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A Possible Bar to Implied Covenants in Wyoming Oil and Gas Leases

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There have been only a few cases decided by the Supreme Court of Wyoming involving extradition, but all were decided prior to the enactment of the Uniform Act and have significance in determining who is a fugitive from justice.[35]

An analysis of the cases decided elsewhere does not reveal any particular trend. No movement away from the older cases could be expected, since the Uniform Act is for the most part merely a codification of the already existing law.

Wyoming has a compact with Kansas, New Mexico and Colorado for the arrest of fugitives which makes extradition proceedings unnecessary.[36] Law enforcement officers from those states are permitted by the compact to come into Wyoming, make arrests of fugitives, and remove them from Wyoming without action on the part of Wyoming courts or officers. Wyoming officers have the same permission to make arrests in the other three states which are members of the compact. To the extent of the compact we are by-passing the extradition statutes.

The Wyoming legislature should adopt the changes recommended by the Commissioners on Uniform Laws, and the problem of interstate rendition of fugitives can be made progressively simpler through the adoption of additional agreements with sister states permitting law enforcement officers to make arrests within the boundaries of the states making such agreements.

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A POSSIBLE BAR TO IMPLIED COVENANTS IN WYOMING OIL AND GAS LEASES

Wyoming's progress in oil and gas production has made the rights and duties of the parties to an oil and gas lease of particular significance to attorneys practicing throughout the state. A particularly important phase of the law of oil and gas is the doctrine of implied covenants. Since the courts have talked of implied covenants in connection with ordinary leases, there has been a tendency to apply the same term to the obligation inferred in the oil and gas lease. By reason of the common lack of stipulations in oil and gas leases governing exploration, development, and operation, the courts have sought to decide these questions by the doctrine of implied covenants. The Wyoming Supreme Court and the Federal District Court of Wyoming indicate they recognize such covenants, yet one finds an apparent conflict with such a result upon examination of the Wyoming statutes.

A Wyoming statute provides that no covenants will be implied in any

35. Ryan v. Rogers, 21 Wyo. 311, 132 Pac. 95 (1913); Zulch v. Roach, 23 Wyo. 335, 151 Pac. 1101 (1915); Harris v. State, 23 Wyo. 487, 153 Pac. 881 (1916).
36. Wyoming Compiled Statutes §§ 10-2701 to 10-2704 (1945).

conveyance of real estate.[1] The statutory definition of "conveyance" defines the term as to embrace every instrument in writing by which any estate or interest in real estate is created, alienated, mortgaged, or assigned, excepting only leases which are less than three years in duration.[2] The question of whether an oil and gas lease is an interest in real estate appears rather well settled by the decisions of the Wyoming Supreme Court. When the nature of an oil and gas lease arose in *Boatman v. Andre,*[3] the court defined it as a profit à prendre, hence an incorporeal hereditament. The nature of the incorporeal hereditament was further pursued in *Denver Joint Land Bank v. Dixon,*[4] in which it was construed to be an interest in real property. In three other Wyoming cases,[5] the court found an oil and gas lease to be a conveyance of an interest in real property so as to come within the statute of frauds.[6] It would appear, in the light of these cases, that the statute excluding implied covenants[7] would have application to an oil and gas lease of a duration of three or more years, and would be in direct conflict with the language of our courts on this subject.

Although the Wyoming Supreme Court has never granted relief on the basis of an implied covenant in relation to an oil and gas lease, and the statute has never been in issue, the court held in *Phillip v. Hamilton,*[8] that there was an implied covenant that the lessee would prosecute the work of development with reasonable diligence. It should be noted, however, that the lessee admitted the implied covenant in this case and the court merely agreed with him on that point. Relief was denied in the case because the court felt that the lessee had not violated the covenant by his actions in development of the tract. In *Pryor Mountain Oil and Gas Company v. Cross,*[9] the court was dealing with an express covenant, but its dicta indicated that the court would imply a covenant to market if the lessee delayed for an unreasonable time, particularly where the territory is being drained.

