Vanderbilt Law Review

Volume 5
Issue 2 *Issue 2 - February 1952*

Article 3

2-1952

Formal Requirements for Creation of the Oil and Gas Lessee's Interest

William D. Warren

FORMAL REQUIREMENTS FOR CREATION OF THE OIL AND GAS LESSEE'S INTEREST

WILLIAM D. WARREN*

The practice of the courts of employing almost as many varying and contradictory descriptions of the nature of the lessee's interest under the usual oil and gas lease as there are petroleum producing states has a historical origin which is clearly traceable. In the latter half of the nineteenth century as each of the known oil bearing states was slowly explored and developed for petroleum, it fell the lot of their courts to solve the complicated legal problems arising in this new and unique industry. Equipped with but little accurate scientific knowledge about the physical behavior of oil and gas, and often with no direct legal precedent, these courts found their task a difficult one. It is not surprising that pioneer oil and gas judges turned for guidance to doctrines of common law real property covering situations seemingly analogous to those confronting them. A gradual, but haphazard, reception of real property terminology into the law of oil and gas followed. But the peg has never really fit the hole. No one term in real property law has been found which for all purposes properly describes the oil and gas lessee's interest. Thus, in casting about for real property precedent to govern one petroleum law question the courts of a state came up with one description of the lessee's interest; however, with reference to different issue to be resolved, the quest for common law analogy often yielded quite another characterization. This tendency, when repeated through the years in the several petroleum producing jurisdictions, has produced a markedly conflicting nomenclature. Thus in cases concerned with formal requirements for the creation of the oil and gas lessee's interest the courts have, at one time or another, described this interest as a determinable fee,[1] a profit a prendre,[2] an incorporeal hereditament,[3] more than an incorporeal hereditament,[4] a freehold,[5] an interest in land,[6] not an interest in land,[7] a chattel interest,[8] a license,[9] not a license,[10] personal property[11] and real property.[12]

---

*Assistant Professor of Law, Vanderbilt University.

1. Jones v. Bevier, 59 S.W.2d 945, 948 (Tex. Civ. App. 1933).

2. Brinkman v. Empire Gas & Fuel Co., 120 Kan. 602, 245 Pac. 107, 110 (1926); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86, 89 (1918).

3. Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490, 493 (1902); White v. Green, 103 Kan. 405, 173 Pac. 974, 975 (1918); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86, 89 (1918); Walla Walla Oil, Gas & Pipe Line Co. v. Vallentine, 103 Wash. 359, 174 Pac. 980, 981 (1918).

4. Terry v. Humphreys, 27 N.M. 564, 203 Pac. 539, 543 (1922).

5. Pure Oil Co. v. Evans, 369 Ill. 416, 17 N.E.2d 23, 24 (1938); Poe v. Ulrey, 233 Ill. 56, 84 N.E. 46, 48 (1908).

6. Ramage v. Wilson, 37 Ind. App. 532, 77 N.E. 368, 370 (1906); Beckett-Iseman Oil Co. v. Backer, 165 Ky. 818, 178 S.W. 1084 (1915); Watson v. Rochmill, 137 Tex.

It is understandable that under the influence of the great amount of verbiage devoted to the task of affixing common law real property labels on the lessee's interest in the opinions, some courts and legal writers have felt that the legal terms used to characterize this interest are important factors in deciding oil and gas cases. Admittedly, in certain limited areas of oil and gas litigation the judicially recognized names ascribed to the lessee's interest are variables of some import.[13] But is the view that the oil and gas lessee's interest is one thing in a state where the courts have given it a certain label and a different and distinct interest in another state in which it is known by a contrary decision supported by the actual holdings of the cases? It is the object of this article to investigate in some detail the role of the legal standards used to depict the nature of the oil and gas lessee's interest in cases concerning the *formal requirements* for the creation of that interest. A secondary aim is a nonexhaustive analysis of the general trends of decisions concerning *creation* of the lessee's interest and their relationship to the desired community goals for petroleum planning and development.

Just as the first problem in a study of the oil and gas lessee's interest is the manner of creating such an interest, so must the primary inquiry into the creation question itself be to examine the formalities which parties desiring to enter into petroleum planning and development are required to meet to make an agreement enforceable against others by the coercive forces of the community. Incontestably, in this day of great civilian petroleum demand and prolonged, oil-consuming military emergencies, the community's principal objective in the area of creation of oil and gas interest should be to encourage the making of those agreements which best promote the *fullest utilization* of the nation's petroleum resources. In some nations this objective is believed to be best attained by having strict governmental supervision, if not, in fact, complete national ownership of petroleum resources. It is, however, but a

565, 155 S.W.2d 783, 784 (1941); First State Bank of Wortham v. Bland, 291 S.W. 650, 652 (1927).

7. Walla Walla Oil, Gas & Pipe Line Co. v. Vallentine, 103 Wash. 359, 174 Pac. 980, 981 (1918).

8. See note 7 *supra.*

9. Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490, 492 (1902) (a license coupled with an interest in land); Walla Walla Oil, Gas & Pipe Line Co. v. Vallentine, 103 Wash. 359, 174 Pac. 980, 981 (1918).

10. Gatewood v. Graves, 241 S.W. 264, 266 (Tex. Civ. App. 1922).

11. De Hart v. Enright, 93 Misc. 213, 157 N.Y. Supp. 46, 51 (Sup. Ct. 1916).

12. Lambert v. Gant, 290 S.W. 548, 550 (Tex. Civ. App. 1926).

13. For a discussion on the importance of the name annexed to the lessee's interest, see Walker, *The Nature of the Property Interest Created by an Oil and Gas Lease in Texas,* 7 TEXAS L. REV. 539 (1929). The use of the word "variable" in the text of this article is a recognition of the fact that there are several elements which influence the judicial response in varying degrees: the objective *facts* of the case, the *claims* of the parties, the *legal standards* or technical doctrines brought to bear on the issues before it by the court and the *policy norms* invoked by the courts. This article is primarily concerned with legal standards as variables. Lasswell and McDougal, *Legal Education and Public Policy,* 52 YALE L.J. 203 (1943).

part of the American philosophical heritage to believe that in this country the goal can be very largely achieved through prudent use of that familiar instrumentality of free enterprise—the free-volition agreement-making process.

If the vital goal of fullest resource utilization is to be entrusted to the vehicle of the free initiative agreement-making process, then a proper secondary community objective would seem to be the improvement of such a process by ridding the paths agreement-makers must follow of those arbitrary and functionless formal technicalities which serve only to obstruct agreement-making. It is inevitable, however, that in its desire to smooth the way for agreement-makers by demanding as few formal requirements for the creation of the oil and gas lessee's interest as possible, the community must collide with its own age-old interest in making sure an agreement with certain terms was actually entered into by ascertainable, serious-minded parties and meant by them to have legal effect. To guarantee these things, some formal safeguards are needed. Where is the optimum point at which the formalities insure that a solemn agreement has been made, yet are not unduly obstructive to those desiring to enter into agreement-making? Furthermore, do the diverse legalistic descriptions of the lessee's interest prove a guide in this field of inquiry?

Seriatim consideration will be given to the more common formalities, (1) the signed writing, (2) the seal, (3) consideration, (4) delivery, (5) acknowledgment and (6) recording.

1. *Signed Writing*

A minimal formal requirement for the creation of the oil and gas lessee's interest is a signed writing.[14] The functions of form have been described as evidentiary and cautionary;[15] the former satisfying the community's interest in seeing that an agreement was actually made, the latter contributing toward the desired serious-mindedness in the participants. A proposed third function of form is its channeling or canalizing effect, that of offering a legal frame-

14. See notes 18-25 *infra* for cases sustaining this proposition. See, generally, MILLS AND WILLINGHAM, OIL AND GAS 54 (1926); 2 SUMMERS, OIL AND GAS § 226 (Perm. ed. 1938); Walker, *The Nature of Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEXAS L. REV. 539 (1929). The prevailing view is that the signing requirement extends only to the lessor; the nonsigning lessee may be bound by his acceptance of the lease. Chandler v. Hart, 161 Cal. 405, 119 Pac. 516 (1911) (lessee bound by acceptance and lessor held to have waived any right he might have to require lessee to sign by delivering it to lessee unsigned); Castro v. Gaffey, 96 Cal. 421, 31 Pac. 363, 364 (1892) (no acceptance shown); Indianapolis Natural Gas Co. v. Kibby, 135 Ind. 357, 35 N.E. 392 (1893); Texas & Pacific Coal & Oil Co. v. Patton, 240 S.W. 303 (Tex. Comm. App. 1922); Lawson v. Kirchner, 50 W. Va. 344, 40 S.E. 344 (1901); Walker, *supra*. *But cf.* Lieber v. Ouachita Natural Gas & Oil Co., 153 La. 160, 95 So. 538 (1922).

