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statutes governing such sales are far from uniform, in fact they . . . "exhibit a surprisingly large range of variation with respect to the precise activity or transaction taxed; the difficulties in attempting to reduce the term 'sales tax' to any single, all inclusive formula appear to be insurmountable."[34] Adding to the difficulty of formulating any guiding rules govering sales tax is the fact that all sales tax law is statutory and as such is subject to the whim of the legislators and are constantly being repealed and amended. In many cses, whether or not a transfer is subject to sales tax will depend upon the definition of terms in the statute. Most of the statutes have incorporated in them their own definitions of the terms, and here again they are far from uniform. The one thing such definitions seem to have in common is the fact that they are far broader than the usual laymen's concept of the term, and under the majority of the statutes the mere fact a transaction does not have all the usual characteristics of a sale does not necessarily mean it will not be taxable as such.

The case law on this subject is comparatively new (about 20 years) and as time goes on it is possible the decisions of the courts on the subject will become more uniform. The "tests" pointed out in this paper are certainly not meant to be a conclusive solution as to what transfers of possession are suche as to constitute a taxable sale, but they do indicate an approach the courts have, to some extent at least, adopted.

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THE MEASURE OF DAMAGES FOR BREACH OF AN EXPRESS COVENANT TO DRILL A TEST WELL

When a Wyoming mineral owner or the owner of an oil and gas lease desires to have a test well drilled on his land or lease he may lease or assign, as the case may be, all or part of his interest in return for a covenant to drill a well. Probably the most common arrangement of this type is the "farmout" in which one party assigns a block of acreage to another party in return for a promise to drill a well. If the assignor retains an undivided interest in the lease he is in effect exchanging a percentage of the lease for a test well and whatever income he will derive from his retained interest, which ordinarily will be a carried working interest, net profit interest, oil payment, or overriding royalty. On the other hand if the assignor assigns all of his interest in a particular block of acreage he probably expects to profit from the enhanced value, resulting from the drilling, of any surrounding acreage he might own. It is at once apparent that there are various opportunities for profit in these situations and consequently when the obligor breaches his covenant to drill it is only natural that the courts, in an attempt to do full justice to both parties, should adopt several rem-

34. 47 Am. Jur. 194.

edies for the relief of the obligee. It is important to note in this connection that before the question of damages may arise there must be a firm drilling commitment on the part of the obligor. If the agreement provides for termination or cancellation upon the non-payment of rentals or the failure to drill within a specified period of time, the courts will ordinarily hold that there is no firm drilling commitment on the part of the obligor.[1] Consequently for the purposes of this discussion a firm drilling commitment with no delay rental or forfeiture clauses will be assumed.

Assuming a breach of a firm commitment to drill, the obligee may in an action to recover damages find himself confronted with a variety of rules relating to the computation of damages. For example, Oklahoma and the majority of oil producing states followng the cost of drilling the well rule which is commonly known as the well-cost rule.[2] Texas, on the other hand, awards the value of performance as set forth in the case of *Guardian Trust Company v. Brothers*[3] and affirmed in *Fain-McGaha Oil Corporation v. Owens.*[4] Perhaps a third rule was set out in the case of *Hoffer Oil Corporation v. Carpenter*[5] in which the federal court in Oklahoma refused to

