His answer when finally filed in 1949 alleges that he claims an interest in the lease adverse to the claims of Meagher, and his counterclaim seeks to rescind his transfer to Meagher.

The background bringing into issue these leasehold interests has already been explained. Meagher, in the original trial, contended that the lease had been forfeited or abandoned and therefore any question of ownership of interests therein was, of course, immaterial. After the appeal and the determination by this court that Meagher's interests were subject to the outstanding interests in the leasehold, it was entirely proper in the further proceedings which were ordered by this court for Meagher to set forth the limitations upon the interests in the leasehold claimed by his adversaries and the existence of such interests in himself. The amended reply merely serves this purpose.

³It is not clear on what basis appellant Phebus remains in this litigation. It is apparent from the record that he has disposed of all interest which he ever had in the property. However, he was belatedly permitted to adopt the answer of Juhan as his own (R. 43) and in so far as he does thereby remain in the action he, of course, accedes to and approves of all of Juhan's claims.

There can be no dispute that a plaintiff who claims a fee simple in a quiet title action but proves ownership of some lesser estate will not be foreclosed from a decree adjudicating that lesser estate.

In *State v. Rolio*, 71 Utah 91, 262 Pac. 987, this court said:

“In an action to quiet title the plaintiff may allege his title, ownership and possession in general terms, and thereafter may prove whatever title he has.”

See also:

Tarpey v. Desert Salt Co., 5 Utah 205, 14 Pac. 338;

Gordon v. Cadwalader, 172 Cal. 254, 156 Pac. 471;

Nadeau v. Texas Company (Mont. 1937), 69 Pac. (2d) 586.

The development of this litigation has required Meagher to reduce the quantum of his claim but his basic controversy with appellants has never changed. Since the day the original complaint was filed, Meagher has claimed interests in this land in opposition to appellants. All appellants have set forth their claims and have asked for determination thereof. Those interests cannot be determined unless their limitations are also determined. The second trial has been conducted in conformity with the prior mandate of this court. It has determined who owns what interests in this property, heeding always the decree of this court that the lease itself was neither forfeited nor abandoned.

2. MEAGHER IS THE REAL PARTY IN INTEREST FOR THE PURPOSES OF THIS LITIGATION.

On January 27, 1948, Meagher quitclaimed to his children all of his right, title and interest in the property excepting his landowner's royalty (A-22).

That conveyance was intended to be just what it purports to be, namely, a transfer of whatever Meagher had, excepting only his landowner's royalty. It was made during the pendency of this action and more than three years after Stock had given his release to Meagher.

Prior to his conveyance to his children, Meagher was the sole owner of the interests transferred and as such was the legal and equitable real party in interest. After that transfer Meagher was acting as trustee for his children in the prosecution of this litigation and as such was the legal real party in interest.

The provisions of Section 104-3-19 Utah Code Annotated, quoted in appellants' brief clearly support Meagher's right to continue this action in his name, and Rule 25(c) of the Utah Rules of Civil Procedure also cited by appellants sets forth the same principle.

Smith Land Co. v. Johnson, 100 Utah 342, 107 Pac. (2d) 158;

Brigham City v. Chase, 30 Utah 410, 85 Pac. 436;

Lowell v. Parkinson, 4 Utah 64, 66, 6 Pac. 58;

Firman v. Bateman, 2 Utah 268;

Cleverdon v. Gray, 62 Cal. App. (2d) 612, 145 Pac. (2d) 95.

In fact, in pleading to the Stock answer and counter-claim Meagher states that he and his grantees have elected to continue the action in his name. As appellants point out, no proof of this was made at the trial, but surely there is no requirement that this election is an issuable and essential fact that must be alleged and proved! The statute states that the action can be continued in the name of the original party but if substitution is desired court approval is necessary. Meagher's pleading merely notified all concerned that Meagher and his grantees had made the election which required neither proof nor order.

Appellants' argument seeks to limit the interest passed under the unqualified quitclaim deed from Meagher to his children by an obscure inference as to the state of Meagher's mind dependent upon the status of the pending litigation at the time of his conveyance. It is true that when Meagher made the transfer to his children he may not have known the legal extent of his interest in the property for the decision of this court concerning the leasehold had just been rendered and Meagher's petition for rehearing was pending. But one thing is certain. He did transfer to his children whatever he had, excepting only his landowner's royalty. Even now, the final determination and definition of Meagher's interest will not be known until this litiga-

tion is finally concluded. The case of *Foster v. Cont. Nat. Bk. of Boston* (1906), 76 N.E. 338, cited by appellants, involved an amendment which sought to convert an action for injunction into a suit to recover for monies paid. The decision points out and appellants concede that two separate and distinct causes of action were involved. In the case at bar, however, the amendment to Meagher's reply did not bring in a new cause of action; nor did it change this suit from an action to quiet title into any other form of action; nor did it add to the litigation any property not previously involved. The amended reply sought merely to limit the issues to that portion of the litigation which had not been determined, namely, to the determination of the ownership of the outstanding interests.

One minor issue remains under this point: In describing Meagher's quitclaim deed in connection with the transfer to his children, appellants' brief at page 23 states:

“We do not concede that a leasehold interest can be transferred by quitclaim deed * * *”

And on page 28 it is stated:

“The document itself, unorthodox in its form as a transfer of an oil and gas leasehold interest * * *”

This suggestion baffles us. Surely counsel must know that the quitclaim is the most common form of document employed to transfer oil and gas leasehold inter-

ests. It is frequently employed when lessees transfer back to landowners once they have decided not to conduct additional explorations and desire to aid the landowner in clearing his title. Similarly, it is frequently employed to transfer leasehold interests from one person to another where the grantor desires to avoid any implication of warranty of title. A mere cursory review of the cases in any oil state discloses the common use of the quitclaim deed in dealing with leasehold interests.

Thus when Meagher decided to transfer his interests in these lands to his children, knowing that the nature and extent of his interests were disputed and in litigation, what better method of conveyance could have been employed than a simple quitclaim deed? And finally note how appellants in their *inter se* transactions used the quitclaim, e.g., Stock to Hill (A-19), Hill to Juhan (A-20), Phebus to Juhan (A-18), Juhan to Stock (A-23), and Juhan to Equity (A-21).

We respectfully submit that appellants dangerously approximate the presentation of a frivolous claim when they seek to make any point of the fact that during the pendency of this litigation Meagher saw fit to transfer his interest in the subject matter to his children.

3. MEAGHER IS NEITHER GUILTY OF LACHES NOR IS HE ESTOPPED TO ASSERT HIS INTEREST IN THE LEASE-HOLD.

Appellants continually imply that Meagher's activities were motivated by the discovery of oil on these lands which occurred during the pendency of this litigation. This is simply not the fact. The only thing which has altered Meagher's contentions since the complaint was filed is the decision of this court holding that the original lease was neither forfeited nor abandoned. When the complaint was filed Meagher believed and asserted that the old lease was a nullity. Accordingly, he alleged that he was the owner of the fee simple and requested a decree establishing that the claims of defendants were groundless. When this court determined that the old leasehold had vitality, it remanded the case for further proceedings. Meagher then was required to examine the status of the various interests and in doing so he was obliged to admit: (1) The gas rights under the lease were still outstanding,⁴ and (2) an undivided 1/2 of the oil rights

⁴As to the gas rights, Meagher believes and alleged that these rights had been transferred back to Stock and Phebus by their corporation, Valley Fuel Supply Co., in order to enable them to clear the title for development by Standard Oil Company and its subsidiaries. If this had occurred, an interest in the gas rights would have passed to Meagher with Stock's release. But Meagher was able to produce no documentary proof and the circumstantial evidence developed at the trial, although substantial, was nevertheless held insufficient to overcome the record title possessed by Juhan.

were still outstanding. The gas rights had passed to Juhan by the assignment from Valley Fuel Supply Company (A-17). The outstanding $\frac{1}{2}$ of the oil rights had passed to Juhan from Phebus by the quitclaim deed of January 19, 1945 (A-18).

But as to the remaining $\frac{1}{2}$ of the oil rights—the portion formerly owned by Stock—Meagher was the owner. He had obtained this interest from Stock by the release of October 21, 1944 (A-30). Any claim of anyone else as to this $\frac{1}{2}$ interest must come only through the quitclaim of April 14, 1945 (A-19) from Stock to Charles S. Hill (Juhan's man). That quitclaim can only have effect if the release which Stock gave Meagher six months before can be avoided.

The controversy over the rights in these lands had been narrowed by this court's decision, but there was still a substantial controversy. The appellants claimed the entire leasehold rights. The claims of appellants exceeded their actual interests. Meagher was free to prove that he owned the remaining leasehold interests.

Appellants now charge Meagher with laches predicated upon the interval which elapsed between the issuance of the remittitur from this court on March 16, 1948, and Meagher's next move in the trial court which was a motion filed April 22, 1949. There was no such delay. Appendix B of "significant events" contained in appellants' brief fails to note that after the remittitur issued more litigation ensued and actually the

case was brought to the Supreme Court for the second time. As noted in the trial court's opinion: "Then came the confusion, induced by the defendants (other than Stock), resulting from this court's entry of an unnecessary and invalid 'Order Vacating and Setting Aside Decree As To Certain Defendants', the obtaining of the ruling of this court upon that act which occupied all parties until, at least November 8, 1948, when the decision of the Supreme Court in 198 Pac. (2d) 173 was filed, and more certainly until February 8, 1949, when this court, upon the suggestion of the Supreme Court, filed its Order Setting Aside Judgment, thus clearing the record for the further proceedings directed by that court." There was thus a wait from February 8, 1949 to April 22, 1949, before Meagher acted in the trial court.

We trust it will not violate the record to point out that respondent Meagher obtained additional counsel during this interval. Certainly the court will take judicial notice of the fact that time is necessary for new counsel to become familiar with a case of this character.

Thus when the facts are stated accurately, it becomes evident that there were no substantial delays at all in the prosecution of Meagher's claims.

Moreover Meagher was under no obligation to act quickly at the risk of losing his rights. Certainly appellants Stock and Juhan were fully aware of Meag-

her's interest in the leasehold. Stock had conveyed it to Meagher and Juhan had brought Stock back into the deal under a private understanding expressly contingent upon the elimination of Meagher's interest. As will be pointed out in the argument concerning estoppel, Meagher had no obligation and indeed *had no right* to prevent the drilling which was conducted during this period. But when litigation is pending and a *lis pendens* is on file (A-42) we know of no case where a party has lost his rights in the absence of a motion to dismiss predicated upon the usual statutory grounds requiring dismissal for want of prosecution.

When the original complaint was filed these appellants knew that Meagher claimed they had *no interest* in the lands. After the appeal was determined and the case was remanded for further proceedings, these appellants must have known that Meagher in those proceedings would assert his right to an undivided $\frac{1}{2}$ interest in the lease.

Finding of Fact No. 1 states: "There has been no undue or substantial delay in the assertion of his claim or in the prosecution of this litigation by Meagher." The trial court did not err in denying appellants' claim of laches.

Let us now turn to the alleged estoppel. We have carefully scrutinized appellants' brief to ascertain each specific ground upon which estoppel is charged. These assertions and Meagher's answers are as follows:

Appellants say: Meagher failed to assert his claim under the Stock release when he received it. We answer: Meagher's original, although erroneous, contention was that the lease was void. In such event Stock's release would have merged in Meagher's fee and proof of that interest by Meagher would have been entirely immaterial.

Appellants also say: Meagher is estopped because he first took the position that the lease was void and now seeks to establish an interest in it. We answer: There is nothing inconsistent, unconscionable, or unusual for a landowner to assert a greater estate than the proof supports. The greater includes the lesser. Conversely, appellants could not be misled by the fact that Meagher originally asserted that they had *no* interest and later (after the decision of this court) conceded in his amended reply that appellants owned a *partial* interest. Appellants could not be prejudiced by a change in the pleadings by which Meagher conceded something to them. However, the point is that throughout the litigation appellants knew that any claims they asserted were vigorously contested by Meagher. The fact that originally he said they had *no interest* and later said they had *only a fractional interest*, raises no basis for estoppel.