Dictum of the Federal District Court in Wyoming has indicated that it would recognize the doctrine. In *Cooper v. Ohio Oil Company,*[10] the court was faced with an express covenant, but stated the view that it was elementary that a duty rests upon the operator of oil property to protect it against drainage through adjoining wells and to develop the tract in a prudent and proper manner, even in the absence of an expression to that

1. Wyo. Comp. Stat., § 66-105 (1945).
2. Wyo. Comp. Stat., § 66-124 (1945).
3. 44 Wyo. 352, 12 P.2d 370 (1932).
4. 57 Wyo. 523, 122 P.2d 842 (1942).
5. Montana and Western Oil Company v. Gibson, 19 Wyo. 1, 133 Pac. 784 (1911); Hageman v. Clark, 69 Wyo. 154, 238 P.2d 919 (1951); Oregon Basin Oil and Gas Company v. Ohio Oil Company, 70 Wyo. 263, 248 P.2d 198 (1952).
6. Wyo. Comp. Stat., § 5-101 (1945).
7. See note 1, supra.
8. 17 Wyo. 41, 95 Pac. 846 (1908).
9. 31 Wyo. 9, 222 Pac. 570 (1924).
10. 108 F.2d 535 (Wyo. 1936).

effect in the lease. The court in *Brimmer v. Union Oil Company,*[11] stated there was an implied covenant that the lessee will exercise reasonable diligence in developing and protecting the premises, and in marketing the products, but since there was an express covenant upon the same subject matter in the disputed lease, it excluded any implied covenants. Recognition of the implied covenant to exercise reasonable diligence in the development of land leased for oil and gas purposes was also inferred in *Kennan v. Texas Production Company.*[12] As in the Wyoming Supreme Court decisions, it appears that the conflicting statute was never in issue nor specifically received the attention of the Federal court in any of these actions.

This writer's research discloses only one case in which a similar statute[13] was in force and the court was squarely faced with deciding its effect upon an alleged implied covenant in an oil and gas lease. The Michigan Supreme Court in *Musthegon Oil Corporation v. Blue Arrow Petroleum Company,*[14] denied the lessor the benefit of the doctrine of implied covenants, holding that the statute was an absolute bar to implied covenants in an oil and gas lease. The oil and gas lease had been interpreted by the Michigan court as a conveyance of an interest in real estate, as similarly construed by the Wyoming Supreme Court.

The language which indicates that the Wyoming courts will recognize implied covenants in the oil and gas lease, despite the statute, may be justified in that the courts have long recognized that there is a basic distinction between the ordinary lease and the one for oil and gas. The statute excluding implied covenants was enacted by the Territorial legislature[15] in a period when the future of oil and gas in our economy was unforeseen, and certainly not within the contemplation of the lawmakers. It has been recognized that the ordinary lease contemplates a user of the surface by the tenant for his own purposes in consideration of payment of rent, while the prime objective of the parties to an instrument of an oil and gas lease is the extraction of subsurface gas and oil for their mutual benefit.[16] Another court expressed the view that while oil and gas leases are regarded as a conveyance of an interest in real estate, until such commodity shall be severed, the nature of an oil and gas lease sets it apart from classification of real estate generally and it cannot be treated in the same manner under all conditions.[17] The view has also been expressed that while an oil and gas lease did convey an interest in real estate, it did not create the ordinary relationship of landlord and tenant.[18] A basis for an original classification of oil and gas interests has been stated in that con-

11. 81 F.2d 437 (Wyo. 1936).
12. 84 F.2d 826 (Wyo. 1936).
13. Mich. Comp. Laws, § 11, 691 (1919).
14. 258 Mich. 288, 241 N.W. 837 (1932).
15. Enacted in 1882, ch. 1, § 5, Wyoming Territorial Laws.
16. Barwise v. Shepard, 299 U.S. 33, 57 S.Ct. 70, 81 L.Ed. 23, rehearing deiend, in 299 U.S. 622, 57 S.Ct. 299, 81 L.Ed. 458 (1936).
17. Warfield Natural Gas Company v. Cassady, 266 Ky. 217, 98 S.W.2d 495 (1936).
18. Vanzandt v. Heilman, 54 N.M. 97, 214 P.2d 864 (1950).

tracts for developing land for oil and gas undoubtedly fall into a class of their own, requiring the application of principles necessary to meet the nature of the business if justice were to be done.[19] Although the statute has never been discussed by the Wyoming courts in relation to the oil and gas lease, these cases would seem to justify a position by the courts that the conflicting statute was intended to apply to the ordinary lease, with its landlord and tenant relationship, but was not intended to be applied to the unique oil and gas lease.