1. Bland v. Bargalow, 117 Fed. Supp. 1 (W.D. La. 1953).
2. Kentucky, Oklahoma, Louisiana, Montana, Pennsylvania, and Alberta, Canada, have applied the cost of drilling the well to this situation. See Note 122 A.L.R. 458.
3. Guardian Trust Company v. Brothers, Tex. Civ. App. 1933, 59 S.W.2d 343; prior to this case the Texas courts had followed the cost of drilling the well rule. However, in this case the Texas court repudiated the well-cost rule and decreed that the loss or injury sustained by the obligee, rather than the cost of performance by the obligor, is the proper measure of damages for the breach of contract. There was some evidence that the well would have been dry if drilled and the court gave cognizance to the rule that a plaintiff should not be put in a better position by a recovery of damages for breach of a contract than he would have been in if there had been preformance by the defendant.
4. Fain-McGaha Oil Corporation v. Owens, 132 Tex. 109, 121 S.W.2d 982 (1939); Although the Guardian Trust Company v. Brothers case is generally referred to as having established the value of performance rule the court in that case referred to Texas Pacific Coal & Oil Company v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928) as having established the value of the royalties in this situation as the correct measure. Actually the Texas Pacific case involved also the breach of a covenant to avoid drainage in which instance the measure would logically be the loss of royalties. The plaintiff had asked for specific performance of the drilling contract and the value of the royalties lost as damages. The court held, "The purpose of the law to give compensation for breach of contract is subserved by allowing the injured party to have the value to him of the contracts performance." 3 Williston on Contracts, Secs. 1338, 1339, pp. 2392 to 2394. Performance of a covenant to produce a certain quantity of oil or gas, under a contract promising royalty, is worth to the lessor as much as the value of his royalty at the time the oil and gas should have been produced and delivered or marketed. Therefore, to allow the lessor the value of royalty wrongfully withheld from him, complies with the laws fundamental purpose of adequate compensation. . . . To deny them the full value of their royalty under such circumstances, would not accord with the prevailing doctrine in most American courts which allows the seller to recover the full purchase price, without diminution, where title to property contracted to be sold does not pass to the buyer for the sole reason that he wrongfully refuses to take the title." In the Guardian case the court stated, "We can see no just reason for departing from the well established rule of law for measuring damages simply because the contract relates to the sinking of an oil well. . . . We are unable to distinguish the instant case from the case of Texas Paficfic Coal & Oil Co. v. Barker, supra." Thus the court in the Guardian case, which involved only a firm drilling commitment, took words from the context of the Texas Pacific case, which involved also a covenant to avoid drainage, and applied them as a measure of damages in all situations.
5. Hoffer Oil Corportion v. Carpenter, 34 F.2d 589 (10th Cir. 1929).

follow the well-cost rule when the plaintiff has no interest in the lease. The court decided that the measure in this case was what a reasonable person owning land adjacent to the well would ordinarily pay by way of contribution to the cost of such test well for the log and the geological information which the drilling would disclose. However, in 1952, in the case of *R. Olsen Co. v. Fiddler*[6] the circuit court of appeals for the 10th circuit, which had previously affirmed the *Hoffer* decision, affirmed a holding of the district court of New Mexico which had adopted the cost of drilling the well as the correct measure.[7]

Occassionally a situation arises in which it is to the advantage of the obligee to assign all of his interest in the lease and in this instance some of the courts apply a different rule than in the typical reserved interest situation.[8] The Oklahoma courts continue to apply the cost of drilling the well measure of damages in this situation,[9] but Louisiana which ordinarily follows the well-cost rule has refused to adopt it in this situation.[10]

In *Riddle v. Lanier*[11] the Texas court applied the value of performance rule to a dispute involving this situation in which the plaintiff was contending for the cost of drilling the well. In denying the plaintiff's contention the court said, "Plaintiff seeks to say, however, that the cost-rule should govern here, because, he contends, the cost of drilling the well was paid in advance by assignment of leases. He overlooks the fact, however, which is emphasized in some of the decisions, that he was not paying defendant for the drilling of a well which was to become the property of the plaintiff when completed. Plaintiff was not contracting for a well as such. What he was contracting for primarily was benefits to his remaining leases." Thus, it appears that Texas and Oklahoma both apply their basic rule to this situation although as already noted they apply different basic rules. A