Appellants claim that Meagher is estopped by accepting the fruits of the first decree. We answer: This argument is simply beyond comprehension. We know

of no decree in this litigation which has as yet yielded any benefits to Meagher. Surely appellants do not refer to the original decree of the trial court which was reversed. Possibly appellants have in mind the elementary principle that estoppel by decree can only arise when the party against whom it is asserted has derived some benefit from a previous decree. This is good law but it has no application to the facts of this case.

Appellants assert that Meagher is estopped, urging that he did not timely assert his claims to an interest in the lease after this court determined that the lease was valid and existing. This has been answered in our discussion above with respect to laches.

Appellants argue that Meagher is estopped because he knew that Stock executed a quitclaim to Charles S. Hill (A-19) some time after Stock had released to Meagher. The short answer to this is that Meagher took all appropriate action to advise Stock of Meagher's position and to ascertain Stock's intentions. The quiet title suit had already been commenced. Meagher had already obtained a release from Stock. But he did more, he wrote to Stock (A-39) and asked why the quitclaim had been given to Hill. He pointed out that he, Meagher, was now the owner of Stock's former interest in the property. He pointed out that deeds of this kind "just mess up an abstract of title". He also pointed out the confusion the quitclaim would

cause in view of the obligation of Stock to reconvey some outstanding landowners' royalty. This was positive action on Meagher's part and is entirely inconsistent with appellants' claim that Meagher led Stock to believe that Meagher had waived any rights or claims or that Meagher acquiesced in Stock's quitclaim to Hill. Certainly upon receipt of this letter it was Stock's duty to speak up if he intended to repudiate his former release. Stock received Meagher's letter. What did he do? He simply ignored it. It was not answered.

We are convinced that no impropriety would be intentionally indulged by any of our opposing counsel. But in discussing this point we must call attention to an inadvertence which involves a gross misstatement of the record. At page 33 of appellants' brief, in referring to the release Stock gave to Meagher, they say: "Notwithstanding it was repudiated by Stock six months after it was obtained, still respondent made no complaint." When appellants say that "respondent made no complaint" they overlook the vigorous complaint addressed to Stock in the letter (A-39) discussed above. Thus the facts are that even though Meagher did complain and did ask Stock for an explanation, Stock remained secretive as to his intentions.

Appellants seek to estop Meagher by a remarkably obtuse line of reasoning predicated upon the fact that Meagher transferred his interest in the property to his

children pending the litigation. We answer that no inference can be drawn that a man waives any rights in favor of strangers merely because he transfers his interest in property to his children.

Appellants argue that Meagher is estopped because he did not try to stop appellants and their assigns from drilling on the property. We answer: Once this court determined that the oil and gas lease had not been extinguished any party having a portion of the lessee's rights also has a clear right to conduct operations on the property. When two or more persons own an interest in land, either can develop it. When two or more persons own lessee's interests in an oil lease either can develop under it.

In *Buchanan v. Jencks*, 38 R. I. 443, 96 Atl. 307, the court said:

“A tenant in common has the right to divest himself of his entire interest in the common property and thus bring into association with his former co-tenants one who has theretofore been a stranger to the title, and this he may do independently and without the consent of such co-tenants.”

In *Prairie Oil & Gas Co. v. Allen* (C.C.A. 8th), 2 Fed. (2d) 566, the court held that where property is held by tenants in common each has the right without consent of any other to explore for and produce oil and gas. At page 571 the court said:

“Tenants in common are the owners of the substance of the estate. They may make such reasonable use of the common property as is necessary to enjoy the benefits and value of such ownership. Since an estate of a co-tenant in a mine or oil well can only be enjoyed by removing the products thereof, the taking of mineral from a mine and the extraction of oil from an oil well are the use and not the destruction of the estate. This being true, a tenant in common without the consent of his co-tenant, *has the right* to develop and operate the common property for oil and gas and for that purpose may drill wells and erect necessary plants.”

In *Davis v. Byrd*, 185 S.W. (2d) 866, one co-tenant sought to restrain the lessee of another co-tenant from developing the property under a mineral lease. In approving the trial court's dismissal of the petition, the opinion says:

“Injunction will not lie at the instance of one co-tenant to restrain another co-tenant or his lessee from conducting mining operations on the common property unless it appears that such tenant in common or his lessee has excluded or prevented the complaining co-tenant from exercising the same rights and privileges.”

The same rule applies between co-lessees as distinguished from co-owners of the fee. In *Allies Oil Co. v. Ayers*, 152 La. 19; 92 So. 720, one co-lessee drilled an oil well and obtained production after his co-lessee had refused to participate. It was held that the non-

participating co-lessee was entitled to one-half of the production less one-half of the expense, the court saying:

“For to the extent that they were invested by the owner with the right to sever the oil from the land, plaintiff and defendant occupied towards each other exactly the same relations as if they owned the land in common.”

Such action by a co-tenant or co-lessee merely imposes upon the acting party an obligation to account to the other for his share of the net production. The drilling, not being an adverse act, cannot be stopped by the other party in interest. One cannot be estopped for failing to prevent action which one has no right to enjoin.

Meagher had already given formal and adequate notice to all concerned that he claimed interests in the property adverse to the interests claimed by them. What better notice could be given than the pendency of an unfinished quiet title action? The lis pendens filed May 4, 1945, notified not only these appellants but the world that the property rights in this land were in litigation and until that litigation was concluded no one, much less the litigants, had any basis for assuming that Meagher was willing to accept less than his lawful interest.

The equity platitudes which follow in the remainder of this portion of appellants' brief tempt us to vio-

late the restraints to which the dignity of this court is entitled.

Here we have Stock and Juhan asserting a title based upon a quitclaim executed six months after the same interest had been transferred to Meagher. They not only knew of the transfer but Juhan's representative took Stock's quitclaim with the express understanding that Stock would receive nothing unless they could subsequently avoid the prior transfer to Meagher.⁵

Appellants called the Stock to Meagher transfer an "after thought." There is no basis for this. It is true Meagher did not consider he would need it to establish his rights for he thought he owned a fee simple. But it was no "after thought" once the various interests in the leasehold became relevant.

Appellants would set aside the release as "a writing almost forgotten." Forgotten by whom? Certainly not by Meagher. Certainly not by Juhan or Stock. Their deal was that Stock would get something only if this "writing almost forgotten" could be rescinded.

These men who now plead that "they at every moment acted as reasonable men" and say: "There is not a

⁵The slight value Stock placed upon his own chances of avoiding the prior release is eloquently proved by the fact that all he was to get from his quitclaim to Juhan via Hill was one-eighth of whatever Juhan could wrest from Meagher. Stock said in effect: "Here is nothing, but if you can make something out of it you can have seven-eighths of it."

scintilla of evidence to put in question their good faith and honest purpose," are the same men who realized for years that rescission of the Stock release would be necessary for them to control the entire leasehold. Did they take any action to rescind the document? They did not. When Meagher learned of the Stock to Hill quitclaim and recognized that was confusing to the title, he wrote to Stock about it. Did Stock reply and assert his position? He did not. On the contrary, these men of "good faith and honest purpose" have *hoped* all along that the "writing almost forgotten" would be forgotten. But when the relevancy of this document became apparent it was urged by Meagher and then for the first and only time Stock and his associates made a belated effort to rescind it.

They talk as though Meagher sat by and took no action until after oil was discovered. This is not true. He commenced this proceeding *four years before oil was discovered* and has never dismissed it. But Stock is guilty of the very charge which is leveled at Meagher. When he made his deal with Juhan in 1945, Stock knew nothing would come of it unless his prior transfer to Meagher could be set aside. That was a few months after Meagher had commenced this suit. Yet Stock made no move to set it aside for four years and ten months after execution. Moreover, Stock waited for eleven months *after oil was discovered* before he took his first step. It was Stock, not Meagher, who deferred action until discovery of oil.

The authorities cited in this section of appellants' brief need not be reviewed. Respondent accepts their principles. They even apply to the facts of this case, but only in this way: the cited cases demonstrate why *Stock* cannot rescind the release he gave to Meagher. But these authorities afford appellants nothing in support of their claim that Meagher is estopped or barred by laches, for the facts upon which these cases depend do not exist as against Meagher.

Estoppel requires at least two elements, (1) representation, and (2) reliance. The above comments show the complete absence of any representation by Meagher indicating any intention on his part to forego his rights and claims. This alone would preclude estoppel.

But in addition, even if some representation could be conceived, the other essential element—reliance—is not present.

We find no contention that any action by Meagher involves an estoppel with respect to any defendant other than *Stock*. But the testimony develops a remarkably clear absence of any reliance by *Stock* upon any act or lack of action by Meagher.

First we must find what it was *Stock* did which can even be claimed to have been done in reliance upon Meagher's actions.⁶ Here we find one fact only:

⁶The effect of the contrary to fact recitals contained in the *Stock* to Meagher transfer is not treated under the subject of estoppel. It is fully discussed in the sections on fraud and mistake, *infra*.

In 1948 Stock purchased from Juhan (A-23) an interest in the lease. It will be noted that Stock claims that his present interest in the lease is not derivative from the one-eighth contingent interest he was to get under the Stock-Hill-Juhan deal of 1945. According to Stock that interest was returned to Juhan in 1948 in the deal by which Stock for \$19,500.00 received a one-fourth interest from Juhan. Further, Stock's own testimony discloses that his purchase in 1948 was not made because Stock thought Meagher had decided to forego his claims, but on the contrary was made to switch Stock's interest in the lease from the small contingency he had saved from the Stock line of title into an interest descending through the line of title from Phebus (Appendix B *infra*). Stock testified that when he obtained the 1948 quitclaim from Juhan he paid \$19,500.00⁷ and gave back to Juhan the old one-eighth contingent interest which Stock retained under the 1945 Stock-Hill-Juhan deal. Stock also testified that he regards the interest he acquired in 1948 as traceable to the *Phebus* line of title, and when that deal was negotiated he was trying to get an interest in the lease "win, lose or draw in the case with Meagher" By such a switch of interests, Stock obviously was trying to put himself into a position that would be free of any claim

⁷Note that \$6500.00 of the \$19,500.00 was used to pay Phebus for the quitclaim (A-18) he had given Juhan on January 19, 1945. See letter agreement between Juhan and Stock dated July 9, 1948 (A-51).

Meagher might assert.⁸ This is a far cry from reliance upon any representation that Meagher had given up his claims.

Appellants' brief does not particularize as to the manner or extent of Stock's participation in the expenses of drilling. This is because there was no commitment by Stock to participate in these expenses prior to July of 1948 at which time Stock made his deal for a new interest as discussed above.

The trial court opinion comments upon this as follows: "If Stock himself had expended any money for development since the action was filed (which the record does not specifically indicate) he, *along with all other parties to this action, dealt with the property subject to the exigencies of this action* and may not assert such expenditures as a change of position upon which to base an estoppel" (Emphasis added).

The following statement from 31 Corp. Jur. Sec. p. 267, par. 71, is sufficient to illustrate the well-established legal principles which dispose of the point:

"It is an essential element of equitable estoppel that the person invoking it has been influenced by, and has relied on, the representation or conduct of

⁸It is not material to Meagher's point whether the Stock-Juhan deal in 1948 did or did not give Stock an interest solely traceable to the Phebus line of title. Meagher's point is that such is Stock's explanation of that deal. If that was his intention, and he claims it was, he could not possibly have been motivated by any belief that Meagher had given up. Therefore, there was no action taken by Stock in reliance upon anything attributable to Meagher.

the person sought to be estopped * * * The person asserting the estoppel must have been actually misled to his injury, by the acts, conduct, words, or silence of the person claiming to be estopped. There can be no equitable estoppel where the complainant's act appears to be rather the result of his own will or judgment than the product of what defendant did or represented. The act must be induced by, and be the immediate or proximate result of, the conduct or representation, which must be such as the party claiming the estoppel had a right to rely on. The representation or conduct must of itself have been sufficient to warrant the action of the party claiming the estoppel."