15. Fuller, *Consideration and Form*, 41 COL. L. REV. 799 (1941). See also on the general problem of legal formalities, Llewellyn, *What Price Contract?* 40 YALE L.J. 704 (1931).

work into which the party may fit his actions, easily recognizable to courts as an attempt to do a legally effective act.[16] That the signed written lease used in the creation of the oil and gas lessee's interest does provide "evidence of the existence and purport of the contract, in case of controversy,"[17] cannot be questioned. It is equally clear that this formality is a deterrent to inconsiderate action, and does force the participants to reduce their demands into legally significant and recognizable language. Nor is it objectionable as being obstructive to the agreement-making process.

The requirement of a signed writing for creation of the lessee's interest is thus socially desirable. The doctrinal course through which this social need has been translated into legal reality has been thought to depend on the judicially accepted description of the lessee's interest prevailing in the jurisdiction in question. So it is that in cases concerning the formal requirement of a signed writing there is much discussion of the nature of the lessee's interest. At least three theories, all of which bear on the nature of this interest, are used to bring an oil and gas lease within the various statutes of frauds. The Texas view is that an oil and gas lease is "a conveyance of an interest in land"[18] and is an "estate of inheritance" under a statute saying, "No estate of inheritance or freehold, or for a term of more than one ycar in lands and tenements shall be conveyed from one to another unless . . . by an instrument in writing . . ."[19] Another line of cases finds an oil and gas lease to be a lease of real estate or an interest therein for more than a stipulated period of from one to three years, hence within the pale of the usual statute.[20] Still other cases liken an oil and gas lease to a "contract for the sale of lands, tenements, or hereditaments,"[21] or "a contract for the transfer and sale of an interest in lands,"[22] and fit it into the statute of frauds in that manner.[23] An occasional case has simply assumed without

16. Fuller, *supra* note 15.

17. Fuller, *supra* note 15, at 800, quoting Austin.

18. Lockhart v. Williams, 144 Tex. 553, 192 S.W.2d 146 (1946); Watson v. Rochmill, 137 Tex. 565, 155 S.W.2d 783 (1941); First State Bank of Wortham v. Bland, 291 S.W. 650 (Tex. Civ. App. 1927); Lamhert v. Gant, 290 S.W. 548 (Tex. Civ. App. 1926); Schmidt v. Baar, 283 S.W. 1115 (Tex. Civ. App. 1926); Priddy v. Green, 220 S.W. 243 (Tex. Civ. App. 1920). THUSS, TEXAS OIL AND GAS 100 (1929), speaks of an oil and gas lease as "the sale of the minerals in place—the sale of realty" and declares that the instrument must be in writing. This statement is quoted in Guerra v. Chancellor, 103 S.W.2d 775, 778 (Tex. Civ. App. 1937) (oral agreement to extend date of delay rental payments) and is adopted from that case into Noxon v. Cockburn, 147 S.W.2d 872, 874 (Tex. Civ. App. 1941) (parol agreement for the assignment of lessee's interest).

19. TEX. STAT., REV. CIV. art. 1288 (1948).

20. Meeks v. Adams Louisiana Co., 49 F. Supp. 489 (S.D. Ga. 1943); Sunburst Oil and Gas Co. v. Neville, 79 Mont. 550, 257 P. 1016 (1927); De Hart v. Enright, 93 Misc. 213, 157 N.Y. Supp. 46 (Sup. Ct. 1916); Kennedy v. Burns, 84 W. Va. 701, 101 S.E. 156 (1919); Montana & Wyoming Oil Co. v. Gibson, 19 Wyo. 1, 113 Pac. 784 (1910).

21. Riffel v. Dieter, 159 Kan. 628, 157 P.2d 831 (1945).

22. Beckett-Iseman Oil Co. v. Backer, 165 Ky. 818, 178 S.W. 1084 (1915).

23. White v. Green, 103 Kan. 405, 173 Pac. 974 (1918); Rohinson v. Smalley, 102 Kan. 842, 171 Pac. 1155 (1918); Sunburst Oil & Gas Co. v. Neville, 79 Mont. 550,

discussion that somehow the statute of frauds necessarily extends to an oil and gas lease.[24] Independent of the statute of frauds, a line of authority holds that the lessee's interest is "incorporeal" and, as incorporeal interests lay only in grant at common law, a writing is necessary to creat the modern oil and gas lessee's interest.[25]

The significant thing is that despite the bewildering assortment of descriptive labels affixed to the lessee's interest[26] and the resourceful methods used to hold that the creation of these various interests falls within the scope of the various statutes of frauds, which normally do not mention oil and gas leases at all, each court, with only one possible exception,[27] has reached exactly the same result: the lessee's interest, whatever it may be called, must be created by a signed writing. This scarcely seems an area in which the descriptive legal standards are of any real effect in conditioning the judicial response.

Nor do the courts have difficulty in projecting the signed writing prerequisite into agreements to give a lease at a later date.[28] Here the usual statute of frauds provision that a "sale of an interest in land" must be in writing is commonly invoked; however, in a jurisdiction where a lessee's interest is not considered an "estate in land" the judicial response does not differ.[29] As

257 Pac. 1016 (1927); Kennedy v. Burns, 84 W. Va. 701, 101 S.E. 156 (1919). These cases and those in note 20, *supra,* mention both the "lease of interest in real estate" and "the contract for sale of interest in lands" theories with no clear indication of which line of reasoning they adopt.

24. See, *e.g.,* Prout v. Hoy Oil Co., 263 Ill. 54, 105 N.E. 26 (1914).

25. Callihan v. Bander, 117 Ind. App. 467, 73 N.E.2d 360, 362 (1947), where the court said, "In the case of Heller v. Dailey . . . this court, in a well-reasoned opinion, held that oil and gas leases created an exclusive and assignable interest in land; that they were in the nature of an incorporeal hereditament (a kind of metaphysical creature of the law) and as such could pass only by written instrument." Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490 (1902); White v. Green, 103 Kan. 405, 173 Pac. 974 (1918); Kennedy v. Burns, 84 W. Va. 701, 101 S.E. 156 (1919).

26. See the terms used to describe the lessee's interest set out in the first paragraph of this article.

27. In Walla Walla Oil, Gas & Pipe Line Co. v. Vallentine, 103 Wash. 359, 174 Pac. 980 (1918), a corporation was allowed to establish by parol its beneficial interest in certain oil and gas leases purchased by and in the name of an agent of the corporation. This ease has been cited as an exception to the rule that an oil and gas lease must be created by a written instrument but the actual holding seems to fall short of establishing such a precedent. The case does, however, contain a dictum, 174 Pac. at 981, to the effect that an oil and gas lease is not within proscription of the statute of frauds. The court supports this statement by declaring that oil and gas leases "convey no interest in, nor create any incumbrance upon, the land or any oil or gas found therein."

28. See, *e.g.,* Sunburst Oil and Gas Co. v. Neville, 79 Mont. 550, 257 Pac. 1016 (1927); Priddy v. Green, 220 S.W. 243 (Tex. Civ. App. 1920).

29. Robinson v. Smalley, 102 Kan. 842, 171 Pac. 1155 (1918), contains this oft-quoted statement in answer to the plaintiff's contention that an agreement to make an oil and gas lease need not be in writing because it does not relate to an interest in land: "While the court has held that an oil and gas lease of the kind under consideration does not constitute a conveyance, will not support a mechanic's lien, does not operate as a grant and severance of mineral in place, and creates no estate proper in the land itself, it does create an incorporeal hereditament. A contract for the sale of hereditaments, whether incorporeal or corporeal is within the sixth section of the statute of frauds. Gen. Stat. 1915, § 4889."

the lessee's interest must be created by a writing, authority is uniform to the effect that it must also be transferred by that formality.[30] It is generally held that an agent's authority to make an agreement to lease,[31] to make the lease itself,[32] or to assign the lessee's interest[33] must be in writing, as must modification of the lease.[34]

2. *Seal*

Unfortunately the seal has yet to be abolished in some jurisdictions. Not since grantors learned to write has the seal contributed to the evidentiary aspects of form, and whatever slight aid it is in bringing about the desired serious state of mind in the participants is today rendered superfluous by other formal safeguards.[35] Here is a situation where the minute contribution made by a formality to the advancement of the policies underlying form is grossly outweighed by the burden placed on the free volition agreement-making process by erecting yet another obstacle in the agreement-maker's path.