6. R. Olsen Oil Company v. Fidler, 199 F.2d 868 (10th Cir. 1952).
7. The court distinguished the Olsen case from the Hoffer case on the grounds that in the Olsen case the plaintiff had furnished the entire consideration for the well. The weakness of the distinction is pointed out by a strong dissenting opinion and under the circumstances it is probably safe to assume that the well-cost rule is being followed in the 10th circuit at this time.
8. Typically the landowner or lessee will assign all of his interest in a particular block of acreage when he has offset acreage abutting the acreage assigned or leased. Commonly the drilling agreement will provide that the first well be drilled as an offset to the obligee's acreage. In this way the surrounding acreage is proven or condemned and the obligee derives almost as much benefit as if the well were drilled on his acreage and the obligor controls enough acreage to make his gamble worth while.
9. Eysenbach v. Cardinal Petroleum Company, 110 Okla. 12, 236 P. 10 (1925). Following the case of Chamberlain v. Parker, 45 N.Y. 569 (1871) the Oklahoma courts at first attempted to distinglish the situation in which the plaintiff could derive no benefit from the situation in which the plaintiff retained an interest. See Ardizonne v. Archer, 72 Okla. 70, 178 P. 263 (1919). In the Eysenbach case the court held that the distinction could not apply where the contract had been made with the express intention of proving the surrounding acreage of the plaintiff.
10. Fogle v. Feazel, 201 La. 899, 10 So.2d 695 (1942). The court distinguished the situation in which the plaintiff had no interest in the land to be drilled from a previous case in which the well-cost rule had been adopted and held that the cost of drilling the well was not the proper measure. However, the court did not state what they considered to be the proper measure in this instance.
11. Riddle v. Lanier, Com. App. 1941, 136 Tex. 13, 145 S.W.2d 1094.

late case, *Whiteside v. Trentman*,[12] gives perhaps the best example of the practical application of the Texas rule or the value of performance. The plaintiff assigned the defendant a certain number of acres in consideration for the drilling of two wells. The defendant drilled the first well which was dry and he failed to drill the second which breach was the subject of the suit for damages. The court held that the proper measure was the loss of profits and not the amount the retained leases would have increased in value. The court reasoned that as the jury found the well would have been dry, the leases would have been worthless after the well was drilled than before or during the drilling.[13] Therefore the plaintiff had three courses open to him: (1) He could have sold all the leases while the well was being drilled. (2) He could have sold part of the leases and retained part. (3) He could have retained all of the leases and "rode the well down." Obviously to collect maximum damages the plaintiff would have to convince the jury that he would have followed course number one and sold all of the leases while the well was being drilled. The court recognized that for the plaintiff to prove what he might have done would be rather unusual but held, nevertheless, loss of profits was the correct measure where the profits can be shown with a reasonable degree of certainty.

An interesting Wyoming case which may shed some light with respect to the Wyoming Supreme Court's attitude toward proving the value of leases that might have been sold during or before the drilling of a well, is *Martel et al. v. Hall Oil Co. et al.*[14] in which the plaintiff contended that the defendant by trespassing upon his oil and gas rights,[15] made the quality of the land known to the public, thereby destroying the sale value. The court in refering to the value of the leases said, "The speculative price of lands within or near a territory thought to contain oil or gas was not then known. Even though such price may continue through some considerable period of time, the speculative character thereof, and that 'market price' in such cases is often a very unsatisfactory standard by which to determine 'value' cannot be denied. . . . Now we should not loose sight of the nature, meaning, and significance of that chance or opportunity, which is claimed to have been destroyed. It may be, though there is no showing to the effect, that plaintiffs might have sold their rights for a considerable sum of money. They would then have been the gainers, and the purchaser would have been the loser. They would, upon their own theory, have

12. Whitesire v. Trentman, Tex. Civ. App. 1942, 163 S.W.2d 418, affirmed 141 Tex. 46, 170 S.W.2d 195.

13. However, if the plaintiff had been able to prove that the well would have been productive, the value of performance would have been the profit he could have realized if he retained all of the leases until after the well was drilled—presuming he could prove that he would have retained all of the leases until then.