Finding of Fact No. 36 deals with the factual phase of this issue, as follows: "No action, lack of action, or change of position by any defendant was induced by or undertaken in reliance upon any action, inaction, or representation, express or implied, attributable to Meagher; nor did any defendant take or refrain from taking any action due to any misconception of fact or of law."

The following portion of Finding of Fact No. 37 is also in point: "Neither said drilling operations nor any expenditures incurred in connection therewith were induced by or were undertaken in reliance upon any representation, express or implied, attributable to Meagher. Stock and all other parties to this action dealt with the property subject to the exigencies of this litigation and with full knowledge that Meagher

asserted interests substantially in conflict with the claims of each defendant.”

Conclusion of Law No. 15 correctly states: “Meagher is neither estopped nor barred by laches from asserting the interests to which he is entitled as herein set forth.”

4. MEAGHER IS GUILTY OF NO FRAUDULENT CONDUCT WHATSOEVER.

Appellants devote separate sections of their brief to claims of mistake and lack of consideration. But in their argument under the serious charge of fraud, these other issues are literally brought in by the heels. Recognizing this they say, “whether it be called fraud or mistake is of little consequence, the result is the same.” The same argument could be urged to distinguish murder from an accidental killing, but the legal consequences are different.

We agree that the result is the same in the sense that either fraud or actionable mistake gives rise to the claim of rescission. In both situations that claim can be lost by a party who, being fully aware of his claim, conceals his decision to assert it, lets years elapse and withholds any action until great changes in the value of the property have occurred. However, the foregoing considerations are in the nature of confession and avoidance and are asserted by Meagher in Section

10 of this argument. At this point Meagher will demonstrate there was no fraud.⁹

The charge of fraud is a serious accusation. Its elements are substantially identical with those of deceit. It involves an intentional over-reaching of one party by another. The motives of the fraudulent party are of great importance. His acts must have been committed with the intention of deceiving the other party and leading him into a prejudicial position. The party defrauded must have been fooled. He must have relied upon the deceptive activities of the fraudulent one.

The cases reciting the elements of fraud are legion. However, there is no substantial variation in the doctrine as applied in the various states. The elements are set forth as follows in 37 C.J.S., page 215:

“Comprehensively stated, the elements of actionable fraud consist of: (1) representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.”

These are elementary principles. They are well known to appellants. But they do not care to grapple

⁹Section 5 is devoted to the issue of consideration. Section 6 argues the issue of mistake.

with the burden which these essential elements impose upon one making the grave charge of fraud. Instead, they merely confuse the issues hoping this court can be induced to forget the many conditions which one must meet before a court will brand a litigant with the stigma of being a cheat.

When the fraud section of the appellants' brief is analyzed its factual foundation boils down to this: Stock owned an undivided $\frac{1}{2}$ of the lessee's rights in lands owned by Meagher. For a period of 15 years Stock and his co-lessee had done nothing about it or at least their efforts to develop the property had accomplished nothing. Meagher wrote to Stock on January 7, 1944 (A-26), telling him: (1) Meagher had purchased the landowner's rights subject to outstanding royalties *and the lease*; (2) Meagher understood that Stock and Phebus had assigned all their rights to one Archie Lewis but finds no record of that assignment. (3) Meagher's objective is to *clear the title of the lease* because the record instruments indicate that Stock is still interested; (4) Meagher requests a release from Stock.

Ten days later a letter was written to Meagher by L. J. Hinkley on behalf of Stock (A-32) acknowledging Meagher's letter of January 7. This letter advises that Stock will execute an instrument to clear the outstanding royalties on the lease which "will enable you to record same and clear the title." This letter does indicate some confusion, at least in the mind of Mr.

Hinkley, for it discusses royalties whereas Meagher's letter (A-26) does not discuss royalties but states that Meagher's efforts are designed to "clear the title of the lease."

The next communication between Stock and Meagher comes *nine months later* and is the letter of October 16, 1944 to Paul Stock (A-27), signed by Meagher's daughter acting as Meagher's attorney. This letter says: "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 Valley Oil field and will sign a release of *any interests you had in the past* so the release may be recorded."

The next step in the Stock-Meagher communications was the receipt by Meagher from Stock of the release which Meagher's daughter had enclosed in her letter of October 16.

Note the long interval of time (nine months) between Hinkley's letter to Meagher and Katherine Meagher's letter to Stock. Note the positive manner in which Katherine Meagher excluded any possible inference that her father was merely talking about outstanding royalties. If there was any question in Stock's mind as to what Meagher was talking about after the Hinkley letter it was certainly clarified by Katherine Meagher's letter.

It is significant that appellants' brief combines the letters to Phebus with the Stock correspondence. There

is nothing in the record to indicate that statements made to Phebus by Meagher were ever communicated to Stock. In fact, the contrary is indicated by Hinkley's letter which states that Phebus is not in "this part of the country" and advises that "his address is somewhere in Illinois."

Even though we find nothing in the letters to Phebus which if addressed to Stock would in any way confuse Stock as to Meagher's intentions, we consider it improper to discuss the Phebus letters in connection with claimed fraud upon Stock. Our real objection in this respect is that it tends to telescope the correspondence chronologically and thereby creates an erroneous impression. There were only two exchanges of correspondence between Stock and Meagher. One occurred in January of 1944, the other in October of that year.

However, we can cite one of the Phebus letters to illustrate the open manner in which Meagher was treating the matter when he was attempting to clear up his title. In this connection see Meagher's letter of November 9, 1944 to Phebus (A-28) which frankly concedes that Meagher *has been solicited for a lease* on the property and assigns this as a reason for wishing to get releases from Phebus and Stock. This is not the type of disclosure made by one who is deceitfully scheming to cheat another out of oil rights.

Appellants cite the testimony elicited from Stock at the trial to indicate that Stock only thought he was

clearing up the landowner's royalty situation when he executed the release to Meagher. However, if such had been the fact, after discovering the discrepancy would not Stock have brought this to Meagher's attention? Particularly is this true in the face of Meagher's letter to Stock written June 18, 1945, a few months after Stock executed and delivered his release. In that letter Meagher asked Stock why he had given a quitclaim to Hill and pointed out specifically how this transfer to Hill would be likely to confuse the title. Certainly at that time if Stock's release to Meagher had been given under the misapprehension that he was merely releasing the royalties, Stock would have promptly said so when Meagher himself brought up the subject. But, as noted above, Stock did not even deign to reply to Meagher's letter of June 18, 1945 (A-39) even though at that time *he had already entered into his plan with Juhan to upset the release he had given to Meagher.*

The fact is that Stock labored under no misapprehension. The trial court has declined to accept this, the one and only excuse Stock gives for avoiding his own document. The opinion says that Stock's counsel seeks to attribute to Stock "an innocence which his wide experience and manifest sagacity do not support". The opinion also states that notwithstanding Stock's testimony that he merely glanced at Katherine Meagher's letter and merely "glanced over the release itself", he could not have misunderstood their import

“unless he was possessed of the innocence which he seeks to have the court believe he was.” The opinion also points out that “since Stock had no interest in the gas rights * * * and had done nothing at all with respect to his oil rights, it would be easy to understand his self-asserted disregard of the contents of these instruments even assuming it to be true that he paid slight attention to them. The opinion goes on “but in either event it hardly comes with the best of grace now after the discovery of oil and in consideration of his implication as to the weakness of his claim expressed in A-19, for him to say that what he thought he was releasing was merely a royalty interest, and that he did not intend to surrender his mineral rights in the property.”¹⁰

Appellants may not thus avoid the real significance of Stock’s testimony. The importance of the testimony quoted on pages 56 and 57 of appellants’ brief is that it proves that when Stock executed the release to Meagher, *he was not relying upon any representations made by Meagher and was not misled by any contrary to fact recitals contained in the release itself.* This point will be discussed further in Section 6 which pertains to mistake.

¹⁰In speaking of Stock’s “implication as to the weakness of his claim” the court refers to the Stock-Hill-Juhan deal whereby Stock transferred what he had to Juhan (via Hill) for one-eighth of what Juhan could make of it in litigation with Meagher. One does not assign away a valued interest in consideration for getting one-eighth of it back.

We agree that on the issue of fraud Meagher's state of mind is material and so is Stock's. We defy counsel to point out any representation made by Meagher to Stock or anyone else which was contrary to fact and known by Meagher to be so. We further challenge appellants to show any action taken by Stock which was taken in reliance upon any representation, action or inaction of Meagher's.

As in the section on estoppel, appellants have cited a number of sound authorities setting forth principles with which we have no dispute. Our quarrel with them lies in their effort to bring the facts of this case within those authorities. It certainly is not fraud for a landowner to ask the tenants of an old oil lease to release their interests. And when such landowner only succeeds in obtaining such release from the owner of an undivided one-half of the lessee's rights, it certainly is not fraud for that landowner to pursue the rights which flow to him by virtue of that conveyance.

The issue has been correctly determined by the trial court. Finding No. 38 expressly meets the claim of fraud and determines that Meagher was not guilty of fraudulent or deceitful conduct with respect to Stock, or any other party to this action.

**5. THE STOCK TO MEAGHER TRANSFER IS SUPPORTED
BY A LEGAL CONSIDERATION.**

This section of appellants' brief attacks Finding of Fact No. 42 which states that the Stock to Meagher transfer is supported by consideration in that Stock was thereby excused from further performance of his obligations under the lease.

Appellants charge that no one has pointed out what obligations existed which Stock was bound to perform as the owner of one-half of the lessee's rights. Surely this cannot be asserted seriously. We have never seen a lease devoid of obligations on the part of the lessee and this one is no exception. A mere casual reference to the lease (A-1) and its modification (A-5) will reveal obligations of the lessee in nearly every section. See e.g. sections 5, 6, 7 and 14 of Exhibit A-5.

Appellants say that Meagher could not relinquish a portion of performance any more than Stock could relinquish a portion of the lease. This statement is confusing. The answer is that Stock most certainly could transfer whatever interests he had to Meagher and in consideration therefor Meagher could relieve Stock from any responsibility he had as a co-lessee. This is just what occurred and Stock, therefore, did receive a benefit which constitutes full legal consideration to support the transfer.

If Phebus had acceded to Meagher's request and had executed a transfer of his interest as did Stock,

all lessees' rights and obligations would thereby have been extinguished. As it was, since Phebus did not release, the lease was not extinguished but Stock's interest had passed to Meagher and Stock's obligations thereunder to Meagher were extinguished.

Appellants seem to argue that a landowner can never gather up outstanding leasehold rights when there is more than one lessee unless he obtains a release from all of the co-tenants. This, of course, is nonsense and particularly so in the case of oil leases which are frequently divided into numerous undivided interests.

It is true that Meagher considered the lease to be a nullity at the time he asked for the release. On the other hand, the record discloses that Meagher did consider that the property still had oil prospects as shown in his letter to Phebus of November 9, 1944 (A-28), in which he frankly stated that other parties were trying to lease the land from him. Thus it appears that Meagher fully intended to do what he could to develop the property. Naturally if those efforts were successful, the value of the right to expore for and produce oil would go from a nominal to a substantial value. But Meagher made no effort to conceal this from Phebus or from Stock and the question of adequacy of consideration to support the release is not affected by calculations of its value based upon developments conducted years later.

When the release was requested Meagher sincerely believed that Stock and Phebus had no lawful rights. Stock was indifferent, but he did come to the reasonable conclusion that after holding onto this property for 15 years and having been unable to do anything with it, it was high time that he release it back to the landowner.