Although neither formal nor substantive bases for retaining it remain, the seal is thought to be a requirement for the creation of the oil and gas lessee's interest in those jurisdictions which require the seal in real estate conveyances and which consider an oil and gas lease such a conveyance.[36] However, no case has been found in which an oil and gas lease was avoided for lack of a seal.

---

30. Beckett-Iseman Oil Co. v. Backer, 165 Ky. 818, 178 S.W. 1084 (1915); Noxon v. Cockburn, 147 S.W.2d 872 (Tex. Civ. App. 1941); Blumrosen v. Burke, 296 S.W. 987 (Tex. Civ. App. 1927); First State Bank of Wortham v. Bland, 291 S.W. 650 (Tex. Civ. App. 1927); Gatewood v. Graves, 241 S.W. 962 (Tex. Civ. App. 1921); Priddy v. Green, 220 S.W. 243 (Tex. Civ. App. 1920); Kennedy v. Burns, 84 W. Va. 701, 101 S.E. 156 (1919); Montana & Wyoming Oil Co. v. Gibson, 19 Wyo. 1, 113 Pac. 784 (1910).

31. See, *e.g.*, Sunburst Oil and Gas Co. v. Neville, 79 Mont. 550, 257 Pac. 1016 (1927).

32. See, *e.g.*, Meeks v. Adams Louisiana Co., 49 F. Supp. 489 (S.D. Ga. 1943); Prout v. Hoy Oil Co., 263 Ill. 54, 105 N.E. 26 (1914).

33. See, *e.g.*, Priddy v. Green, 220 S.W. 243 (Tex. Civ. App. 1920).

34. See, *e.g.*, Riffle v. Dieter, 159 Kan. 628, 157 P.2d 831, 838 (1945) ("It is also well settled upon unassailable grounds that if the original contract is required to be in writing in order to be enforceable, any substantial modification of the contract must likewise be in writing and signed by the party to be charged therewith"); Guerra v. Chancellor, 103 S.W.2d 775 (Tex. Civ. App. 1937) (oral agreement to extend time for paying delay rentals). *Contra:* Crawford v. Bellevue & G. Natural Gas Co., 183 Pa. 227, 38 Atl. 595 (1897). For cases holding an oral release of an oil and gas lease ineffective, see Ramage v. Wilson, 37 Ind. App. 532, 77 N.E. 268 (1906); Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490 (1902).

35. "In the wide open spaces where seals were seals . . . the likelihood is strong that the seal made an excellent positive test for enforceability, and certainly as to the seal all assurance that the positive test is a wise one vanishes when printed forms containing '[L.S.]' are simply executed on the dotted line." Llewellyn, *What Price Contract?* 40 YALE L.J. 738 (1931).

36. 2 SUMMERS, OIL AND GAS § 227 (Perm. ed. 1938); 4 TIFFANY, REAL PROPERTY § 1024 (3d ed. 1939). An occasional case has utilized the seal to bolster that other sagging formality, consideration, and has held that the presence of the seal imports a consideration. See, *e.g.*, Greer v. Carter Oil Co., 373 Ill. 168, 25 N.E.2d 805 (1940).

3. *Consideration*

The controversy on whether consideration is a fundamental requirement for the creation of the oil and gas lessee's interest has been fought out on a lofty legalistic plane. It has largely entailed scrutiny of the *instruments* creating that interest, in the belief that if the true nature of such instruments could be ascertained, the problem would be solved. If the oil and gas lease is treated as a "conveyance," then unless it is operating under the Statute of Uses, no consideration is said to be necessary; but if it is regarded as a "contract," consideration emerges as a factor to be dealt with.[37] The better writers contend that the oil and gas lease is a conveyance.[38] The historical foundation for this view is persuasive when it is recalled that the law of contract was so ineffectual[39] that the medieval man did not contract that he might have three cords of wood out of a forest for the next ten years, but instead was granted the right to so much wood.[40] One did not contract with a religious house for room and board, one was granted an incorporeal hereditament known as a corody for this purpose.[41]

Walker's much quoted view is, "Rightly understood a lease is not an executory *contract* but a present *conveyance* of an interest in land. . . ."[42] Hence, "It is submitted that . . . if an oil and gas lease is held to be a *conveyance* of a determinable fee estate, the presence or absence of any consideration . . . are irrelevant inquiries except upon the issue of fraud or mistake; that the occasional judicial utterances otherwise are relics of the period when oil and gas leases were regarded as option contracts in [Texas]."[43]

This writer respectfully submits that any attempt to determine the necessity of consideration by forcing the modern oil and gas lease into the molds of traditional common law terminology—"conveyance" or "contract"

37. 2 SUMMERS, OIL AND GAS § 234 (Perm. ed. 1938); 4 TIFFANY, REAL PROPERTY § 984 (3d ed. 1939); Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEXAS L. REV. 539 (1929). On the general problem of consideration, see the notable series of articles in 41 COL. L. REV. 777-876 (1941): Llewellyn, *On the Complexity of Consideration: A Foreword*, 777; Sharp, *Pacta Sunt Servanda*, 783; Fuller, *Consideration and Form*, 799; Mason, *The Utility of Consideration—A Comparative View*, 849; Llewellyn, *Common-Law Reform of Consideration: Are There Measures?* 863; and a review of this symposium by Dean Havighurst, *Consideration, Ethics and Administration*, 42 COL. L. REV. 1 (1942).

38. 2 SUMMERS, OIL AND GAS § 734 (Perm. ed. 1938); Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEXAS L. REV. 539 (1929).

39. "The yet feeble law of contract is supplemented by a generous liberality in the creation of incorporeal things." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 146 (2d ed. 1923).

40. *Ibid.*

41. *Id.* at 134.

42. Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEXAS L. REV. 1, 20 (1928) (italics in original).

43. *Id.* at 24, 25. In Jones v. Bevier, 59 S.W.2d 945 (Tex. Civ. App. 1933), where a $1 consideration was recited but never paid, the court adopted the position of the Walker article.

—is fruitless.[44] Possessing features of both, the oil and gas lease of today is clearly neither wholly "conveyance" nor "contract." It is a unique legal act, and when this fact is accepted more than mere semantic purity will have been achieved.

A more rational approach to the problem is a policy-oriented one.[45] If the fullest utilization of community petroleum resources is our desideratum and if we choose to achieve this through free-volition resource development agreements, then we must encourage the free initiative agreement-making process by ridding it of needless technicalities, fatal to all but the forewarned. However, an effective agreement-making process must have safeguards adequate to assure the community that an agreement consisting of definite terms was actually made by serious-minded parties intending to do a legally effective act. The conflict, then, should not be the conceptualistic one of "conveyance" versus "contract," but the intensely practical one of easy agreement-making against formal safeguards. The issue should be joined on whether the contribution of consideration to form outweighs its obstruction to smooth petroleum agreement-making.

A careful review of the matter leads one to realize that any view which credits the presence of consideration in an oil and gas lease with advancing in any appreciable degree the community policies underlying form cannot be supported.[46] It is difficult to discover any *evidentiary* purpose served by consideration. "[A] perjurer stout enough to snatch a verdict by swearing to a false promise would not have the slightest difficulty in snatching one by swearing also to a false counter-promise."[47] Even in the situation where the parties are honest but find themselves in dispute over the terms or existence of the lease, other formal safeguards so far overshadow the consideration element that the community would scarcely be justified in withholding its enforcement of the agreement because of the lack of this one piece of evidence. Nor does consideration tend in any material way to force "expression into a form which both the actors in the transaction and the judge may readily recognize"[48] and thereby further the channeling function of form. It may be contended that in the bilateral contract situation consideration does perform a valuable cautionary function in producing the desired serious-mindedness.[49] Perhaps the giving of a promise in return for another

44. See 1 SUMMERS, OIL AND GAS § 153 (Perm. ed. 1938) for an excellent discussion on the futility of ascribing common law labels to modern oil and gas leases and the leases and the interests created thereby.

45. See generally, MCDOUGAL AND HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 475 *et seq.* (1948); McDougal, *Future Interests Restated: Tradition vs. Clarification and Reform*, 55 HARV. L. REV. 1077 (1942).

46. Havighurst, *Consideration, Ethics and Administration*, 42 COL. L. REV. 1 (1942).

47. *Id.* at 7.

48. *Id.* at 6, 7.