14. Martel et al. v. Hall Oil Company et al., 36 Wyo. 166, 253 P. 862 (1927).

15. The defendant, under no color of title and against the plaintiff's wishes, moved a rig on to the plaintiff's land and drilled a "dry hole." The plaintiff claimed the well was not dry and that the defendant had destroyed the hole by abandoning. Defendant offered proof that the well was dry and that the hole had been cemented and was not damaged if there was oil. Judgment for defendants.

pocketed a lot of money, but for what? They would, upon their own theory, have received something for nothing in return."

Taking the words of the Wyoming court out of context it would seem seem that they would be little inclined to follow the Texas rule in situations in which the plaintiff had reserved no interest. Apparently the court feels the surrounding acreage is valueless as oil and gas property, ab initio, after it has been proven that a well on the land would be "dry." Under the Texas rule, if the jury finds the well would have been unproductive, it is necessary to establish the value for which the surrounding acreage could have been sold before it was proven worthless. If the court were to use "hindsight" in each situation and hold that since the well would have been unproductive the surrounding acreage would be valueless from the beginning the obligor would be denied recovery in every instance under the value of performance rule. However, this is merely conjecture based on dictum and if the opportunity ever arose to apply the Texas rule the court very possibly would not hold the acreage valueless ab initio merely because the jury found as a matter of fact that the well would have been dry.

Probably the more common arrangement is that in which the obligee retains an interest of some type.[16] Here again Oklahoma follows the well-cost rule[17] and propably the majority of oil producing states do likewise.[18] It is interesting to note in this regard, however, that the courts are ever sensitive to the equities of the case and if there is a variation in the facts of the case they will refuse to follow the customary rule. For example, in the Kentucky case, *Midland Gas Corporation v. Reffitt*,[19] the defendant agreed to drill a test well and if completed to drill a second well within the year. If the property was productive defendant was to continue drilling on 50 acre tracts. The defendant drilled two wells which were proven to be commercial at the trial but refused to continue drilling. The plaintiff was awarded damages and interest amounting to approximately $3,000, the court holding, "The measure of damagse in such cases is the amount of the royalties the lessor would have received had production been marketed, if it can be shown with reasonable certainty that the land would have produced a certain quantity of gas." Although not specifically mentioned as such the rule adopted here is the value of performance to the obligee, not the cost of performance by the obligor which would have been the cost of drilling out the remainder of the tract on 50 acre offsets. Thus Kentucky, which customarily follows the well-cost rule, has applied the Texas rule to a situation in which it would be inequitable, due to the limited commercial possibilities of the prospective wells, to award the obligee the cost of drilling

16. These arrangements are probably as many and varied as the specific factual situations that might arise. However, in general, they fall into rather basic categories which include the overriding royalty, working interest, net and gross profit interest and the reserved mineral interest.
17. Smith v. Kious, 194 Okla. 17, 147 P.2d 442 (1944).
18. See again 122 A.L.R. 458 for a list of states that follow the cost of drilling the well measure of damages.
19. Midland Gas Corporation v. Reffitt, 286 Ky. 11, 149 S.W.2d 537 (1941).

the wells.[20] This is adequately emphasized by comparing the damages awarded, $3,000 with the amount it would require to drill several more wells. Obviously the obligee is in a position, in this instance, to argue that since no one knows until it is drilled, whether a well will be commercially productive, and that since the obligor bargained for further wells as long as they continued to be productive he, the obligee, is entitled to the cost of the well regardless of its prospects. If a court purports to follow the well-cost rule, there is seemingly no essential difference between the situation in which the commercial prospects of the well are very poor and that in which the well is likely to be dry. The court, however, might have recognized a further inequity in this instance if the well-cost rule were applied. While the cost of drilling the well as a measure of damages in effect permits the obligee to go ahead and drill a well on a lease in which he has only a part interest, he is under no actual obligation to do so. Thus the defendant might be required to pay for drilling the well where the chances of production are slight, but never have the opportunity of having his interest in the acreage proven. Perhaps the answer to this would be to give the defendant the opportunity to drill the well or pay the cost thereof.