This is just what Standard Oil Company of California and its subsidiary did for Stock and Phebus after they took a lease and decided not to develop it. These companies were not in default when they released. Although the record is silent on the point, the circumstances of the transaction are such that we confidently assert that Stock and Phebus paid nothing to the California Company for its release back to them. If the argument claiming inadequacy of consideration has merit, the California Company could now claim that its release to Stock and Phebus is voidable. Such a contention would also be nonsense.

On the subject of adequacy of consideration, appellants go to the extreme in clutching at straws. Where adequacy of consideration is relevant, the inquiry is always limited to the fair value of the subject matter of the transfer considered at the time it is made. Inadequacy of consideration cases are closely related to fraud and usually involve over-reaching of an ignorant person by one possessed of superior information. On the subject of superior information, do appellants con-

tend that Meagher knew when he asked for this release that the property overlay an oil field? The values which appellants urge to establish the inadequacy are predicated upon oil sales commencing in September of 1948. The transaction which is attacked for inadequacy occurred in October of 1944.

Thus, regardless of whether Stock was under a contractual duty to release or was voluntarily turning back his lessees' rights, the fact remains that he did make the transfer and did thereby cease to have any obligations as a lessee. These facts alone dispose of the issue of consideration.

Barker v. Smythe (Wyo. 1944), 143 Pac. (2d) 565;

Exeter Co. v. Samuel Martin, Ltd. (Wash. 1940) 105 Pac. (2d) 83;

Hallam v. Commercial Mining & Realty Co. (C.C.A. 10, 1931), 49 Fed. (2d) 103, cert. den.; 284 U. S. 643.

It is not necessary to support Meagher's position but an additional element of consideration can be found in the facts. It will be noted that the quiet title suit was commenced on October 17, 1944 immediately after Katherine Meagher had written to Stock asking for his release. Stock was named as a party in the action but since he was a nonresident, service by publication was required to obtain jurisdiction. However, the requested release from Stock was executed Oc-

tober 21, 1944. At no time was service on Stock perfected, and his first appearance in the action on August 17, 1949 was purely voluntary. Thus Meagher forbore prosecution of his suit against Stock in consideration for the release Stock had given him. In fact, if Meagher had later sought to bring Stock into the suit, Stock could certainly have urged his release as a basis for obtaining a summary dismissal.

We know of no case where a lessee under an oil and gas lease who has released his interest to the landowner has been able to repudiate his release on the basis of lack or inadequacy of consideration. And where, as here, discovery of oil intervenes between execution of the release and the effort to rescind it, no such case can ever arise.

6. THE STOCK TO MEAGHER TRANSFER MAY NOT BE RESCINDED ON THE GROUND OF MISTAKE.

This section of appellants' brief goes to great lengths to avoid the use of the term "rescission". This omission is not inadvertent. The obvious purpose of our able adversaries is to divert this court's attention from the fact that the plea of mistake, like fraud, lack of consideration, and estoppel goes to the question of whether Stock can rescind the instrument he signed.

This, of course, immediately brings to mind the many affirmative duties which are imposed upon one who seeks rescission, practically all of which have been

ignored by Stock. These will be discussed in Section 10, *infra*. We now turn to the question of whether a mistake was made of a character which will support rescission even if Stock could meet the conditions precedent to exercising this right.

We frankly state that Meagher was under a misapprehension with respect to his legal rights at the time he asked Stock to release his interest. Meagher thought the lease had been forfeited or at least had been abandoned. He frankly said so. But Stock did not share this misapprehension. Although the doctrine of rescission for mistake has many ramifications, one element exists in all the cases, that is: the party aggrieved must have participated in the error. That element is lacking here and we prove it by the testimony of Stock himself.¹¹

¹¹Even if Stock had joined in Meagher's error, the mistake would not constitute grounds for rescission because of Stock's negligence and indifference.

See *Fraters G & P Co. v. Southwestern C Co.* (1930), 107 Cal. App. 1, 290 Pac. 45, which states:

"The burden is on one who relies upon fraud or mistake as grounds for the rescission or revision of an instrument to allege and prove the essential elements of the charge. * * * Courts of equity will not encourage the cancellation or revision of instruments on the ground of mistake where they appear to have been executed by the complainant without the exercise of reasonable care."

See also: *Moreno Mut. Irr. Co. v. Beaumont Irr. Dist.* (1949), 94 Cal. App. (2d) 766, 211 Pac. (2d) 928, which states:

"Moreover, mere ignorance of the facts is not necessarily a ground for relief nor will the courts relieve one from the consequences of his own improvidence or poor judgment. Parties must exercise ordinary diligence * * * and may not avoid a contract on the basis of mistake where it appears that ignorance of the facts was the result of carelessness, indifference or inattention."

Appellants say: "In light of all the circumstances it is clearly evident that Stock was mistaken as to the contractual obligation to release as to Meagher." This we emphatically dispute. The record offers circumstantial evidence in support of this statement except for the fact that *Stock's own testimony precludes it*. He was directly asked what he had in mind when he signed the release. This question gave him a fair opportunity to support the claim of mistake contained in his pleading. But to the credit of our adversaries, we can say that Stock was not coached. He made no effort whatsoever to claim that he signed the release because he thought he was legally obliged to or because he had placed any reliance in Meagher's contention that he, Stock, had no remaining rights. On the contrary, he admitted that he only glanced at the document. He made no claim that he was misled by the contrary to fact (or law) recitals contained therein. He admitted that he only glanced at Katherine Meagher's letter. He made no claim that he was mistaken with respect to his legal rights. In fact, he admitted that he had not even read the pleading which had been filed in his behalf.

The only explanation Stock made upon which anyone could predicate an attack upon the release was that he thought he was transferring back to Meagher certain royalties. But there is a limit to what mistakes will support a rescission. One cannot make a mistake so flagrant, so irresponsible as the only one Stock

suggested in his testimony and still avoid responsibility therefor. There was nothing in any correspondence from Meagher to indicate that he was limiting his request to a transfer of royalties. The subject of royalties was injected into the correspondence by Stock's man Hinkley nine months prior to the letter Katherine Meagher sent to Stock. Her letter enclosed the release and is the letter Stock acted upon. Her letter said nothing about royalties and expressed the request for a release in such clear and direct language that no one could have misunderstood her intent. The only explanation Stock assigned as his reason for avoiding the release was not acceptable to the trial court. The trial judge saw and heard the witness. Stock offered no other explanation. Even if Stock's testimony had been acceptable to the court, the best situation appellants could present would involve mistakes of both parties relating to different matters. This situation will not support rescission. The rule is stated in Restatement, Contracts, Section 503, as follows:

“A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable; nor do mistakes of both parties if the respective mistakes relate to different matters * * *”

Nor can appellants suggest that Stock was ignorant of the ways of handling oil interests. The trial judge refers to Stock as a man of “wide experience and manifest sagacity.” In this regard note that Stock had been in the oil business for many years and by

the end of 1944 had dealt extensively with oil leases and royalties and oil interests of all kinds. In fact during 1934 he sold a substantial part of his oil interests to The Texas Company in a deal involving millions. This is not the type of individual who is likely to make a mistake in the release of an oil interest. And if he had made the mistake suggested by his counsel he would not forget it when asked the outright question as to what was in his mind when he signed the release.

We have stated to the trial court and we say again here that our comments with respect to Stock's frame of mind and his failure to read his own pleadings are not to be understood as insinuating improper conduct on the part of opposing counsel. The documents of record do present circumstantial evidence indicating the *possibility* of estoppel or mistake. But the actual testimony of Stock with respect to his own state of mind first at the time he executed the release and second at the time he bought into the deal in 1948, refutes the circumstantial inferences beyond a doubt.

The true facts with respect to the issue of mistake are these: Meagher made a mistake and thought his legal position was stronger than it actually was. He cannot be blamed for this misapprehension for his position was confirmed by a trial court and it was not until that decision had been reversed by this court that Meagher knew he was wrong. Meagher may have presented his misapprehension to Stock in

such a manner that Stock could have joined in Meagher's mistake of law. Conceivably Stock might have relied upon Meagher's erroneous presentation of the situation in such a manner as to permit him to rescind his own instrument. But the facts, disclosed from the mouth of Stock himself, establish that no such error motivated any of Stock's actions.

On the face of it, it would appear that Stock was grossly negligent. However, we suggest that this is not the true explanation. The real reason why Stock released to Meagher is because he was finished with the Ashley Valley Oil structure. He had been interested for 15 years. The best he was able to do was to get Standard to take over the lease. Standard held it for 3 years and turned it back. Stock figured it was "a dead play" to use the language of oil men like appellants. When the letter from Katherine Meagher came in the fall of 1944 Stock knew it was a request from a patient landowner to release the property in order to give him a chance to do something with it himself. That is what Stock did. Actually Stock *wasn't interested* in the legal status of the lease. He was through with it.

There is no factual or legal basis for rescission here predicated upon mistake of law or fact or otherwise.

7. THE STOCK TO MEAGHER TRANSFER, VIEWED AS A SURRENDER, IS A VALID RELINQUISHMENT OF STOCK'S INTEREST IN THE LEASE TO MEAGHER.

Appellants object to the use of the word "transfer" which is employed in the findings to describe the legal effect of Exhibit A-30.

The trial court's first opinion reached conclusions which would logically and properly follow from an interpretation of the document as a "surrender". However, those conclusions were inconsistent with the stipulation made in court by Meagher which foreclosed any contention that Meagher was making an effort to attack the overriding royalty which defendant Ashley Valley Oil Company had acquired. The trial court's analysis yielded a smaller interest for *all appellants* than was conceded by the stipulation. However, Meagher was bound by his stipulation and promptly pointed out the situation to the trial court. The findings cleared up the matter and the trial court filed a supplemental opinion explaining that regardless of whether the transfer be viewed as a "surrender" or as a "conveyance" it was a transfer sufficient to pass from Stock to Meagher whatever lessee's rights Stock had in the leasehold.

The findings of fact were adopted by the court only after objections were filed and argument thereon. Of course, the findings are not to be modified or sup-

planted by remarks of the court in discussing the decision.

Pender v. Anderson (September 11, 1951, 235 Pac. (2d) 360;

Christensen v. Nielsen, 73 Utah 603, 276 Pac. 645.

But the above rule need not be invoked by Meagher because the trial court's supplemental opinion corrected the oversight, so there is no inconsistency to explain.

Moreover, the result finally reached in the findings, conclusions and decree varied from the original opinion only by *increasing* the amount of overriding royalty adjudicated to Stock and Juhan as well as to Ashley Valley Oil Company. The decree awards 4% to Ashley in lieu of 2%; 1% to Juhan in lieu of 1/2%; and Stock received 1% in lieu of 1/2%. Thus appellants here seek to make capital of the fact that the findings and decree give them *more* than the original opinion, and this even though it was Meagher who voluntarily brought the prior stipulation to the attention of the trial court.

Actually, the Stock to Meagher transfer is really a quitclaim¹² and as such is both a "surrender" and a "conveyance".

¹²In Section 8 we discuss the granting clause of the document and demonstrate that it is a valid quitclaim deed.

Since Section 7 of appellants' brief elects to attack the transfer as a surrender, we will now seek to meet those arguments.

(a) The transfer is not affected by the provisions of Exhibit A-5, the modification of the lease.

First, appellants argue that the surrender was not made in the manner prescribed by the modification agreement, A-5, which changed many of the terms of the original lease, A-1. We answer: First, this is not an accurate interpretation of the modification agreement; second, a surrender consented to by both lessor and lessee supersedes any provisions in the lease concerning surrender.

Defendants argue that paragraphs 20 and 28 of the modification agreement set forth the method and prescribe the conditions under which a surrender may be given, and urge that the Stock-to-Meagher surrender (A-30) is ineffective in that it was executed in a different manner than contemplated in the cited paragraphs of the modification agreement.