Still, contrary views may be found to this line of reasoning from other courts, who have been faced with the problem of application of real property statutes to the oil and gas lease. One court held that the mineral leases should be construed as "leases" and that statutory provisions applicable to ordinary leases should be applied thereto in the absence of mineral statutory provisions.[20] Another court expressed a view along these same lines in holding an oil and gas lease creates an interest in real estate and is governed by law applicable to land.[21] It has also been held that there was a substantial difference between a mineral lease and an ordinary lease, but that the chief characteristics of both types brought them within the ordinary term of "lease".[22] While these cases seem to recognize that there is a difference between the ordinary lease and the one for oil and gas, they would apply statutory provisions relating to ordinary leases, in the absence of mineral statutes or language, within the statute itself, excepting the oil and gas lease from the operation of the statutory provisions relating to ordinary leases. If the Wyoming Supreme Court chooses to clearly exclude the oil and gas lease from the provisions of the statute excluding implied covenants, it would appear that the exact nature of an oil and gas lease would be uncertain. The question of when the oil and gas lease is to be within the provisions of statutes using the term "lease," "interest in real estate," or "conveyance of an interest in real estate," would then be a more difficult problem. By definition of the Wyoming court, the oil and gas lease has become subject to the provisions of the recording statutes[23] and the statute of frauds,[24] yet appears to be excluded from the operation of the statute prohibiting implied covenants, when the statute expressly uses the term "conveyance of real estate," a term which has been used by the court to describe the nature of the oil and gas lease. These arguments support the proposition that while the statute excluding implied covenants remains in its present form, the court ought to include oil and gas leases within its provisions. This argument is not based on the view that implied covenants should be denied the oil and gas lessor, but is premised on the fact that consistent application of the court's definition of the interests created by an oil and gas lease does result in such a lease

19. Taylor v. Stanley, 4 F.2d 279 (W.D. La. 1925).
20. Tyson v. Surf Oil Company, 195 La. 248, 196 So. 336 (1940).
21. Piney Oil and Gas Company v. Allen, 235 Ky. 767, 32 S.W.2d 325 (1930).
22. Reclamation District No. 108 v. Gibson, 63 Cal. App.2d 311, 147 P.2d 80 (1944).
23. Wyo. Comp. Stat., § 66-114 (1945).
24. See note 6, supra.

being within the provisions of the statute prohibiting implied covenants.

Assuming that it is to the advantage of the oil and gas interests in Wyoming to be assured of the status of the doctrine of implied covenants, and still have the judicial definition as to the nature of an oil and gas lease remain unchanged, the solution may be found by examination of statutory provisions of other states. Some states[25] have solved the problem of implied covenants by expressly providing for protection of the lessor through statutory enactment. An example of such legislation is illustrated by Arizona. It has provided an administrative remedy for the landowner in which a state commissioner is given the power to prescribe and enforce rules and regulations governing the drilling, casing, and abandonment of oil and gas wells, as well as being empowered to forfeit leases for the failure of the lessee to develop the tract within six months after the lease, if it is determined that there is oil and gas in paying quantities.[26] The simplest solution would be the method employed by the Michigan legislature when it realized that its statute,[27] reading the same as Wyoming's statute excluding implied covenants, would be a bar to implied covenants in oil and gas leases. The legislature simply amended the statute, adding the words, "except oil and gas leases," thus preserving the judicial definition of the interest created by an oil and gas lease, and availing the doctrine of implied covenants to the oil and gas lessor of that state.[28] In this same manner, any doubt as to the status of the implied covenant or the interest created by the oil and gas lease in Wyoming could be easily resolved.

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NO SURVIVORSHIP FROM JOINT TENANCY OF SAFE DEPOSIT BOX

The case of *Hartt v. Brimmer*[1] presented for the first time in Wyoming a fact situation calling for a decision of the effect of a joint tenancy of a safe deposit box upon ownership of the contents. That case involved the question of the ownership of valuable stock certificates contained in a safe deposit box. The deceased had been sole lessee of the box, and about nine months after he had made out his will, his wife became co-lessee of the box. The contract with the bank contained the following provision: "As joint tenants with right of survivorship and not as tenants in common." After the husband's death, the wife claimed to be the sole owner of the property in the box because of the survivorship clause in the contract. The executors of the estate contended that there could be no

25. Burns Annotated Ind. Stat., § 4859 (1934); Ky. Rev. Stat., § 353.040 (1948); Ariz. Rev. Code, §§ 2493, 2495 (1928).
26. See note 25, supra.
27. See note 14, supra.
28. Mich. Comp. Laws, § 565.5 (1948).

1. Hartt v. Brimmer, ____ Wyo. ____, 287 P.2d 638 (1955).