Where there is a reserved interest in the obligee, Texas continues to follow the value of performance rule. A representative case is *Westgate Greenland Oil Co. v. Mack.*[21] The plaintiff reserved certain oil payments and the court held that it was the same as an overriding royalty and thus applied the value of performance rule. The plaintiff failed to establish the value of the royalty and was awarded only nominal damages although the court admitted that there was definitely an actionable breach of the contract.[22]

The question of the proper measure of damages came up in a recent Wyoming case[23] but the only point in controversy on appeal was whether the case should have been decided on a demurrer. The court remanded the case for trial and in event certain issues are resolved in favor of the plaintiff, the court will have to determine the correct measure of damages if the case is appealed. The final ruling of the Wyoming Supreme Court may rest upon a decision as to what general damage rule is most analogous

20. See also Sawyer v. Dixon, Tex. Civ. App. 1940, 143 S.W.2d 987 in which the plaintiff obligor sued for the cost of completing the well and defendant obligee filed a cross complaint and set-off. The plaintiff had "twisted-off" the drill stem in the hole and abandoned. The court held the measure was the reasonable cost of removing the drill stem by the obligee when that amount was less than the contract price agreed to. It will be noted that the measure is the cost of performance by the obligor, not the loss to the obligee by the abandonment of the well. Also Alphonzo E. Bell Corporation v. Listle, 74 Cal. App.2d 638, 169 P.2d 462 (1946) where the defendant abandoned because of damage to the hole. The court held the amount of damages is the amount necessary to redrill the well to the horizon at which the destruction occurred, notwithstanding the fact that the venture may result in total loss.

21. Westgate-Greenland Oil Company v. Mack, Tex. Civ. App. 1942, 164 S.W.2d 31.

22. Apparently under this rule the plaintiff must prove conclusively every element of the damage before he can recover—including such factors as the probable limit, length, and quality of the prospective production.

23. Hageman & Pond, Inc. et. al. v. Clark, 69 Wyo. 154, 238 P.2d 919 (1951).

to the drilling of an oil well. For example, the Texas court believes the situation is analogous to contracting to erect a building on a vacant lot with one-eighth of the gross revenue from the building going to the lot owner[24] or contracting to lend money with which to buy wheat.[25] On the other hand, the Oklahoma court feels the situation is closely analogous to a situation in which A contracts to build a house for B, and is paid for it, and then fails to keep his agreement.[26] Coupled with this is another basic difference. The Oklahoma court and many state courts feel that just because it later becomes apparent that the well will be dry is no reason to allow the defendant to escape his obligation with nominal damages. The Texas courts on the other hand seem to feel that where it is proven that the well would be dry the plaintiff's recovery should be limited to the loss he can actually prove, the value of his overriding royalty or the amount for which he could have sold his surrounding acreage. Consequently logic dictates that a choice of the better analogy and the correct theory of recovery for damages for breach of contract should produce the most satisfactory rule for Wyoming. The courts, to date, in a search for the most appropriate analogy have overlooked the most basic of all. A promise to drill a well in exchange for an oil and gas interest, in effect involves a sale of such interest, the consideration for which is a promise to perform services—the drilling of an oil well. Accordingly the situation is analogous to a contract to sell property with respect to which contract the vendor has failed to perform. The only difference is that in the typical oil and gas case the land is conveyed at the time of making the contract, while in the ordinary contract to convey land, the vendor usually doesn't tender performance until time for the vendee to perform. Logically the measure of damages in this situation would be the price agreed to be paid.[27] The measure is not true in all land contract cases but probably had its origin in the analogy of chattel sales where the title passes at the time of making the contract.[28] The general rule in regard to chattels is that where the title to the goods has passed to the vendee, the vendor can recover the contract price in full.[29] If the title has not passed the measure of damages is the difference between the contract and the market price of the article at the time when and the place where it should have been accepted.[30] Since the contract price is the drilling of a well, the measure of damages would be the reasonable cost of drilling the well if title had passed. If title has not passed the measure would be the difference between the reasonable cost of drilling the well and the market price of the lease at the time the well should have been drilled.