Meagher replies that the provisions of the modification agreement concerning surrender refer to the lessees' *right* to surrender, regardless of the desires of the lessor. Surrender is not always desirable from the lessor's point of view, and for this reason conditions were properly included in the agreement to specify the terms under which the lessee can *force* a

surrender upon the lessor. This has no bearing upon the right of the lessor and lessee to negotiate a surrender by mutual consent, which is always inherent in any leasehold.

Meagher concedes that the provisions of the modification agreement are such that Ashley's rights to an overriding royalty must be protected. But there has been no attempt in this litigation to curtail Ashley's rights to this royalty, and what Stock could surrender he did surrender, namely, *his* one-half interest in the lease.

Everything in paragraphs 20 and 28 of the modification agreement is designed to define the conditions upon which the lessee may, as a matter of right, "be relieved and released of all obligations" under the lease. There is nothing in the provisions of the agreement which precludes the lessor and one or more lessees from agreeing to a surrender on other or different terms than those specified in the agreement so long as the rights of third parties are not prejudiced.

Furthermore, the possibility that a surrender might be effected in some manner other than those specified in paragraph 20 is recognized in paragraph 26 of the modification agreement, which provides (emphasis ours):

"Notwithstanding anything in this lease provided or contained to the contrary, it is hereby

*expressly agreed by the lessee that in the event of, and at all times from and after, the forfeiture, cancellation, surrender and/or other termination for any cause whatsoever, of the lessee's right to drill, prospect and/or produce oil upon the lands the subject of this agreement, then the lessors, their respective heirs, legal representatives, and/or assigns shall have, and the lessee hereby grants unto them, reciprocal rights of possession and control of, and all necessary rights-of-way * * * for the purpose of prospecting, drilling for, * * * all oil contained in or produced from; * * * it being the understanding and intent of the parties hereto that in the event of the surrender or other terminating of lessee's said such oil rights, the lessee shall thereafter exercise his rights to operate and develop for gas upon the lands the subject of this agreement in a manner consistent with the reciprocal rights of the lessors to operate said lands for oils. * * **

The foregoing paragraph is important not only as a recognition that there might be a surrender in a manner different from that contemplated elsewhere in the modification agreement, but it also demonstrates the proposition that Stock's surrender to Meagher is adequate to pass Stock's right to prospect for oil, even though Stock was divested of the right to develop for gas.

Anticipating the above arguments, appellants then say that where lessor and lessee consent to a sur-

render in a manner different from that provided in the lease, "the consent of the lessor must be shown." We submit that acceptance of the transfer, recording it and relying upon it in subsequent litigation, evidences Meagher's consent beyond question.

(b) The transfer does not lack consideration.

Next appellants say that the transfer wants consideration when viewed as a surrender. The question of consideration has been fully discussed in Section 5, *supra*, and the argument therein is fully applicable here.

(c) Stock was fully empowered to surrender to the reversioner Meagher whatever interest he had in the leasehold.

Appellants' next point is the assertion that Stock did not have the power to surrender his interest in the lease. Meagher concedes that Stock and Stock and Meagher together could not contract in such a manner as to cut off the rights of any other party having an interest in the lessee's rights under the lease. But no such effect resulted under this transfer. Appellants' entire argument at this point is predicated upon hypothetical damage to Ashley Valley Oil Company but not to appellants Stock, Juhan, or Phebus. Ashley Valley Oil Company has filed its own appeal in this case. It charges no error with respect to any rights it might have in the 440-acre parcel. That parcel is the only property involved in the dispute between

Meagher and appellants Juhan, Stock and Phebus. Yet it is the hypothetical rights of Ashley Valley Oil Company, not their own, which these appellants now urge. The explanation of this situation lies in the fact that Meagher stipulated in open court that he did not attack the overriding royalty interests of Ashley Valley Oil Company. Thus any contractual provisions designed to protect those interests were not affected by the transfer from Stock. This stipulation was fully kept. The decree awards Ashley everything Ashley claimed so far as concerns the 440-acre parcel. Obviously, a lessee can surrender what he has to his lessor so long as no injury is thereby sustained by other parties in interest. Meagher claims no different result from this. Ashley Valley Oil Company makes no complaint. The other appellants are not concerned.

(d) Meagher was the owner of the reversionary rights in the property and as such was eligible to receive a surrender.

Finally in attacking the effect of the transfer, viewed as a surrender, appellants claim that Meagher was not the reversioner. In fact, appellants claim the reversionary rights themselves by virtue of a deed to Edward F. Richards, one of the attorneys for appellants, which was obtained September 14, 1948 (A-61), from one Johnson who, acting for appellants, obtained a deed from the heirs of M. P. Smith on September 11, 1948 (A-60). Appellants concede that if Edward

F. Richards obtained any interest by virtue of these deeds he holds for the benefit of appellants. It is noteworthy that appellants did not consider these belated transactions worthy of inclusion in their own chart of the title (A-62), which is reproduced in their brief.¹³ Meagher also considers these transactions to be irrelevant and omitted them from his chart (A-57).

But to return to the question of Meagher's reversionary rights: It was agreed at pre-trial that the question of reversion depends upon construction of the deeds M. P. Smith gave to Meagher as to an undivided four-fifths interest (A-7) and to Meagher's grantor, Alexander, as to the remaining undivided one-fifth (A-8). The question is whether these deeds passed only surface rights to the grantees or also passed the reversionary oil and gas rights which Smith held as lessor.

By "reversionary rights" in this case we mean the rights remaining in the owner of the fee after he has leased his property for oil and gas development. Such reversionary rights could be termed "lessor's rights".

Possibly a helpful way to analyze the location of the reversionary or lessor's rights in the oil and gas estate is to follow each transaction and see where the reversion vested thereafter.

¹³These two deeds were procured by appellants' attorney within less than a week prior to discovery of oil. The record is silent as to the consideration paid to the widow and children of M. P. Smith.

We start with Sheridan, the fee owner prior to execution of any lease, at which time Sheridan, of course, owned the entire oil and gas estate.

Then Sheridan executed the original lease to R. C. Hill (A-1). It will be undisputed that Sheridan was the lessor, and, as such, retained the reversionary or lessor's rights.

Then Sheridan conveyed his entire interest to Smith (A-4). It is undisputed that Smith thereby acquired the oil and gas estate subject to the leasehold, and, as such, became the reversioner.

Then Smith executed a number of assignments of royalty (the one to Meagher is Ex. A-46, and all of these assignments are enumerated in A-7). These assignments of royalty did not pass any reversionary or lessor's rights to the various assignees. They merely assigned *the value of* certain specified proportions of ultimate production from the property.

Then Smith entered into the modification agreement with Ashley Valley Oil Co. (A-5). This, however, is nothing more than what it purports to be, namely, a modification of the terms of the original lease. While it is true that this modification agreement converted an ordinary lease into one much more onerous on the lessor, it would be the height of presumption to contend that Smith thereby lost the remainder of his oil and gas estate. The modification agreement contains no provisions indicating an intent to eliminate Smith

from the chain of title to the oil and gas estate and, on the contrary, provides: (1) that Smith succeeded to the rights of the Sheridans, the lessors, (2) that certain paragraphs of the lease are superceded by specific substitute paragraphs, (3) that the parties be designated as "lessor" and "lessee", (4) that the lease be forfeited to Smith if specified events of default should occur, and (5) that Smith is the proper party to whom surrender shall be made if and when surrender is made.

Bearing in mind that all owners of royalties subscribed to the modification agreement, the express recognition of Smith as the lessor or reversioner would seem conclusive on three points: (1) there were reversionary rights in existence after execution of the modification agreement, (2) Smith was the reversioner, and (3) the royalty owners had no reversionary rights.

Since Smith obtained these reversionary or lessor's rights from Sheridan and did not transfer them to anyone else until he conveyed to Meagher, the entire issue with respect to the location of reversionary rights depends upon construction of the transfers from Smith to Meagher as to an undivided four-fifths (A-7), and from Smith to Alexander as to an undivided one-fifth (A-8). Since these documents are substantially identical, an analysis of A-7 should be sufficient.

This deed says that Smith, for a valuable consideration, quitclaims an undivided four-fifths interest in the land to Meagher, excepting and reserving all the

rights in the land and in the oil and gas *which have been sold or disposed of* by the Smiths or their grantors under the following instruments to which this grant is subject:

- (a) The Sheridan lease;
- (b) to (h), inclusive. Various assignments of land-owner's royalty;
- (i) The modification agreement of May 21, 1926 (A-5).

The deed further states that Meagher assumes and agrees to pay and to perform the obligations of Smith under the above instruments and agrees to hold Smith harmless and to indemnify him for any loss occasioned by any default in the performance of said obligations. The deed can be analyzed down to this: Smith transfers to Meagher the 480 acres subject to the lease, the modification agreement, and the royalty assignments, and Meagher assumes and agrees to perform Smith's obligations with respect to those interests.

As pointed out above, none of these assignments or agreements disposed of Smith's reversionary rights or his lessor's rights, and therefore when Smith conveyed everything he had to Meager subject to those outstanding instruments, Meagher succeeded to Smith's reversionary or lessor's rights.

It is understandable why Smith spelled out the obligation of his grantees, Meagher and Alexander, in such detail. It was prudent for him to make sure that his

grantee should acquire and assume the charges he had imposed upon his oil and gas estate. As to the lease, he had slight cause to be troubled, because it was obviously an interest in land eligible for recordation, but, as to the outstanding royalties, even though the assignments expressly state that they shall constitute covenants running with the land, they were also personal obligations of Smith. If the lessee paid the royalties due under the lease to Smith's grantee, and for any reason the royalty owners were not paid, Smith would be personally responsible. Even though such landowner's royalties are universally recognized in oil states as interests in land eligible for recordation, there was no Utah law on the subject, and in some states in the early stages of their oil industry, considerable confusion has been experienced as to the nature of royalty interests. Under the circumstances, it was proper for Smith to take care, in wording his deeds, to bring forcibly to the attention of his grantee the responsibility for recognizing the charges existing against Smith's oil and gas estate, and to require them to warrant that they would see to it that the lessor's obligations under the lease would be performed and that the royalty owners would be protected. But it does not follow from this that Smith retained his oil and gas estate or his reversionary or lessor's rights therein. On the contrary, if such had been his intent, his grantees would have had no standing with the lessee and would have no opportunity to do any of the things against which Smith sought protection. If Meagher was not to be the lessor of the

lease after acquiring the property from Smith, there was no occasion to require him to pay over the royalties to Smith's assignees. In other words, if Meagher was not to be the lessor, there was no occasion for Smith to insist that Meagher perform the lessor's obligations. It follows, of course, that if Meagher was to become the lessor, he would succeed to the reversionary rights remaining to Smith as lessor.

To summarize the above: Smith conveyed the property to Meagher subject to whatever interests Smith had previously conveyed away. He reserved nothing else. Since Smith had not previously conveyed away his reversionary rights Meagher became the reversioner.¹⁴

Meagher submits that the foregoing demonstrates that the transfer, viewed as a surrender, is a valid relinquishment to Meagher of whatever lessee's rights Stock had in the lease.

8. THE STOCK TO MEAGHER TRANSFER, VIEWED AS A CONVEYANCE, IS EFFECTIVE TO TRANSFER STOCK'S INTEREST IN THE LEASE TO MEAGHER.

When a landowner seeks to clear his title of outstanding easements, leases or other encumbrances, the accepted procedure is to obtain quitclaims from the

¹⁴See pages 14-18 of the trial court's opinion for a discussion of the reversionary rights fully supporting Meagher's contentions. Findings 22 and 23 and Conclusion 11 dispose of the issue.

parties who hold such outstanding interests. Those interests may be valid or invalid but once the holders thereof quitclaim them, the landowner's title is cleared.

