IN THE SUPERIOR COURT OF SEMINOLE COUNTY STATE OF OKLAHOMA.

J.F.Killingsworth,
Plaintiff,

vs #787.

Indian Territory Illuminating Oil Company,
Defendant.

Dudley Lancaster,
Plaintiff,

vs #788.

Indian Territory Illuminating Oil Company,
Defendant.

PLAINTIFFS' BRIEF UPON TRIAL IN SUPERIOR COURT.

PLEADINGS.

It is alleged in the petitions in each of the cases that the plaintiffs by mineral deeds acquired fractional interests of royalties and by letter notified defendant submitting their original deeds at the time of notice and that the defendant acknowledged notice but failed to notify Carter Oil Company, the purchaser of the oil produced by the defendant upon the lands involved in controversy and that by reason thereof defendant became indebted to plaintiffs in the amount of royalties sued for.

Defendant denied generally allegations of plaintiffs petitions and that plaintiffs were entitled to the royalties sued for and pleads the statutes of limitations.

STATEMENT OF FACTS

May 12th,1926,John Quimby et al executed and delivered to Fred S.Brinkman oil and gas lease covering W½ NW Sec.12,T 8 N, R 6 E,Seminole County,Oklahoma,reserving one eighthpart of the oil produced and saved from the premises as royalty.

May 12th,1926,Fred S.Brinkman assigned the oil and gas lease to defendant Indian Territory Illuminating Oil Company.

December 10th,1928,John Quimby by mineral deed conveyed to the plaintiff Dudley Lancaster a three acre or 3/80 interest in and to all the oil,gas and other minerals or royalties produced from said land under said lease. Lancaster by letter notified defendant enclosing deed. December 29th,1928,defendant by letter acknowledged receipt of the deed,returning same and stating that notations of ownership would be made upon defendant's records.

December 10th,1928,John Quimby executed and delivered mineral deed conveying to J.H.Killingsworth 1/40th or a 2 acre royalty interest of the royalties produced and saved from said land under said lease. January 15th,1929,J.H.Killingsworth executed

and delivered to plaintiff G.F.Killingsworth mineral deed conveying 1/40th of the royalty produced and saved from said land under said lease. January 24th,1929,G.F.Killingsworth by letter notified defendant of the interest acquired enclosing his deed which was returned by defendant to plaintiff.

The lease,assignment,mineral deeds and letters were introduced in evidence on the trial and properly marked for identification as plaintiffs' exhibits.

The oral evidence offered and introduced by plaintiffs showed that the defendant took possession of the land described in said lease and developed same for and produced oil therefrom and that plaintiffs have not been paid their royalties accruing prior to the 1st day of April 1930 and that defendant was indebted to the plaintiff Killingsworth in the sum of $339.38 and was indebted to plaintiff Lancaster in the sum of $509.09.

Defendant offered in evidence three division orders,dated August 11th,1928,neither of which were signed or executed by plaintiffs. Defendant offered in evidence division order,dated August 4th,1928, not signed by either of plaintiffs. Defendant offered in evidence division order,dated February 19th,1930,executed by plaintiff Dudley Lancaster and his vendor John Quimby. Defendant offered in evidence transfer order,dated February 19th,1930,executed by J.H.Killingsworth and his vendor John Quimby. Defendant also offered in evidence transfer order,dated February 19th,1930,executed by plaintiff G.F. Killingsworth and his vendor J.H.Killingsworth. They were properly marked for identification as defendant's exhibits. Plaintiffs objected and excepted to the introduction in evidence of defendant's four last mentioned division and transfer orders.

ARGUMENT AND AUTHORITIES.

A part of the consideration stated in the lease is as follows:

"In consideration of the premises the said lessee covenants and agrees:

1st,to deliver to the credit of lessor,free of cost,in the pipe line to which he may connect his wells,the equal one-eighth part of all oil produced and saved from the leased premises."

The lease also contains another paragraph worded as follows:

"If the estate of either party hereto is assigned,and the privilege of assigning in whole or in part is expressly allowed, the covenants hereof shall extend to their heirs,executors,administrators successors or assigns,but no change in the ownership of the land or assignments of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof; and it is hereby agreed in the event this lease shall be assigned as to a part or parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of their proportionate part of the rents due from him or them,such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands which the said lessee or any assignee thereof shall make due payment of said rental."