If the interest is regarded as an interest in real property and the court

24. Guardian Trust Company v. Brothers, Tex. Civ. App. 1933, 59 S.W.2d 343.
25. Trentman v. Whiteside, Tex. Civ. App. 1942, 163 S.W.2d 418.
26. Ardizonne v. Archer, 72 Okla. 70, 178 P. 263 (1919).
27. 3 SEDGWICK, DAMAGES, Sec. 1024 (9th ed. 1912).
28. Ibid.
29. 2 SEDWICK, DAMAGES, Sec. 750 (9th ed. 1912).
30. 2 SEDWICK, DAMAGES, Sec. 753 (9th ed. 1912).

would grant specific performance of the purchase price, which would be the cost of drilling a well, the case for the well-cost rule is strengthened. The courts at present appear to be split as to whether specific performance is avaliable as a remedy. Louisiana holds that it is not available as the courts have no way of enforcing it.[31] However, the Texas courts in at least one instance have granted specific performance. In the case of *Texas Pacific Coal & Oil Co. v. Barker*[32] the obligor had agreed to drill a test well and to protect the acreage against drainage by drilling offset wells. One well was drilled which produced gas in paying quantities but since then the defendant had failed to drill. The plaintiff asked damages of $100,000 and also specific performance of the contract. The case was tried before a jury and a verdict and judgment were rendered against the defendant for $60,000 damages and a decree for specific performance was entered requiring defendant to drill five additional wells on the tracts. The damages were calculated as the full value of royalty lost to the lessor through the lessee's failure to exercise ordinary care to develop the minerals and protect the same from drainage by nearby wells. The supreme court reversed and remanded holding that the proper measure of damages was the loss of royalties. The theory of the court in reversing the decree for specific performance was that a judgment for the value of the royalties was in effect specific performance of the purchase price. The court recognized the problem that if the obligor ever decided to go ahead and perform his obligation, the obligee might recover double royalties on the same interest by stating, "We do not mean to say that a lessee, desiring and offering to go on and comply with his obligations, might not be able to invoke the aid of a court of equity in such a way as to obtain the benefit of unmined minerals on which such lessee had been required to pay royalties." Thus it seems that the argument of the courts that will not grant specific performance because they have no way of enforcing it is adequately rebutted by the theory that the court may in effect grant specific performance of the purchase price by merely awarding the cost of drilling the well.

Assuming then that the contract to sell property in return for services is a better analogy there are in addition policy factors which would dictate the well-cost rule. Under the Texas rule the plaintiff has the burden of proving the well would have been productive which he frequently fails to do as it is virtually impossible to prove conclusively that a wildcat well will be successful. The result might be that the sanctity of contracts would not be meaningful if the obligor could freely enter into a contractual obligation and fail to perform without being subject to damages if the plaintiff was unable to establish that the well would have been a producer. Furthermore, the Texas rule might seriously restrict the farm-out practice as we know it today. Landowners and lessees would be very reluctant to contract

31. Luther S. Fite, Appt. v. Paul L. Miller, 192 La. 229, 187 So. 650, 122 A.L.R. 446 (1939).
32. Texas Pacific Coal & Oil Company v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928).

of the effect of the damage rule would be to negative what the parties in fact bargained for and agreed to.

Oil formations in many Wyoming localties are such that except in cases of close off-sets it is difficult if not impossible to determine as a matter of fact that a well would or would not have been productive. The rule thus limits the recovery to what the obligee would have sold the lease for during the drilling provided he can prove that he would have sold. In many areas there is only one way to determine whether a well is going to be productive and that is to drill the well.