Particularly is this procedure adapted to eliminate outstanding interests in oil and gas leases. Sometimes the lease interests are in default, sometimes not. But once the holder transfers his interest by quitclaim he has conveyed to the landowner the interest he held regardless of whether he was legally obliged to do so. Surely this court will take judicial notice of the well-known fact that oil lands are frequently leased, quitclaimed, and leased again. We venture the statement (though unsupported by the record) that every major oil company has at one time or another quitclaimed lands subsequently proved to overlay an oil field.

Thus appellants' repetition here of the conceded fact that Stock was not obliged to quitclaim is nothing but a reargument of the claim of rescission which has been thoroughly covered elsewhere. Of course, it was Meagher's purpose to clear up his title. He said so very clearly. In fact, the immediate reason which motivated Meagher was to be in a position to lease the property to someone else for further exploration. Meagher's letters frankly explain this.

We cannot understand the following statement contained in appellants' brief: "Meagher was not asking for a transfer of interest nor did he believe the Stock instrument * * * to be a transfer or a surrender." What

else could Meagher possibly have thought it was? He had asked in unequivocal words for a quitclaim. Stock complied. Meagher was asking the same thing of Phebus. Phebus declined. Neither quitclaim was dependent or conditioned upon receipt of the other. Meagher was frankly and openly gathering up all potential lease interests in order to be free to make a new lease. If Stock's transfer was not a conveyance of his interest, what was it?

Appellants complain that "This court is now called upon to determine the effect of the instrument by the sheer weight of its words." We plead guilty to this charge. How else are documents construed? Meagher does not deny that the words contained in the recitals in the quitclaim which Stock gave him require explanation because they recite conclusions of law which were subsequently held by this court to be erroneous. However, as demonstrated above, Stock was not misled by these words for he paid no attention to them.

This brings us to the words contained in the granting clause of the instrument and to the real subject of this section of appellants' argument. We find the following:

"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.”

These are the words of a quitclaim deed. The essence of a quitclaim lies in the fact that it only conveys “the right, title and interest” of the grantor. The purpose of this phrase is to avoid any implied warranty of title. It only passes what the grantor had. It promises nothing. It is a convenient form of conveyance where a grantor doubts whether he has an interest. It was properly used for that purpose when Stock conveyed nothing to Chas. S. Hill in the Stock-Hill-Juhan deal. But if the grantor does have an interest, that interest is conveyed. Yes, it is the “sheer weight” of these “words” which conveyed to Meagher whatever interests *in the lease* Stock then owned.

This court will search in vain through appellants’ brief to find any authority denying vitality to words of conveyance similar to the combination of verbs used in this document. True, the same result could have been more simply obtained by using the simpler verb “quitclaim” or “grant” or “convey” or any number of similar expressions. But the meaning of these words cannot be misunderstood. Their meaning was to take from Stock and give to Meagher “all of his right, title and interest in and to the said oil and gas lease”. It cannot be attacked by claiming inadequate words of conveyance. Here again, as it has so often occurred during this litigation, when the facts are put forward as they

exist rather than as they *might* have been, the issue is solved by application of the most elementary legal principles.

There are many cases holding these words adequate for purposes of quitclaim. *Osburn v. Finkelstein*, 189 Ind. 90; 126 N.E. 11, is particularly interesting because the words of grant there were “surrenders, cancels, annuls, and releases”. The only difference is that our document says “relinquish” where the cited case employs the verb “annuls”. In the *Osborn* case the document of transfer was held to be an effective quitclaim. The court said:

“Appellant does not say what word or words should here be added to make this release sufficient. We are left to imagine that he means ‘quitclaim’. We hold it sufficient without that word.”

In *Ruthrauff v. Silver King Co.*, 95 Utah 279, 80 Pac. (2d) 338, it was held that the statutory form of quitclaim deed is permissive only and use of the words “re-mise, release and quitclaim” were sufficient to transfer all of grantor’s interest.

In the early and leading case of *Field v. Colombet*, 9 Fed. Cas. 12, Case No. 4764, the federal court sitting in California said:

“Any words in a deed indicating an intention to transfer the estate, interest or claim of the grantor will be a sufficient conveyance, whethey they be such as were generally used in a deed of feoffment,

or of bargain or sale, or of release, irrespective of the fact of possession of grantor or grantee, or of the statute of uses.”

In *Evenson v. Webster* (So. Dak.), 53 N.W. 747, the court held that the simple word “give” was sufficient to convey real property, citing *Field v. Colombet*, *supra*.

In *Olson v. Cornwell*, 134 Cal. App. 419, the court approved the following careless granting clause: “shall have and from now on are entitled to”, saying:

“It seems clear from the language of the parties that it was the intention to make a present transfer to plaintiffs of an undivided interest in the property; and where the intent is expressed it is sufficient, whatever may be the inaccuracy of expression, or the inaptness of the words used, and the courts will give the instruments that effect.”

In *Adams v. Reed*, 11 Utah 480, 40 Pac. 720, affirmed 168 U.S. 573, a deed of “release” was recognized and treated as a quitclaim deed.

9. MEAGHER’S LANDOWNER’S ROYALTY INTEREST CAN BE ADJUDICATED IN THIS ACTION.

We now come to an entirely distinct phase of the case. The argument thus far has been concerned with the determination of the ownership of outstanding les-

see's rights in the lease. The subject of this section is the ownership of an undivided one-third of two per cent in landowners' royalties which were originally created by M .P. Smith when he owned the property. We are satisfied that all parties agree that these landowners' royalty interests are not in any sense of the word interests in the leasehold but represent a different and distinct interest in the lands which are the subject of this litigation.

The question is whether Meagher owns landowner's royalties totaling 2% in oil and gas, or, as defendants claim, $1\frac{1}{3}\%$ in oil and 2% in gas.

There is no dispute that of the landowner's royalties totaling $12\frac{1}{2}\%$ created by Smith, 2% was ultimately transferred to Meagher. Smith transferred a 1% interest to Meagher directly (A-46) and Meagher obtained the other 1% interest from Alexander (A-55), who in turn had acquired it from Smith.

That Meagher is entitled to 2% royalties with respect to gas is not disputed. As to oil, however, his royalty interest was reduced to $1\frac{1}{3}\%$ by an assignment from him and the other royalty owners to Stock and Phebus on October 11, 1930 (A-40). As this time, Stock and Phebus anticipated an assignment of the lease to Standard Oil Company, but in order to reduce the burden of outstanding royalties, Standard Oil Company insisted upon the $18\frac{1}{2}\%$ outstanding royalties (which consisted of landowner's royalties totaling $12\frac{1}{2}\%$ and

Ashley Valley Oil Company's overriding royalties of 6%) being reduced. Accordingly, the royalty owners who signed document A-40 were reducing by one-third their royalty interests on the terms set forth in A-40. The intent of the instrument is clear. It may be paraphrased as follows: It relates to oil royalties only; its purpose is to obtain the drilling of a well by Standard Oil Company of California or one of its subsidiaries; if Stock and Phebus succeed, within the limitations provided in the agreement, in obtaining a test well on the structure, the royalties assigned in A-40 are extinguished. The limitations in question are that Standard Oil Company, or its subsidiary, shall commence a well on the Ashley Valley structure within certain specified time limits, but if such well is not drilled as contemplated, then Stock and Phebus agree to turn back the royalty interests transferred to them in A-40.

The lease was assigned to Standard Oil Company of California by Stock and Phebus (A-12). About a year later Standard assigned it to its subsidiary, The California Company (A-13). Thereafter neither Standard Oil Company of California nor The California Company, or any other subsidiary of Standard, ever drilled or even commenced a well on the Ashley Valley structure. Thus Stock and Phebus were obliged to return to Meagher the two-thirds of 1% oil royalty he had contributed to facilitate the deal with Standard

on the terms set forth in A-40. Stock and Phebus thereupon became the trustees of Meagher as to this royalty interest and Meagher again became the beneficial owner thereof. It is this equitable title to this two-thirds of 1% oil royalty that Meagher seeks to quiet.

A quiet title action is appropriate to establish the existence of this equitable title in Meagher. The rule is now well established that one may prove whatever title one owns, legal or equitable, under general allegations of ownership in a quiet title action.

State v. Rolio, 71 Utah 91, 292 P. 987;

Oliver v. Dougherty (Ariz.), 68 P. 553;

Van Vranken v. Granite County (Mont.), 90 P. 164.

The royalty interest involved is an interest in real estate, and, as such, is provable under a general allegation of ownership of the land. In Kansas, the rule seems to be otherwise, but all other authorities we have found hold that royalties created by the landowner are interests in land.

Watkins v. Slaughter (Tex.), 189 S.W. (2d) 699;

La Laguna Ranch v. Dodge 18 Cal. (2d) 132, 114 P. (2d) 351;

Denver Joint Stock Land Bank v. Dixon (Wyo.), 122 P. (2d) 842;

Williams' Administrator v. Union Bank & Trust Co. (Ky.), 143 S.W. (2d) 297;
Veal v. Thomason (Tex.), 159 S.W. (2d) 472.

Therefore, Meagher is entitled to a decree declaring that he is the owner of the equitable title to the two-thirds of 1% landowner's royalty free from any claims of the defendants herein in addition to the 1 $\frac{1}{3}$ % royalty which is concededly owned by Meagher.

It is true that the legal title to the disputed two-thirds of one per cent was transferred to Stock and Phebus. Defendants say that if this interest is beneficially owned by Meagher, his remedy is to sue in equity to enforce specific performance of a reconveyance. If such remedy does exist, it does not preclude declaration by this court of Meagher's equitable title, which is all that Meagher seeks at this time. As demonstrated above, the existence of an equitable title is one which can be ascertained in a quiet title action.

The record discloses that there have been many assignments of interests owned and claimed to be owned by Stock and Phebus since they acquired Meagher's royalty. Frankly, plaintiff is not sure whether these defendants have retained the legal title to this royalty, and, if they have parted with it, specific performance would be an empty remedy. All that Meagher requests in this action with respect to his royalty is a declaration that he is beneficially entitled to it. Thereafter,

if it develops that it has been wrongfully transferred, whether or not to a bona fide purchaser for value without notice, he will at least have laid the foundation of ownership to which he is entitled and can then pursue such remedy as may be necessary. When Stock and Phebus failed to reconvey as they agreed to, they became constructive or resulting trustees for Meagher's benefit of this royalty interest. Meagher should not be forced to sue all of the others who have become involved in this complicated chain of title if his trustees have violated their trust. The obvious multiplicity of actions which would ensue points up the very reason why the courts have and do take cognizance of equitable interests in quiet title proceedings.

The appellants seem to indulge in asserting interests to which they are not entitled and then claiming laches when they are asked to disgorge. Such tactics are not favored by courts who are called upon to declare equitable titles held by resulting or constructive trustees. A landowner's royalty is real estate. If one should transfer his home for a limited purpose one does not risk loss of ownership by leaving the title with one's trustee after the limited purpose is accomplished.

The final paragraph of Section 9 of appellants' brief completely confuses interests in the lease with landowner's royalties. This paragraph criticizes the trial court for failing to hold that Stock's transfer to Meagher affected outstanding landowner's royalties.

But that transfer pertains only to lessee's rights under the lease. It has no bearing upon landowner's royalties as distinguished from overriding royalties. Landowner's royalties do not depend upon the existence of an oil lease for their validity. They are interests in the oil and gas estate created by the *landowner*. On the other hand, overriding royalties do depend upon the existence of the lease from which they are carved out. They are interests in the production and are created by the *lessee*. If a lease is extinguished, the overriding royalties fall with it, and this is what the trial court spelled out in the original opinion. However, in recognition of the protection against this very thing which was saved to R. C. Hill¹⁵ when he assigned the lessee's rights to Utah Oil Refining Co. (A-2), Meagher stipulated and conceded that the transfer from Stock could not cut off the overriding royalty. The fact that the briefs below did not call the trial court's attention to this portion of the record was cured by the findings and the decree after Meagher pointed out the inadvertence.