49. *Id.* at 8, 9. See also Fuller, *Consideration and Form*, 41 COL. L. REV. 799, 805 (1941).

promise does act as a deterrent to the promisor. However, the factual probabilities that consideration might produce a cautionary effect in oil and gas leasing are much more slight. The oil and gas lessee's handing of a dollar over to the lessor scarcely insures deliberation on the lessor's part; if it guarantees anything, it is caution on the part of the lessee. Yet only the lessor's serious-mindedness need concern us, for only he has irrevocably parted with anything in making an oil and gas lease. Under the modern form of lease, the lessee may simply terminate a lease obtained in an improvident moment by surrender or lapse, depending on the type of drilling clause involved.[50] The cases document this by showing that attacks on leases made on the ground of lack of consideration are usually brought by lessors or their successors in interest.[51] It has been said that "The need for investing a particular transaction with some legal formality will depend on the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arise."[52] If this is true, it would seem the realization on the part of the lessor that he is passing from his control for a period of five or ten years potentially valuable mineral rights would tend to place him in a sufficiently circumspect frame of mind. It is apparent that this "natural formality,"[53] firmly braced

50. The "drill or pay" type drilling clause requires the lessee to commence a well on the premises within a certain time *or* to pay the lessor a rental for the privilege of delaying drilling. For many years this clause has customarily been accompanied in leases by a surrender clause allowing the lessee to terminate the lease at will. The "unless" type drilling cause provides if no well be commenced before a stated date, the lease shall terminate as to both parties, *unless* the lessee on or before that date shall pay or tender to the lessor a sum as a rental to cover deferring the commencement of the well. The lessee can terminate the lease here by failing to do both the alternatives, drill or pay rental. A surrender clause in the lessee's favor is sometimes found attached to the "unless" type lease.

51. Brewster v. Lanyon Zinc Co., 140 Fed. 801 (8th Cir. 1905); Rechard v. Cowley, 202 Ala. 337, 80 So. 419 (1918); Rogers v. Magnolia Oil & Gas Co., 156 Ark. 103, 245 S.W. 802 (1922); Sandrini v. Branch, 32 Cal. App. 2d 707, 90 P.2d 593 (1939); Poe v. Ulrey, 233 Ill. 56, 84 N.E. 46 (1908); Sledd v. Munsell, 149 Kan. 110, 86 P.2d 567 (1939); Remple v. Shell Petroleum Corp., 134 Kan. 350, 5 P.2d 1094 (1931); Pittsburg Vitrified Paving and Building Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803 (1907); Ford v. Kentucky-West Virginia Gas Co., 299 Ky. 455, 185 S.W.2d 953 (1945); Smith v. Tullos, 195 La. 400, 196 So. 912 (1940); Raines v. Dunson, 145 La. 525, 82 So. 690 (1919); Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906); Boles v. Nash, 145 Okla. 120, 291 Pac. 800 (1930); Garber v. Hauser, 76 Okla. 292, 185 Pac. 436 (1919); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918); Magnolia Petroleum Co. v. Connellee, 11 S.W.2d 158 (Tex. Comm. App. 1928); Bost v. Biggers Bros., 222 S.W. 1112 (Tex. Civ. App. 1920); and Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S.E. 707 (1911). Those suits attacking leases on the ground of lack of consideration not actually brought by lessors or their successors often arise when the lessor, or his successor in interest, in the belief that the first lease is void for want of consideration, leases to a second lessee. The law suit is then brought to adjudicate the rights of the rival lessees. Carter Oil Co. v. Owen, 27 F. Supp. 74 (E.D. Ill. 1939); Lindlay v. Raydure, 239 Fed. 928 (E.D. Ky. 1917), *aff'd*, 249 F. 675 (6th Cir. 1918); Brinkman v. Empire Gas and Fuel Co., 120 Kan. 602, 245 Pac. 107 (1926); Union Gas & Oil Co. v. Wiedeman Oil Co., 211 Ky. 361, 277 S.W. 323 (1925); Brown v. Fowler, 65 Ohio St. 507, 63 N.E. 76 (1901).

52. Fuller, *Consideration and Form*, 41 COL. L. REV. 799, 805 (1941).

53. *Id.* at 805, 815.

by the less artificial of the synthetic formalities—writing, signing and delivery—could hardly be enhanced by the passage of one dollar.

With no discernible contribution to make to the community policies underlying form, consideration stays on in oil and gas law only as a snare to the uncounseled and an absolution to the welcher. The justification for its presence even under traditional doctrine is shaky;[54] its existence in a policy-oriented scheme of law would be indefensible. Whatever technical term is used to describe an oil and gas lease, whether a contract,[55] conveyance,[56] deed,[57] grant *in praesenti*,[58] lease,[59] not a lease,[60] license,[61] option,[62] or sale;[63] whatever label is affixed to the lessee's interest, consideration simply does not pull its weight as a formal requirement in oil and gas leasing.

Nevertheless, courts still discuss consideration in oil and gas cases. Significantly, however, their references to the doctrine are largely confined to approval of whatever is held out as consideration in the case *sub judice*.[64] Rarely have modern opinions expressly catalogued consideration as a basic requirement for the creation of the oil and gas lessee's interest;[65] seldom, with the exception of the Louisiana courts, have they avoided leases for lack of it.[66]

---

54. See note 37 *supra*.

55. Rogers v. Magnolia Oil & Gas Co., 156 Ark. 103, 245 S.W. 802, 803 (1922); Pittsburg Vitrified Paving & Building Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803, 804 (1907); Beckett-Iseman Oil Co. v. Backer, 165 Ky. 818, 178 S.W. 1084 (1915); Murray v. Barnhart, 117 La. 1023, 42 So. 489, 490, 491 (1906); De Hart v. Enright, 93 Misc. 213, 157 N.Y. Supp. 46, 50 (Sup. Ct. 1916); Walla Walla Oil, Gas & Pipe Line Co. v. Vallentine, 103 Wash. 359, 174 Pac. 980, 981 (1918).

56. Miles v. Jerry, 158 Ark. 314, 250 S.W. 34, 35 (1923); Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N.E. 219, 225 (1908); Watson v. Rochmill, 137 Tex. 565, 155 S.W.2d 783, 784 (1941); Jones v. Bevier, 59 S.W.2d 945, 948 (Tex. Civ. App. 1933); Schmidt v. Baar, 283 S.W. 1115, 1117 (Tex. Civ. App. 1926); Canon v. Scott, 230 S.W. 1042, 1046 (Tex. Civ. App. 1921).

57. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 83 Kan. 136, 109 Pac. 1002, 1004 (1910); Test Oil Co. v. La Tourette, 19 Okla. 214, 91 Pac. 1025, 1029 (1907); Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, 719 (1915); Davis v. Texas Co., 232 S.W. 549, 556 (Tex. Civ. App. 1921).

58. Brewster v. Lanyon Zinc Co., 140 Fed. 801, 807 (8th Cir. 1905); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86, 90 (1918).

59. See, *e.g.*, Brown v. Fowler, 65 Ohio St. 507, 63 N.E. 76, 80 (1901).

60. Pittsburg Vitrified Paving & Building Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803, 804 (1907); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86, 90 (1918).

61. Pittsburg Vitrified Paving & Building Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803, 804 (1907); Walla Walla Oil, Gas & Pipe Line Co. v. Vallentine, 103 Wash. 359, 174 Pac. 980, 981 (1918).

62. Carter Oil Co. v. Owen, 27 F. Supp. 74, 80 (E.D. Ill. 1939); Pittsburg Vitrified Paving & Building Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803, 805 (1907); Bost v. Biggers Bros. 222 S.W. 1112, 1115 (Tex. Civ. App. 1920).

63. Noxon v. Cockburn, 147 S.W.2d 872, 874 (Tex. Civ. App. 1941); Guerra v. Chancellor, 103 S.W.2d 775, 778 (Tex. Civ. App. 1937).

64. See, *e.g.*, Greer v. Carter Oil Co., 373 Ill. 168, 25 N.E.2d 805 (1940) (seal held to import consideration); Riffle v. Dieter, 159 Kan. 628, 157 P.2d 831 (1945) (oil and gas lease held within coverage of a statute providing that a contract in writing, signed by party bound thereby, imports consideration).

65. For cases so holding, see, *e.g.*, Remple v. Shell Petroleum Corp., 134 Kan. 350, 5 P.2d 1094 (1931); Brinkman v. Empire Gas & Fuel Co., 120 Kan. 602, 245 Pac. 107 (1926).

