Opinion No. 58.

Counties—County Land—Oil and Gas Leases, Cancellation of.

HELD: In a suit to cancel an oil and gas lease three things must be shown: First, a valid forfeiture; second, demand for release; and, third, the failure of the lessee, his successor or assigns, to release the lease of record.

March 12, 1935.

Mr. W. M. Black
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Your letter to us of March 2, anent the judgment in favor of the plaintiff in the case of Adams v. Toole County, whereby a certain oil and gas lease was cancelled, and the advisability of appealing to the Supreme Court therefrom, has been received and duly considered.

Through the tax deed issued to Toole County by its treasurer on August 3, 1934, the defendant in the action became the successor in interest of the Radigan-Hungerford Company as assignee of Gordon Campbell, the lessee of the 320-acre tract of oil land involved. As such successor it became entitled to the benefits of the lease but at the same time assumed the burdens thereof. (Sunburst Oil & Refining Co. v. Callender, 84 Mont. 178.)

The record discloses an implied covenant on the part of the lessee to operate the well with reasonable diligence, but discloses no provision for forfeiture in connection therewith. There are respectable authorities which support the view that before a forfeiture of the lease can be declared for failure to so operate the lessor must give notice of his intention to forfeit unless production is resumed within a reasonable time. (Wapa Oil & Development Co. v. McBride, 201 Pac. 984; Utilities Production Corporation v. Riddle, 16 Pac. (2d) 1092; Herbert v. Graham, 237 Pac. 58; 2 Thornton on Oil and Gas 518; Summers on Oil and Gas 471; Merrill on Implied Covenants, 148 et seq.) If this conception be sound, the complaint and the evidence corresponding thereto are insufficient to sustain the judgment.

In a suit of this kind three things must be shown: First, a valid forfeiture; second, demand for release; and, third, the failure of the lessee, his successor or assigns, to release the lease of record. (Solberg v. Sunburst Oil & Gas Co., 70 Mont. 177.)

We have before us a copy of the lease. Evidently the plaintiff did not plead the instrument **in haec verba**; neither did she plead it entirely according to its legal effect. It was not offered in evidence at the trial. In form it was an "unless" lease, though that was not made to appear. Our Supreme Court has held that the breach of an implied covenant, such as this, in an "unless" lease ipso facto terminates the same. (Berthelote v. Loy Oil Co., 95 Mont. 434.)

On the whole, therefore, the prospect of ultimate success is not very good. Even if it were fair or better it may be well to consider whether or not it would be worth while to put Toole County to the expense of an appeal to the Supreme Court and possibly another trial in the district court, as the leasehold interest in question may have little, if any, value.