But *landowner's* royalties are interests which are carved out of the fee estate, not from a particular lease. They are not dependent upon the existence of a lease for their validity and existence. Thus when

¹⁵Ashley Valley Oil Company obtained its rights from R. C. Hill by assignment of November 10, 1924 (A-3). Please refer to chart attached.

Stock transferred to Meagher "all of his right, title and interest in and to said oil and gas lease" he did not convey any royalty interest to Meagher and the point which appellant refers to as "interesting to observe" becomes meaningless and leads only to confusion.

The issue concerning Meagher's outstanding landowner's royalty is discussed in the trial court's opinion at pages 39-44.

10. STOCK IS BARRED BY LACHES FROM ASSERTING RESCISSION OF HIS TRANSFER TO MEAGHER.

In order to discuss each point suggested by appellants in the order presented by them, the above contention which is asserted in Meagher's behalf appears here somewhat out of context.

It will be noted that the defenses of lack of consideration, fraud, estoppel, and mistake are all directed to the basic issue of rescission.

We sincerely sought to meet each of these contentions in the order presented to demonstrate that there is no merit to any of them. We believe we have demonstrated that Stock never could have avoided his own transfer under the facts of the case.

But if for any conceivable reason the right to rescind ever arose in Stock's favor his action to assert it comes too late.

He executed the transfer in October of 1944. A suit was then pending hostile to his interest in the lease and he was named as a defendant although service had not been effected upon him. Jurisdiction over Stock was never perfected by Meagher. Thus Meagher abandoned his efforts to bring Stock into the litigation after receipt of the transfer. By April of 1945 Stock had discussed his transfer to Meagher with Juhan's representative, Chas. Hill. It was then decided to contest the legal effect of the transfer. Stock then quitclaimed what was no more than his right to litigate with Meagher under an agreement that would yield Stock one-eighth of what might be gleaned from that litigation. In June of 1945 Meagher, who had learned of Stock's quitclaim to Hill but did not know the purpose, wrote to Stock. He pointed out that Stock had already transferred his lease interest to Meagher. He pointed out that the quitclaim to Hill would confuse Meagher's title. He pointed out that the quitclaim would complicate the problem of straightening out the landowner's royalty situation. He asked Stock for an explanation. Stock remained silent and continued to secrete his intentions until August of 1949, when he voluntarily appeared in the action. Meanwhile Meagher continued with his quiet title action. This court determined that the lease was still valid. The case was remanded for further proceedings. Stock and his associates then became bolder for *they now knew that they had a clear*

right to a one-half interest in the lease and could get it all if they could shoulder Meagher aside. They also knew their expenses would be recouped if they struck oil. They decided to drill. Stock bought a new interest in 1948 just before the drilling commenced. According to Stock's own contentions, this purchase gave him a participation independent of Meagher's ultimate interest. Oil was discovered. Meagher continued to press his suit. Appellants then realized that Meagher could establish his ownership of the former Stock one-half interest unless the transfer could be rescinded. Juhan's attorneys then filed an answer and counterclaim in Stock's name setting forth for the first time all possible claims for rescission. Stock did not even know what those claims were or on what theory it was hoped the rescission could be established. He did not read the pleading. He was called to the stand by Meagher's counsel, not his own. Then his own testimony demonstrated beyond question that none of the many theories, upon which he *might* have had a rescission, were actually founded upon fact.

Unless Stock by action first taken in 1949 can rescind a transfer made in 1944 he cannot prevail here. Add to this the fact that quiet title litigation had been going on throughout the entire period. Add to this the fact that oil was discovered in 1948. Add to this an intention on the part of Stock and Juhan to disavow the transfer, which plan had been made in 1945. Add to this

the refusal by Stock to state his position when asked by letter to do so in 1945. If ever a claimant was barred by laches Stock is that person.

At this point we cite for Meagher's benefit every case on the subject of laches which has been put forward in this appeal by appellants. In addition, we mention *Frailey v. McGarry* (Utah 1949), 211 Pac. (2d) 840. In that case the purchaser of land sought to rescind for fraud. This court said:

"After reviewing the record of events as they transpired, we find it unnecessary to determine whether defendant, by fraud, induced the plaintiff to enter into the contract. There are facts present in the instant case which preclude plaintiff from rescinding the contract for the reasons he alleges. It is well settled by decisions from this court that a person claiming the right to rescind a contract because of misrepresentations or fraud, must, after discovery of the fraud, announce his purpose and adhere to it. *Taylor v. Moore*, 87 Utah 493; 51 Pac. 2d 222. We have also held that the purchaser must evidence his intent to rescind by some unequivocal act, either by notice or some act amounting to notice of intent to rescind. *McKellar Real Estate Co. v. Paxton*, 62 Utah 97; 218 Pac. 128."

In the *Frailey* case, the plaintiff was barred because he waited only ten months before notifying the plaintiff of his intention to rescind. In the case at bar, the interval was nearly five years.

See *DeLamar Mines of Montana v. Mackay* (C.C.A. 9th), 104 Fed. (2d) 271, in which laches was applied where the period before notice of rescission was given was 19 months.

In 30 *C.J.S.*, p. 540, the rule is stated thus:

“If the property involved is of a speculative or fluctuating nature, more than ordinary promptness is required of a claimant. He must present his claim at the earliest possible time. This rule is applied with great strictness in the case of oil or mining property since it is of an especially precarious nature, and is exposed to the utmost fluctuations in value.”

In *Twin-Lick Oil Company v. Marbury*, 91 U.S. 587, 23 L. Ed. 328, the Supreme Court of the United States refused rescission in a transaction involving oil properties and held the claimant to be barred by laches. The opinion points out the necessity for strictness where property of fluctuating value is involved.

We hesitate to present the defense of laches, because of its element of confession and avoidance. We believe that Magher is entitled to the decree of this court confirming the findings below which establish that he was guilty of no fraud; that he committed no deceit; that there is no actionable mistake; and that the attempt to distort his misapprehension as to the legal status of the lease into a misrepresentation relied upon by Stock is not supported by the evidence. However, in excess of

caution we urge the indisputable facts which foreclose Stock and anyone claiming under him from rescinding the transfer he gave to Meagher in October of 1944.

SUMMARY AND CONCLUSION.

With apologies for imposing such a long brief upon a busy court, we will attempt here to briefly summarize the entire argument point by point.

1. The court did not err in permitting Meagher to amend his reply because: (1) The reply actually added nothing to Meagher's overall claims. His complaint asserted a fee simple. His reply merely conceded that he could only prove a lesser estate. (2) The amended reply was appropriate to dispute the affirmative claims presented in the pleadings of appellants. As such the reply was a proper answer to affirmative contentions. It merely defined the issues more precisely than Meagher's original reply which denied that the answering defendants had any interest in the property.

2. Meagher is the real party in interest because: (1) Before he transferred his interest during the litigation he had acquired all of the interests he now asserts, and (2) the transfer by a litigant of the subject matter of a suit, pending litigation, does not prevent completion of the litigation in that party's name.

3. Meagher is neither guilty of laches nor is he estopped from asserting his interest. As to laches: (1) There was no undue delay. Meagher began his

action long before any drilling was commenced and has vigorously continued its prosecution. (2) Since all appellants knew that Meagher had formally disputed their claims since the very day the action was commenced, there was no basis for any appellant to construe any delay which may have occurred as a waiver by Meagher of any right he had. As to estoppel: (1) There is no factual basis for such claim. (2) No appellant took any action based upon any representation of Meagher. (3) There was no reliance upon any action or inaction attributable to Meagher.

4. There was no fraud.

5. The Stock to Meagher transfer is supported by valid legal consideration because: (1) Stock thereby was relieved of his obligations under the lease as a lessee. (2) Meagher did not pursue the quiet title suit as against Stock after he received the transfer until Stock voluntarily appeared.

6. Rescission cannot be granted for mistake because: (1) The only mistake involved in the entire action was Meagher's legal misapprehension as to the validity of the lease; (2) Stock did not participate in that mistake; and (3) Stock placed no reliance upon any representations made by Meagher with respect to the legal status of the lease.

7. The transfer, viewed as a surrender, can be sustained because: (1) It was not inconsistent with any provision of the lease; (2) as between Stock and

Meagher the provisions of the lease could be superseded by any method of surrender acceptable to them; (3) the document is supported by valid legal consideration as described above; (4) while Stock could not surrender the interests of any co-lessee he could surrender his own lessee's rights, and that is all he did; and (5) Meagher was the reversioner because he acquired via M. P. Smith and Alexander all of the rights and interests of the landowner subject only to outstanding royalties and the lease itself.

8. The transfer is effective as a conveyance because its words of grant meet all the requirements of a quitclaim deed.

9. Meagher is the equitable owner of the one-third of two per cent landowner's royalty which Stock and Phebus hold for him because: (1) their right to retain this royalty was based on definite and specific conditions which have not been met; and (2) a quiet title action is an appropriate action in which to determine any interest in property, legal or equitable.

10. Although Stock has failed to make out a proper case for rescission, he is also barred from asserting any such right because: (1) he knew as early as 1945 he would attack his own conveyance; (2) as early as 1945 he secreted his intentions from Meagher even after express inquiry; (3) he permitted nearly five years to elapse before making any claim or taking any action; and (4) his first action was taken only after oil was discovered.

Thus Meagher has squarely faced each point raised by appellants. Upon analysis it will be seen that the solution to the case lies in its factual background. On the "paper record" as disclosed by the title documents alone it does appear that Stock, conceivably, might have been misled as to his legal rights. This explains the plausible pleadings presented by Juhan's lawyers in Stock's behalf. But Stock would have given Meagher the requested transfer regardless of whether he was obliged to do so. He was finished with the Ashley Valley oil play. In any event, he was completely indifferent as to the situation. It was only when Juhan came along and suggested to Stock that exploration might be financed that Stock sought to "back in" for a mere one-eighth of his former interest if Juhan could retrieve it from Meagher. The *theories* of Stock's pleadings, though untenable, are not unreasonable. But when Stock was called to the stand by Meagher he was not acquainted with those pleadings. Thereupon all support for the elaborate theories put forth in Stock's behalf fell away.

For a time it appeared to Meagher's counsel that the case would present interesting problems of oil and gas law. We welcomed the opportunity to present our views to the Utah courts in the hope that we might contribute something to Utah's now unfolding law of oil and gas. However, the case is not concerned with these interesting and important problems. Although the facts themselves are interesting, the applicable law

is limited to basic principles well known to and often expounded by this court. This case turns on its facts.

The only lesson of the case so far as concerns oil and gas is that oil men are tough and they will gamble. Once appellants knew that they were safely entitled to a one-half interest in this lease they knew their drilling expenses were safe if oil could be discovered. They also knew they stood the chances afforded by litigation to get the other one-half. A Texas oil man once said: "Drill 'em up and let the oil buy your title." That attitude has been assumed in this case but it has failed.

We need not weep for these appellants notwithstanding the touching plea with which their brief concludes. They will fare handsomely from the proceeds of their one-half interest in the leasehold. They have lost only what they knew they did not have.

It is respectfully submitted that the decree below should be affirmed.

Dated: October 29, 1951.

HERBERT VAN DAM,

GILBERT C. WHEAT,

Attorneys for Respondent

N. J. Meagher.

(Appendices A and B Follow.)

Appendix A

Herewith we set forth extracts from declarations of trust disclosing the Stock-Hill-Juhan deal and other related matters. Emphasis herein is ours.

Exhibit A-48, an unrecorded agreement, was executed by Chas. S. Hill¹ in favor of Paul Stock on April 14, 1945.