There is one situation in which the Texas rule might afford relief that would not be available under any other measure. The problem would arise if the obligor were virtually certain that the well would be productive but for some reason such as tax considerations or lack of marketing facilities he did not wish to drill. If the lease were not terminable, or the obligee could not compel forfeiture, under the well-cost rule the obligee would recover the cost of drilling which might be considerably less than the royalties he would receive or the enhanced value of his surrounding land if the well were drilled. In other words the obligor would be willing to sacrifice the cost of the well in order to relieve himself of the burden of drilling at the present time. The obligee would receive the cost of drilling a well but it would not compensate for his lost rents and royalties. In this case the Texas rule with its value of performance might afford the better solution. The courts could easily invoke an exception to the well-cost rule in this situation and apply the value of lost royalties. Actually the case would seldom arise as the obligee very possibly would drill the acreage himself if the loss were very great.

With the law in its present state of flux the most practical solution for the obligee is to provide for liquidated damages in the contract. Liquidated damages are enforceable where the damages which result from the breach are not fixed by law or are in their nature uncertain and where the amount stipulated does not manifestly exceed the injury which is suffered.[33] Likewise a provision for liquidated damages is not invalid because the contract provides for recovery by one party only.[34] In computing liquidated damages there are two alternatives, the total cost of drilling to a certain depth or a per foot cost of drilling to a certain depth. Each has its advantages. A combination of the two might provide flexibility and avoid the penalty pitfall. If the sum stipulated is so large as to be out of all proportion to the probable or presumptive loss it will be regarded as a penalty without regard to the express language of the contract and although each sum is expressely denominated "stipulated" or "liquidated" damages.[35]

The probable inference to be drawn from this discussion is that al-

33. 49 AM. JUR., DAMAGES, Sec. 240 (1941).
34. Ibid.
35. 49 AM. JUR., DAMAGES, Sec. 250 (1941).

though the Wyoming courts have not yet adopted a measure of damages for breach of an express covenant to drill an oil well the better measure would be the well-cost rule whether applied as a direct measure or damages or by giving specific performance of the purchase price, in effect, through awarding the cost of drilling the well. In any event the uncertainty can be eliminated by including a provision for liquidated damages in the contract.

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RELIEF FROM FORFEITURE OF BAIL IN CRIMINAL CASES

The practice of allowing an accused his freedom upon posting a certain bail with the court has been in use in England for about 1000 years, and was first codified about 1275 A.D.[1] The purose of bail is to relieve from imprisonment a person accused but not proven guilty.[2] When it is considered that even today six months to a year may elapse between the arrest of an accused and his trial, it is obvious that there is a real need for provisions for bail.

The constitutions of most states and the Federal Government make provision of some sort granting bail to an accused. This subject has been extensively covered in the law reviews and the concensus generally is that bail is a matter of right in cases in which the accused has not had a trial;[3] and that in cases in which a trial has been had and an appeal is pending, the granting of bail rests in the sound discretion of the court.[4]

It will be assumed in this article that the accused has been admitted to bail, i.e that the required security or bond was posted and the accused released on condition of his appearing at a later time, but that the accused failed to appear at the required time and his bail was forfeited. The purpose of this note is to explore the posibilities of obtaining relief from this forfeiture.

Allowance of bail, provisions for forfeiture on default, and relief from this forfeiture is statutory today in almost all states. Results reached in the decided cases will vary from state to state depending upon the requirements of the particular statute involved.

Statutes and case law providing for relief from forfeiture of bail can be generally classified into three groups, depending upon a time factor. Statutes falling into class one require that the parties inform the court of any extenuating circumstances that might justify a remission, before the forfeiture, or after the forfeiture but before final judgment on the forfeiture of the

1. Desmond, Bail-Ancient and Modern, 1 Buff. L. Rev. 245 (1952).
2. State v. Wynne et al., 356 Mo. 1095, 204 S.W. 927 (1947); State ex rel. Smith v. Western Surety Co., 154 Neb. 895, 50 N.W.2d 100 (1951).
3. 5 Wyo. L. J. 195 (1951).
4. 13 Pitt. L. R. 755 (1952).