66. The lease was avoided for this reason in Remple v. Shell Petroleum Corp., 134 Kan. 350, 5 P.2d 1094 (1931). For the Louisiana situation, see notes 77, 78, *infra*.

Prior to the advent of the escape clauses in oil and gas leases, consideration was most often present by way of covenants on the part of the lessee to drill a well.[67] When economic and legal changes brought about the addition of the surrender clause to the "drill or pay" lease and the origination of the "unless" drilling clause, covenants to drill no longer served as consideration, for the lessee could escape his obligation by exercising the surrender clause under the "drill or pay" lease or by allowing the lease to lapse under an "unless" lease.[68] Hence, absent any initial cash payment, there was no traditionally recognized consideration in a lease containing an escape clause for the lessee's benefit. A drafting strategem stipulating for the payment of one dollar as a condition precedent to the exercise of the surrender clause was devised to save the "drill or pay" lease with a surrender clause and no initial cash consideration. With such a clause, consideration was undeniably present, for the lessee was irrevocably bound to do one of three things, drill a well, pay delay rental or pay one dollar in order to surrender.[69]

The coming of escape clauses in oil and gas leasing focused attention in consideration litigation on the initial cash consideration, for with no binding promises to satisfy formality-minded courts any longer, only this remained to uphold the lease. The principal inquiry then became how much initial cash payment would be "sufficient" consideration. With the sole exception of Louisiana, shackled by the civil law concept of "serious" consideration, the cases have stood unanimously for the proposition that nominal consideration is "sufficient" consideration to support an oil and gas lease.[70] Leading to this conclusion are several factors. Among them must be counted the compromise aspect of the recognition of nominal consideration as "sufficient." As it has been shown, the role of consideration in furthering the

67. See Professor Summer's masterly treatment of this subject in 2 SUMMERS, OIL AND GAS §§ 237-43 (Perm. ed. 1938).

68. See note 50 *supra*.

69. Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918); 2 SUMMERS, OIL AND GAS § 239 (Perm. ed. 1938).

70. Brewster v. Lanyon Zinc Co., 140 Fed. 801 (8th Cir. 1905); Carter Oil Co. v. Owen, 27 F. Supp. 74 (E.D. Ill. 1939); Lindlay v. Raydure, 239 Fed. 928 (E.D. Ky. 1917), *aff'd*, 249 Fed. 675 (6th Cir. 1918); Rechard v. Cowley, 202 Ala. 337, 80 So. 419 (1918); Rogers v. Magnolia Oil & Gas Co., 156 Ark. 103, 245 S.W. 802 (1922); Poe v. Ulrey, 233 Ill. 56, 84 N.E. 46 (1908); Brinkman v. Empire Gas & Fuel Co., 120 Kan. 602, 245 Pac. 107 (1926); Pittsburg Vitrified Paving & Building Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803 (1907); Gray-Mellon Oil Co. v. Fairchild, 219 Ky. 143, 292 S.W. 743 (1927); Union Gas & Oil Co. v. Wiedeman Oil Co., 211 Ky. 361, 277 S.W. 323 (1925); Brown v. Fowler, 65 Ohio St. 507, 63 N.E. 76 (1901); Garber v. Hauser, 76 Okla. 292, 185 Pac. 436 (1919); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918); Bost v. Biggers Bros., 222 S.W. 1112 (Tex. Civ. App. 1920); Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S.E. 707 (1911). It is also settled that sufficient initial consideration supports every promise in the lease. Brewster v. Lanyon Zinc Co., *supra;* Lindlay v. Raydure, *supra;* Rogers v. Magnolia Oil & Gas Co., *supra;* Pittsburg Vitrified Paving and Building Brick Co. v. Bailey, *supra;* Union Gas & Oil Co. v. Wiedeman, *supra;* Brown v. Fowler, *supra;* Magnolia Petroleum Co. v. Connellee, 11 S.W.2d 158 (Tex. Comm. App. 1928).

community demand for serious-minded agreement-makers is a dubious one, yet if some courts still require consideration, they should be satisfied at the least expense to the resource development and planning process. Clearly nominal consideration is that least likely to hinder free initiative petroleum development agreement-making by its burdens. If pay for functionless antiquities we must, let us do so cheaply.

Then, too, with the elements of speculation and risk inherent in oil and gas production transactions, who can say that the mineral rights to a tract of land in unproven territory are worth more than a nominal sum, for, "It may be that one dollar is all or even more that the oil and gas interest is worth."[71] One court concerned with the sufficiency of one dollar given for mineral rights to a tract of land fifteen miles from producing territory opined that, "An economical person . . . would consider the price paid for the lease extravagant."[72] The time honored maxim that the law will not enter into an inquiry as to the adequacy of consideration[73] seems peculiarly applicable to the oil and gas situation where rights of indeterminate value are being dealt with.[74] Titles are more settled and resource agreement-making is more smooth when the participants are allowed to place their own final evaluation on the mineral rights in question, free from judicial interference except in cases of fraud or other foul play. Case after case has held that in "wildcat" territory the slightest consideration is sufficient.[75] In the more proven areas judicial intervention is made unnecessary by the natural formality of *exchange*,[76] innate in oil and gas leasing, which sets the initial consideration at what almost invariably is the market value of the interests involved.

Only Louisiana saddles its judiciary with the burden of determining the value of a right to explore for and produce oil and gas in cases where the adequacy of the consideration is challenged. This civil law position is enunciated in *Murray v. Barnhart*,[77] which held, "But under our law, the consideration 'must be serious': 'it must not be out of all proportion with

71. Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86, 94 (1918).

72. Brinkman v. Empire Gas & Fuel Co., 120 Kan. 602, 245 Pac. 107, 110 (1926).

73. RESTATEMENT, CONTRACTS § 81 (1932); 1 WILLISTON, CONTRACTS § 115 (Rev. ed. 1936).

74. Union Gas & Oil Co. v. Wiedeman Oil Co., 211 Ky. 361, 277 S.W. 323 (1925).

75. Lindlay v. Raydure, 239 Fed. 675 (6th Cir. 1918); Greer v. Carter Oil Co., 373 Ill. 168, 25 N.E.2d 805 (1940); Brinkman v. Empire Gas & Fuel Co., 120 Kan. 602, 245 Pac. 107 (1926); Garber v. Hauser, 76 Okla. 292, 185 Pac. 436 (1919); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918); Freeman v. Parks, 102 S.W.2d 291 (Tex. Civ. App. 1937); Bost v. Biggers Bros., 222 S.W. 1112 (Tex. Civ. App. 1920); Magnolia Petroleum Co. v. Connellee, 11 S.W.2d 158 (Tex. Comm. App. 1928).

76. "[T]he most important characteristic of exchange is that it is a situation in which the interests of the transacting parties are opposed, so that the social utility of the contract is guaranteed in some degree by the fact that it emerges as a compromise of those conflicting interests." Fuller, *Consideration and Form*, 41 COL. L. REV. 799, 817 (1941). See also FERSON, THE RATIONAL BASIS OF CONTRACTS 13-28 (1949).

77. 117 La. 1023, 42 So. 489, 491 (1906).

the value of the thing.'" That the task of the Louisiana courts is not an enviable one is apparent from the number and complexity of their recent cases on this subject.[78]

One issue in the field of oil and gas consideration on which authority has been divided is the effect to be given a recital of consideration.[79] *Poe v. Ulrey*[80] states one view as follows: "It is true that for the purpose of applying equitable principles and granting equitable remedies a court of equity will inquire into the real consideration of a contract . . . if the effect is not to impair the instrument as a conveyance. . . . But while the recital of the payment of the consideration may be contradicted for such purposes, an acknowledgment of such payment cannot be contradicted by parol for the purpose of invalidating the instrument or impairing its legal effect as a conveyance."[81] Perhaps this seemingly arbitrary rule is only a thin legalistic veil over the sound policy norm that it is not desirable to overturn otherwise valid oil and gas leases simply because strict obeisance was not paid to ineffectual formal requirements. Stated another way, the danger to the petroleum development agreement-making process threatened by a doctrine which would allow the contradiction of recitals by parol evidence greatly outweighs any benefit to the community policies underlying form gained from requiring lessees actually to pay the money acknowledged as received by the lessor. The task of getting a free influx of capital into the risky oil production industry is difficult enough without increasing the instability of titles, the inevitable result of allowing parol contradiction of consideration recitals. Nor does it appear that the contribution to the community policies underlying form resulting from a recital of consideration made for the very reason of satisfying these community demands is appreciably less than the supposed contribution to these policies rendered by the actual handing over of a dollar.