The declaration refers to the quitclaim which Stock gave Hill on the same day (A-19), and then proceeds as follows:

“Hill agrees to investigate the title of Stock in respect to said lands; to manage the interest of said Stock therein with all the rights of ownership, including the right to * * * bring suits to assert, protect and defend the said interest; to do whatever in his judgment may be advisable to make said interest valuable and saleable; and to pay all expenses in relation thereto. * * * It is the purpose of the parties that ultimately the said interest shall be converted into money or into a property with unquestioned title. * * * what remains after payment of all the expenses and the satisfaction of all obligations shall belong to the parties in the proportion of 12½ per cent to Stock and 87½ per cent to Hill.”

¹Stock testified that Juhan told him that Hill was acting for Juhan at the time this declaration of trust was executed.

The following is an extract from Exhibit A-49, an unrecorded agreement between Juhan and Chas. S. Hill entered into January 5, 1946. Many of its clauses are exact copies of the phraseology of Exhibit 48. Among other things, this agreement provides:

“Juhan agrees to investigate the title of Hill in respect to said land; to manage the interest of said Hill therein with all the rights of ownership, including the right * * * to bring suits to assert, protect and defend the said interest; to do whatever in his judgment may be advisable to make said interest valuable and saleable; and to pay all expenses in relation thereto * * * It is the purpose of the parties that ultimately the said interest shall be converted into money or into a property with unquestioned title * * *”

The following provisions of this agreement reflect the parties' understanding of Stock's position in the transaction:

“It is recited that this declaration is made *with the knowledge of* and subject to a declaration by Hill to one *Paul Stock*, of Cody, Wyoming, by the terms of which the said Stock was to receive 12½ per cent of the net.”

The following is particularly important:

“In order to fully show all interests that may affect the interested parties as of this date, and without increasing the interest of the said Stock, it is now recited that one J. L. Dougan has agreed

to finance all necessary litigation for an undivided 50 per cent interest of the recovery from the above described land, which has been obtained by two quitclaim deeds and assignments, one from Ray Phebus and one from Paul Stock.”

The following discloses the recognition by the parties of the necessity of getting rid of Meagher’s interest. Thus:

“A 12½ per cent interest in the said recovery from the above described acreage belongs to said Stock, *based on his half interest* when and if the title to his interest is sustained by a court of competent jurisdiction *or if his former interest is adjudicated as belonging to N. J. Meagher, then and in such event the said Stock shall have no interest.*”

Appendix B

EXTRACTS FROM TESTIMONY OF PAUL STOCK.

For the convenience of the court the following extract is furnished which contains some of the more important portions of Stock's testimony:

By Mr. Wheat:

Q. Your name is Paul Stock?

A. Yes, sir.

Q. And you are one of the defendants in this action?

A. Yes, sir.

Q. And what business are you in, Mr. Stock?

A. The oil business.

Q. How long have you been in the oil business?

A. Ever since I was a boy.

Q. You were engaged in the oil business during the fall of 1944?

A. Yes, sir.

Q. And by the end of 1944 had you dealt extensively with oil leases?

A. Quite a few, yes, sir.

Q. And royalties?

A. Yes, sir.

Q. And oil interests of all kinds?

A. Yes.

Q. And wasn't it about 1944 that you sold a good part of your oil interests to the Texas Company?

A. That's right.

Q. As a matter of fact, in that deal you received several million dollars for those interests, didn't you?

A. Well, it was involved.

* * * * *

Q. 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.

* * * * *

Q. Now Mr. Stock, tell us in your own words what your understanding was with respect to that document.

Mr. Gustin. Now we object to that, your Honor, on the same grounds. The document speaks for itself, it is the best evidence.

* * * * *

The Court. Let me have the question read, will you?
(Question read.)

The Court. He may answer it.

A. *I thought that I was releasing to Mr. Meagher a royalty that we had obtained from him to drill a well.*¹ There was some overriding royalty and we wanted to reduce the royalty, which we did do. And this, the

¹Note that the only explanation given by Stock as to the state of his mind when he executed the release has never been urged by appellants' counsel in this litigation. Of course, an error based upon such negligence would not support a rescission. Furthermore, the trial court has rejected the excuses offered by Stock.

Appellants have consistently urged that Stock was misled as to the legal status of the lease. The importance of this testimony is that it excludes that possibility.

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.²

Mr. Wheat. Q. 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.

* * * * *

Q. Did you read the release before you signed it?

A. I never read it thoroughly. I just glanced over it and signed it and sent it back.

Q. And did you read the letter with which it was sent to you?

A. I glanced at it, yes.

Q. Now about six months after you signed the release to Mr. Meagher, you gave a quitclaim deed of your oil and gas rights under this Sheridan lease, to a person by the name of Charles S. Hill, didn't you?

A. Yes, sir.

* * * * *

²Note the inconsistency of Stock's testimony. He claims that he was not required to return the royalty in the same answer which assigns the return of the royalty as his motive for executing the release of Meagher.

Q. Now who was Charles S. Hill?

A. He had been a friend of mine for a good many years over there, interested in the oil business and leasing business.

Q. And he didn't pay you anything for that quitclaim, did he?

A. No.

Q. In the negotiations with you and Charles Hill at that time, he said "transfer what interests you have in this lease to me and I will try to make something of it," in words to that effect?

A. Mr. Hill stated that the property at Vernal in Ashley Valley was in litigation, and if I would turn it over to him on that agreement, that he would handle it and litigate it, or clean it up, clean the title.

Q. Then in consummation of that agreement with Hill, he gave you another document called a Declaration of Trust, didn't he?

A. The trust agreement was signed along with it.

Q. Now I show you Exhibit A-48 and ask you if that isn't a photostatic copy of the trust agreement you just referred to?

Q. It is?

A. Yes.

Q. Did you subsequently have a conversation with Mr. Juhan, in which you discussed your deal with Charles S. Hill?

A. I had a good many different discussions with Mr. Juhan.

Q. Well, in any of those discussions did Juhan tell you that Charles S. Hill had been working for him when he got that quitclaim deed from you?

A. He told me that he had acquired the Hill interest.

Q. And he told you that he sent Hill over to you just for that purpose, didn't he?

A. Yes.

* * * * *

Q. At the time of your transaction with Charles S. Hill, did you tell him you had given the release to Mr. Meagher?

A. He told me, and we discussed it.

Q. And part of his job, after that deal was made, was to eliminate any contentions that Meagher might make with respect to that release, isn't that correct?

A. Yes.

* * * * *

Q. So my question is, after October of 1944 did you ever give—communicate to Mr. Meagher, by word or by letter, or otherwise, that you intended to cancel or repudiate the release that you had given him in October of 1944?

A. I don't think there was ever any communication between Mr. Meagher and myself to that effect.

* * * * *

Q. Now in July of 1948 you purchased a 25 per cent interest in the Sheridan lease from Juhan, didn't you?

A. Yes, sir.

* * * * *

Q. Juhan then got the one eighth that you had reserved in your deal with Hill, I mean in July of 1948?

A. Yes.

Q. But you paid Juhan some \$19,500 in that transaction, didn't you?

A. Yes, sir.

Q. So you gave Juhan, according to your position, the \$19,500 cash, and your old one-eighth contingent interest, didn't you?

A. Yes, sir.

Q. And Juhan gave you a quarter interest in the lease, according to your contentions, didn't he?

(Witness nods head affirmatively.)

Q. And you contended that the quarter interest in the lease that you then got from Juhan was traceable to the Phebus source of title, is that right?

A. Yes, sir.

* * * * *

Q. But it is a fact, isn't it, Mr. Stock, that the reason you were putting good money into that transaction was to get a position in that lease which was independent of any claims of Meagher, isn't that true?

A. I was putting the money into the lease with Juhan and with Mr. Dougan in order to drill the well, that we drilled.

Q. I know. Of course you were anticipating drilling a well, but you were trying to get a 25 per cent interest in that lease, win, lose or draw, in the case with Meagher, isn't that true?

A. That's the way the deed is.

Q. Well, that was your position too, wasn't it?

A. That's right.

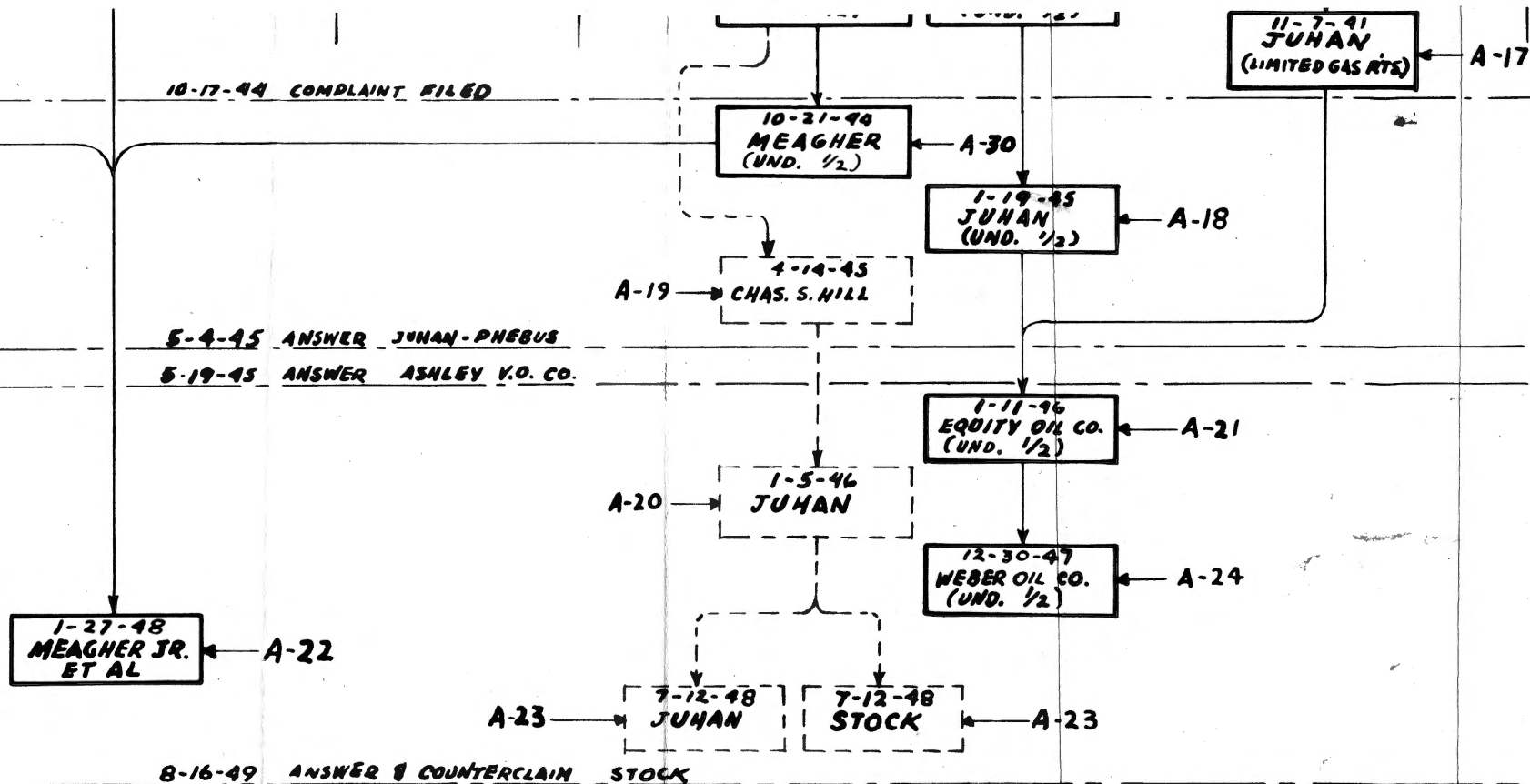
* * * * *

Q. Now have you read the answer and counterclaim filed in your behalf in this case?

A. No, sir.

Q. Haven't read it to this day?

A. No, sir.



NOTE 1 - unrecorded assignment
NOTE 2 - dotted lines indicate
transfers challenged
by Meagher