4. *Delivery*

Although scant attention is devoted to the issue in the decisions, it seems clear that delivery is essential to the creation of the oil and gas lessee's interest in all states where the problem has presented itself.[82] Most

78. Jones v. First National Bank, 215 La. 862, 41 So.2d 811 (1949); Noxon v. Union Oil Co. of California, 210 La. 1074, 29 So.2d 67 (1946); Lee v. Perkins, 195 La. 939, 197 So. 607 (1940); Smith v. Tullos, 195 La. 400, 196 So. 912 (1940).

79. 1 CORBIN, CONTRACTS § 130 (1950); 2 SUMMERS, OIL AND GAS § 243 (Perm. ed. 1938).

80. 233 Ill. 56, 84 N.E. 46 (1908).

81. 84 N.E. at 49. See also 4 TIFFANY, REAL PROPERTY § 984 (3d ed. 1939).

82. Bledsoe v. Magnolia Petroleum Co., 36 F. Supp. 531 (E.D. Ill. 1941); Jordan v. Winooski Sav. Bank, 187 Ark. 212, 58 S.W.2d 942 (1933); Rockefeller v. Smith, 104 Cal. App. 544, 286 Pac. 487 (1930); Pure Oil Co. v. Evans, 369 Ill. 416, 17 N.E.2d 23 (1938); Hughes v. Franklin, 201 Miss. 215, 29 So.2d 79 (1947); Wahby v. Renegar, 199 Okla. 191, 185 P.2d 184 (1947); Davenport v. Doyle Petroleum Corp., 190 Okla. 548, 126 P.2d 57 (1942); Kidd v. Karns, 181 Okla. 17, 72 P.2d 391 (1937);

of the opinions on the question of delivery launch immediately into the sufficiency of the alleged delivery in issue, omitting entirely any discussion on whether delivery is an indispensable formal requirement in oil and gas leasing, and thereby assume the point.[83] Moreover, those courts not content with bland assumptions[84] satisfy themselves with such statements as, "The general rule with reference to the execution of written instruments is that delivery constitutes an essential element thereof. . . ."[85]

Inquiry into the part played in delivery cases by the words employed to describe the lessee's interest leads to the observation that these labels are not variables of any consequence in this area. Delivery is quite as much a requirement for the creation of the oil and gas lessee's interest in California[86] and Oklahoma [87] where it has been denoted a "profit a prendre"[88] as in Texas[89] where it has been held to be a "determinable fee"[90] and Illinois[91] where it is described as a "freehold."[92] Nor is the name given the dispositive instrument itself a factor of any import. The oil and gas lease has at different times and for various purposes been characterized as a "deed" in Kansas,[93] Oklahoma[94] and Texas;[95] a "sale"[96] and a "conveyance"[97]

Bell v. Rudd, 144 Tex. 491, 191 S.W.2d 841 (1946); Pelican Oil & Gas Co. v. Edson Petroleum Co., 123 S.W.2d 696 (Tex. Civ. App. 1939); Porter v. Cluck, 13 S.W.2d 130 (Tex. Civ. App. 1929); First State Bank of Wortham v. Bland, 291 S.W. 650 (Tex. Civ. App. 1927); Schmidt v. Baar, 283 S.W. 1115 (Tex. Civ. App. 1926); Ralls v. Woods, 291 S.W. 532 (Tex. Comm. App. 1927).

83. Bledsoe v. Magnolia Petroleum Co., 36 F. Supp. 531 (E.D. Ill. 1941); Jordan v. Winooski Sav. Bank, 187 Ark. 212, 58 S.W.2d 942 (1933); Rockefeller v. Smith, 104 Cal. App. 544, 286 Pac. 487 (1930); Pure Oil Co. v. Evans, 369 Ill. 416, 17 N.E.2d 23 (1938); Wahby v. Renegar, 199 Okla. 191, 185 P.2d 184 (1947); Davenport v. Doyle Petroleum Corp., 190 Okla. 548, 126 P.2d 57 (1942); Kidd v. Karns, 181 Okla. 17, 72 P.2d 391 (1937); Bell v. Rudd, 144 Tex. 491, 191 S.W.2d 841 (1946); Pelican Oil & Gas Co. v. Edson Petroleum Co., 123 S.W.2d 696 (Tex. Civ. App. 1939); Ralls v. Woods, 291 S.W. 532 (Tex. Comm. App. 1927).

84. Some consideration is given to the problems in Hughes v. Franklin, 201 Miss. 215, 29 So.2d 79 (1947); Porter v. Cluck, 13 S.W.2d 130 (Tex. Civ. App. 1929); First State Bank of Wortham v. Bland, 291 S.W. 650 (Tex. Civ. App. 1927); Schmidt v. Baar, 283 S.W. 1115 (Tex. Civ. App. 1926); Ralls v. Woods, 291 S.W. 532 (Tex. Comm. App. 1927).

85. Schmidt v. Baar, 283 S.W. 1115, 1117 (Tex. Civ. App. 1926).

86. Rockefeller v. Smith, 104 Cal. App. 544, 286 Pac. 487 (1930).

87. Wahby v. Renegar, 199 Okla. 191, 185 P.2d 184 (1947); Davenport v. Doyle Petroleum Corp., 190 Okla. 548, 126 P.2d 57 (1942); Kidd v. Karns, 181 Okla. 17, 72 P.2d 391 (1937).

88. See, *e.g.*, Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237, 243 (1935); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86, 89 (1918).

89. Schmidt v. Barr, 283 S.W. 1115 (Tex. Civ. App. 1926); and see other Texas cases cited in note 82 *supra*.

90. See, *e.g.*, Jones v. Bevier, 59 S.W.2d 945, 948 (Tex. Civ. App. 1933).

91. Bledsoe v. Magnolia Petroleum Co., 36 F. Supp. 531 (E.D. Ill. 1941).

92. See, *e.g.*, Pure Oil Co. v. Evans, 369 Ill. 416, 17 N.E. 23, 24 (1938); Poe v. Ulrey, 233 Ill. 56, 84 N.E. 46, 48 (1908).

93. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 83 Kan. 136, 109 Pac. 1002, 1004 (1910).

94. Test Oil Co. v. La Tourette, 19 Okla. 214, 91 Pac. 1025, 1029 (1907).

95. Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, 719 (1915); Davis v. Texas Co., 232 S.W. 549, 556 (Tex. Civ. App. 1921).

96. Noxon v. Cockburn, 147 S.W.2d 872, 874 (Tex. Civ. App. 1941); Guerra v. Chancellor, 103 S.W.2d 775, 778 (Tex. Civ. App. 1937).

97. Watson v. Rochmill, 137 Tex. 565, 155 S.W.2d 783, 784 (1941); Jones v.

in Texas; a "license"[98] in Oklahoma; and a "contract" in the federal courts,[99] California,[100] Oklahoma[101] and Texas;[102] and yet in all of these jurisdictions delivery has been held necessary to the validity of the instrument.[103]

As a formality, delivery, one of the most intrinsic of all formalities, can hardly be found a hindrance to the agreement-making process. This is particularly so now that delivery is no longer restricted to the "crude conception of manual transfer."[104] Certainly the community is justified in requiring some manifestation on the part of the grantor that he intends the oil and gas lease in question to be legally operative.[105] The cautionary features of physically transferring an instrument to the grantee, or to a third person in his behalf, or of any other show of intent to put the instrument out of the grantor's control, are apparent. Human experience alone, without legal promptings, should be adequate to impress on the grantor that this is the culminating act of the agreement-making process—retractable before, irretrievable thereafter.

Once it is accepted that delivery of oil and gas leases is necessary, the troublesome problems of sufficiency of delivery arising in the cases are not unlike those of delivery of real estate deeds, nor are their solutions, especially in the conditional delivery cases, any more predictable.

5. *Acknowledgment*

Save in certain situations believed by the community to warrant stronger evidentiary and cautionary safeguards, acknowledgment is generally not a minimum requisite for the creation of the oil and gas lessee's interest, as between the parties to the agreement.[106] The questions in which acknowledgment becomes an important, even vital, element are those involving recording, homestead extinguishment, the transfer of community property and the admission of records into evidence.[107] Although the prin-

Bevier, 56 S.W.2d 945, 948 (Tex. Civ. App. 1933); Canon v. Scott, 230 S.W. 1042, 1046 (Tex. Civ. App. 1921).

98. Michell v. Probst, 52 Okla. 10, 152 Pac. 597, 599 (1915).

99. Federal Oil Co. v. Western Oil Co., 112 Fed. 373, 375 (D. Ind. 1902), *aff'd*, 121 Fed. 674 (7th Cir. 1902).

100. Carlisle v. Lady, 109 Cal. App. 567, 293 Pac. 686, 688 (1930).

101. Brown v. Wilson, 58 Okla. 392, 160 Pac. 94, 99, 100 (1916).

102. Wilson v. Gass, 289 S.W. 141, 142 (Tex. Civ. App. 1902); National Oil & Pipe Line Co. v. Teel, 67 S.W. 545, 547 (Tex. Civ. App. 1902).

103. See note 82 *supra*.

104. 4 TIFFANY, REAL PROPERTY § 1034 (3d ed. 1939).

105. MCDOUGAL AND HABER, PROPERTY, WEALTH AND LAND: ALLOCATION, PLANNING AND DEVELOPMENT 595-96 (1948).

106. Wahby v. Renegar, 199 Okla. 191, 185 Pac. 184 (1947); Roach v. Junction Oil & Gas Co., 72 Okla. 213, 179 Pac. 934 (1919); Johnson v. Russell, 220 S.W. 352 (Tex. Civ. App. 1920). *But see* Miles v. Jerry, 158 Ark. 314, 250 S.W. 34, 35 (1923), where the court said, "A proper acknowledgment is an essential part of the execution of a conveyance of land. . . ."

107. See, *e.g.*, ILL. L. REV. STAT. c.30, § 19 (1949); KAN. GEN. STAT. ANN. § 67-229 (1935); OKLA. STAT. tit. 16, § 27 (1941); TEX. STAT., REV. CIV. art. 3726 (1948).

cipal function of acknowledgment is to serve as a prerequisite to recording,[108] it is not uncommon to find acknowledgment as essential to the validity of conveyances affecting homestead[109] or the wife's separate property in a community property state.[110]

The primary question, all too often glossed over in the opinions, is what these statutes have to do with oil and gas leases at all. Why should an oil and gas lease be required or even permitted to be acknowledged when representative acknowledgment statutes proclaim their scope with no direct reference to petroleum interests?[111]

Does the answer depend on the nature of the lessee's interest and of the instrument disposing it? In Oklahoma, where the lessee's interest is often called a "profit a prendre"[112] and has been described as a "chattel real" and "personalty,"[113] the statute applies to "an instrument affecting the title to real property." In Texas, where the lessee's interest is generally denominated "a determinable fee,"[114] the statute refers to a "conveyance of real estate." In Kansas the statute covers a "conveyance of land, or of any other estate or interest therein," but in that state the lessee's interest has been bluntly held to be not an "estate in the land."[115] In Illinois, where the lessee's interest is usually characterized obscurely as a "freehold,"[116] the statute applies to "other writings of or relating to the sale, conveyance or other disposition of lands or real estate or any other interest therein." It is noteworthy that each of the four above-mentioned illustrative states, working with dissimilar statutes and irreconcilable conceptions of the character of the lessee's interest, reached exactly the same result in holding that oil and gas leases are covered by acknowledgment statutes;[117] it is even more

108. See, *e.g.*, ILL. REV. STAT. c.30, § 24 (1949); KAN. GEN. STAT. ANN. § 67-221 (1935); OKLA. STAT. tit. 16, § 26 (1941); TEX. STAT., REV. CIV. art. 1294 (1948).

109. See, *e.g.*, ILL. REV. STAT. c.52, § 4 (1949); TEX. STAT., REV. CIV. art. 1300 (1948).

110. See, *e.g.*, TEX. STAT., REV. CIV. art. 1299 (1948).

111. "Deeds, mortgages, conveyances, releases, powers of attorney or other writings of or relating to the sale, conveyance or other disposition of real estate or any interest therein. . . ." ILL. REV. STAT. c.30, § 19 (1949). "All conveyances, and other interests affecting real estate. . . ." KAN. GEN. STAT. ANN. § 67-211 (1935). "All deeds, mortgages, conveyances or other instruments affecting the title to real property. . . ." OKLA. STAT. tit. 16, § 39a (1941). "Every deed or conveyance of real estate. . . ." TEX. STAT., REV. CIV. art. 1294 (1948).

112. See, *e.g.*, Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86, 89 (1918).

113. Duff v. Keaton, 33 Okla. 92, 124 Pac. 291, 294, 295 (1912).

114. See, *e.g.*, Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290, 295 (1923).

115. Beardsley v. Kansas Natural Gas Co., 78 Kan. 571, 96 Pac. 859, 860 (1908).

116. See, *e.g.*, Daughetee v. Ohio Oil Co., 263 Ill. 518, 105 N.E. 308, 310 (1914); Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53, 54 (1908).

117. Miles v. Jerry, 158 Ark. 314, 250 S.W. 34 (1923); Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N.E. 219 (1908); Poe v. Ulrey, 233 Ill. 56, 84 N.E. 46 (1908); Hester v. O'Rear, 202 Ky. 176, 259 S.W. 41 (1924); Roach v. Junction Oil & Gas Co., 72 Okla. 213, 179 Pac. 934 (1919); Carter Oil Co. v. Popp, 70 Okla. 232, 174 Pac. 747 (1918); Fagan v. Texas Co., 220 S.W. 346 (Tex. Civ. App. 1920); Hamilton County Development Co. v. Sullivan, 220 S.W. 116 (Tex. Civ. App. 1920); McEntire v. Thomason, 210 S.W. 563 (Tex. Civ. App. 1919); Southern Oil Co. v. Colquitt, 69 S.W. 169 (Tex. Civ. App. 1902).

remarkable that they did so almost by assumption, with virtually no discussion of the point at all in the opinions. This must give us pause to reflect on the true role of the legal terms used to describe the lessee's interest. We are compelled to question whether they actually are, as they are held out to be, consequential factors in deciding law suits.

If it is settled that in certain cases oil and gas leases must be acknowledged, we must next examine the utility of acknowledgment as a formality. Is its burden to the free creation of oil and gas interests[118] outweighed by its benefits to the policies underlying form? The wide-spread requirement that an oil and gas lease be acknowledged before it may be recorded has a sound formal basis. If the community is to be asked to bring its compulsive forces to bear to protect a recorded lease against otherwise innocent parties it is not unreasonable that the creator of the protected instrument be required to manifest a solemnity of purpose before an appropriate official. Some jurisdictions demand special acknowledgments where a married woman makes an oil and gas lease affecting her homestead or separate property, sometimes requiring that her acknowledgment be taken apart from her spouse and that the notary explain the transaction to her.[119] This attempt to erect a cautionary barrier around womanhood has frequently impeded the free creation of oil and gas interests and has left a wake of assailable titles.[120] It is plainly open to question whether this obstruction to free-volition agreement-making can be counter-balanced by any community policy founded on the crumbling theory of the existence of a weaker sex, dependent on legal formalities for protection against domineering spouses. Such statutes are, in the second half of the twentieth century, on shaky sociological footings and are disappearing in all but the most chivalric areas.[121] However, the homestead acts requiring acknowledgment, based on the community policy of

118. That acknowledgment has proved an obstruction to the free creation of oil and gas leases is shown by the number of appellate cases in which leases have been attacked on the ground of missing or defective acknowledgments. See the cases enumerated in note 117 *supra* and the following: Franklin Land Co. v. Wea Gas, Coal & Oil Co., 43 Kan. 518, 23 Pac. 630 (1890); Brandenburg v. Petroleum Exploration Co., 218 Ky. 557, 291 S.W. 757 (1927); Terry v. Humphreys, 27 N.M. 564, 203 Pac. 539 (1922); Wahby v. Renegar, 199 Okla. 191, 185 P.2d 184 (1947); Gulf Production Co. v. Continental Oil Co., 139 Tex. 183, 164 S.W.2d 488 (1942); English v. Plumlee, 291 S.W. 922 (Tex. Civ. App. 1927); Cooper v. Casselberry, 230 S.W. 231 (Tex. Civ. App. 1921); Richmond v. Hog Creek Oil Co., 229 S.W. 563 (Tex. Civ. App. 1920); Davis v. Burkholder, 218 S.W. 1101 (Tex. Civ. App. 1920).

119. See, *e.g.*, TEX. STAT., REV. CIV. art. 6605 (1948).

120. Humble Oil & Refining Co. v. Downey, 143 Tex. 171, 183 S.W.2d 426 (1944), 23 TEXAS L. REV. 284 (1945); Cooper v. Casselberry, 230 S.W. 231 (Tex. Civ. App. 1921); Richmond v. Hog Creek Oil Co., 229 S.W. 563 (Tex. Civ. App. 1921); Maynard v. Gilliam, 225 S.W. 818 (Tex. Civ. App. 1920); Fagan v. Texas Co., 220 S.W. 346 (Tex. Civ. App. 1920); Hamilton County Development Co. v. Sullivan, 220 S.W. 116 (Tex. Civ. App. 1920); Texas Co. v. Keeter, 219 S.W. 521 (Tex. Civ. App. 1920); Davis v. Burkholder, 218 S.W. 1101 (Tex. Civ. App. 1920); McEntire v. Thomason, 210 S.W. 763 (Tex. Civ. App. 1919); Southern Oil Co. v. Colquitt, 69 S.W. 169 (Tex. Civ. App. 1902).

121. 4 TIFFANY, REAL PROPERTY § 1031 (3d ed. 1939).

seeking serious-mindedness in agreements affecting the homestead interest, but which prescribe no special rites for the female participant, are defensible formality-wise.

6. *Recording*

Recording, like its prerequisite formality, acknowledgment, is generally not an essential requirement for the creation of the oil and gas lessee's interest. It assumes importance only on the entry of third parties into the controversy.[122] Although it is true that some states have statutes expressly covering the recording of mineral interests,[123] all too often they do not.[124] This leaves the extremely important resource planning decision of whether oil and gas leases are within the scope of the recording acts to be made on the hypertechnical issue of the nature of the leasing instrument and the interest which it passes. For without a specific statute oil and gas leases are recordable only if they fall within the purview of statutes apparently drawn with no consideration of mineral interests.[125] Here again the courts find

122. "The fact that the lease was not recorded until after the conveyance to appellee did not affect its validity as between the parties thereto nor as to third persons . . . unless they were purchasers for value without notice. . . ." English v. Plumlee, 291 S.W. 922, 923 (Tex. Civ. App. 1927). See also Blumrosen v. Burke, 296 S.W. 987 (Tex. Civ. App. 1927); Hester v. Shuster, 234 S.W. 713 (Tex. Civ. App. 1921).

123. KAN. GEN. STAT. ANN. § 79-420 (1935): "That where the fee to the surface of any tract, parcel or lot of land is in any person . . . and the right or title to any minerals therein is in another or is in others, the right to such minerals therein shall be valued and listed separately from the fee of such land, in separate entries and descriptions, and such land itself and said right to the minerals therein shall be separately taxed to the owners thereof respectively. . . . Provided, that when such reserves or leases are not recorded within ninety days after execution, they shall become void if not listed for taxation." For cases construing this statute, see Farmers' Union Royalty Co. v. Hushaw, 307 U.S. 615, 59 Sup. Ct. 1046, 83 L. Ed. 1496 (1939); and Volker v. Crumpaker, 154 Kan. 403, 118 P.2d 540 (1941).

KY. REV. STAT. ANN. § 382.080 (1943): "No deed conveying any title to or interest in real property, or lease of oil, gas, coal or mineral right and privilege, for a longer time than five years . . . shall be good against a purchaser for a valuable consideration without notice thereof, or any creditor unless the deed is acknowledged by the party who executes it, or is proved and lodged for record in the proper office, as prescribed by law." S.D. Laws 1943, c.25, § 1: "No register of deeds shall accept for the record in his office any deed, oil, gas or other mineral lease that does not contain the post office address of the grantee or lessee and a legal description of the property conveyed or leased."

124. *E.g.*, Illinois, Oklahoma and Texas. However, OKLA. STAT. tit. 19 § 231 (1941) indirectly recognizes the recordability of oil and gas leases by authorizing county clerks to hire more help in case an unusual increase in mineral leasing occurs within any county.

125. Typieal statutes of this type are: ILL. REV. STAT. c.30, § 27 (1949): "Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded. . . ." KAN. GEN. STAT. ANN. § 67-221 (1935): "Every instrument in writing that conveys real estate, or whereby any real estate may be affected, proved or acknowledged, and certified in the manner herein before prescribed may be recorded. . . ." OKLA. STAT. tit. 16, § 15 (1941): "but no deed, mortgage, contract, bond, lease or other instrument relating to real estate other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded." Texas Acts 1951, c. 403, § 1: "The following instruments of writing . . . are authorized to

themselves having to make weighty policy judgments under the guise of determining whether the lessee's interest "concerns lands or tenements" in Texas; "affects real estate" in Kansas; "relates to or affects the title to real estate" in Illinois; or "relates to real estate" in Oklahoma. As in other situations where the nature of the lessee's interest has been held out as an important factor in influencing the judicial response, despite the varying and conflicting descriptions of that interest prevailing in the different states and the difference in the wording of the statutes, all cases considering the point have reached indentical conclusions—that oil and gas leases are recordable instruments,[126] and, in fact, as against creditors and subsequent purchasers for value without notice, must be recorded to be valid.[127]

Any other result would be disastrous to effective petroleum planning and development. An efficient recording system is essential for establishing that stability and security of interest imperative to attract the free flow of investment capital into the oil production industry necessary to keep petroleum supply up to the ever rising demands of a rearmed nation. The formal requirement of recording is not onerous. If one wishes the judicial processes of the community set in motion to protect the interest granted by a lease against otherwise innocent purchasers and creditors, it is not unreasonable to require him to see that such a lease is noted in the proper public books.

7. Conclusions and Alternatives

Legislatures have very largely omitted to set up formal requirements for the creation of the oil and gas lessee's interest. This has placed on the courts alone the task of declaring policy for the new and vigorous petroleum production industry. In doing so they have been faced with the decision of whether to fit oil and gas leases into existing statutes prescribing the formal requirements for the more traditional instruments—statutes which were usually drawn with no foresight of the impending discovery and production of oil within the jurisdiction. The new oil and gas producing state is frequently faced with the question of whether an oil and gas lease is to be included in the coverage of a statute framed in language not specific to the issue—*e.g.*,

be recorded, viz.: all deeds, mortgages, conveyance, deeds of trust, bonds for title, covenants, defeasances or other instruments of writing concerning any lands or tenements. . . ."

126. Charles v. Roxana Petroleum Corp. 282 Fed. 983 (8th Cir. 1922); Derby Oil Co. v. Bell, 134 Kan. 489, 7 P.2d 39 (1932); Cadillac Oil Co. v. Leonard, 203 Ky. 105, 261 S.W. 888 (1924); Baird v. Atlas Oil Co., 146 La. 1091, 84 So. 366 (1920); Gulf Production Co. v. Continental Oil Co., 139 Tex. 183, 164 S.W.2d 488 (1942); English v. Plumlee, 291 S.W. 922 (Tex. Civ. App. 1927); Witherspoon v. Green, 274 S.W. 170 (Tex. Civ. App. 1925).

127. Rader v. Schaffer, 186 Ky. 802, 218 S.W. 292 (1920); Hester v. Shuster, 234 S.W. 713 (Tex. Civ. App. 1921); Requa v. Joseph, 225 S.W. 585 (Tex. Civ. App. 1920).

whether a lease is included in a statute applying to "instruments of writing concerning any lands or tenements"; then the court must translate its policy decision on whether it is desirable to have oil and gas leases recorded into terms of whether such a lease is an "instrument of writing concerning lands or tenements." This entails discussions of the nature of the lessee's interest which would lead the casual observer to believe that the label given the lessee's interest by the courts is an important factor in influencing the court's decision. It is here submitted that in the great majority of cases, the label attached to the lessee's interest is not a factor in influencing the court's decision, for the very choice of that description is, in fact, the *decision itself.*[128] That is, the lessee's interest is not necessarily a "tenement" or "hereditament" in the abstract; it is a "tenement" or "hereditament" because the court has decided the interest should fall within a statute and to get it within the statute the interest must be of that description. This is borne out by the fact that, as we have seen, although the lessee's interest is described in radically different ways by the various state courts, still on questions involving formalities they arrive at very similar results, most likely because they are impelled by the same policy norms.

The alternatives are clear. The oil and gas production industry has long since come of age. It should no longer be compelled to look for guidance to statutes written in the years when petroleum was referred to as "Barbados tar" or "rock oil" and used as a curiosity or a medicine. The importance of the modern petroleum industry justifies a legislative program in all producing states which will definitely state the community's policy toward formalities with unambiguous reference to oil and gas interests—legislation which will not hesitate to rid oil and gas agreement-making of formal antiquities derived from nonanalogous situations in common law real property and serving no useful purpose in modern oil and gas leasing.

128. 1 SUMMERS, OIL AND GAS 376 (Perm. ed. 1938).