Under the first clause,above quoted,the one eighth of the oil remained the property of the lessor after its delivery in the pipe line by the lessee or assignee unless the lessor had executed a division order or contract of sale by which the lessor sold and the pipe line company purchased the one eighth oil royalty. W.T.Waggoner Estate v Wichita County,3rd F.(2nd)962 and other cases hereinafter cited upon this and other propositions involved.

When the defendant accepted the assignment from Brinkman and entered into possession of said land under said lease and produced oil therefrom it became liable as assignee to comply with and carry out all the terms and conditions of the lease. The covenants for the payment of rents and royalties run with the land. Summers Oil & Gas Sec.194. Mills Law of Oil & Gas Sec.145. Ardizzonne v Archer,160 P.446.

Under the second clause, quoted from the lease above, it is provided that either lessor or lessee may assign his or its interest in whole or in part, the right or privilege to do so being expressly conferred by the clause quoted. An assignment or transfer is not binding upon the lessee or assignee until notified and furnished with a copy of the instrument of conveyance by the lessor or his assignee. It does not require the lessee or assignee of lessee to notify the lessor or assignee of lessor of a conveyance by the lessee. Such a clause is legal and valid, sustained by sufficient consideration and is not against public policy and the lessee or assignee is liable thereon after notice by lessor or assignee of lessor. Gypsy Oil Co v Sconwald,231 P.864, The principal point determined in the case last cited is that where the surface and mineral rights of the $W\frac{1}{2}$ of a 160 acre tract was conveyed the vendee had no right to participate in the oil royalties produced from the $E\frac{1}{2}$, as the 160 acre tract was not being developed as a unit. And again the mineral deed did not convey an undivided one half interest in the whole of the 160 acre tract but conveyed specifically the $W\frac{1}{2}$.

A conveyance of a portion or fractional part of the oil royalties, subject to a subsisting oil and gas lease, entitles the grantee to receive his proportionate share of rentals subsequently acruing under said lease. Wright v Carter Oil Co,223 P.835. It is also held in this case that bonus and delay rentals accruing after the mineral conveyance, following a decision of the United States Supreme Court, are payable to the grantee in the mineral deed.

The fact that the transfer orders executed by the plaintiffs and their vendors, dated February 19,1930, provided that beginning February 1st 1930, and continuing until further notice, defendant was authorized to purchase the royalty interests of the plaintiffs would not estop them from maintaining this action for prior unpaid royalties. The transfer or division orders do not purport to convey to defendant prior unpaid royalties and there is no consideration in the transfer orders for the sale of prior unpaid royalties. The only consideration in the transfer orders is for the sale of future accruing royalties after February 1st,1930.

That the liability of the assignee becomes that of the lessee is also declared to be the law in Mills Law Oil & Gas, Sec. 96 and Sec.140, and Summers Oil & Gas, Sec.194.

In Clark v Slick Oil Co,211 P.496 it was held by the Supreme Court of this State that under the clause requiring the delivery of the lessor's one eighth royalty oil in the pipe line that the lessor was the owner of the royalty oil after its delivery to the pipe line company and that the lessor was not precluded or estopped from demanding delivery of the royalty oil to the pipe line and for which he had not prior thereto accepted settlement in money. Such is also declared to be the rule in Sec.189, Summers Oil & Gas.

A division order is a contract of sale of the royalty oil by the owner thereof and purchase of same by the pipe line company. Texas Company v Pettit,220 P.956,961,962. In this case the division order was ante dated. It was also held that the vendor executing the division order was estopped from claiming a greater interest than that stated in the order. Amerada Petroleum Corporation v Melton,281 P.591,593. Elliott Jones & Company v Waurika Oil Association,253 S.W.601. Mills Law Oil & Gas, Sec.136.

The lessee or assignee of an oil and gas lease may pay the rents and royalties to the lessor until notified of a change of ownership as provided by the terms of the lease. After the notice same are to be paid in accordance with the notice. Dorman Farms Co v Stewart,247 S.W.778.

In this case the defendant,the assignee owner of the lease, was notified as required by the terms of the lease of the interests acquired by the plaintiffs. The defendant failed to notify the pipe line company of the purchase by the plaintiffs,and did not deliver plaintiff's royalty oil to the pipe line company, and thereby became liable to the plaintiffs therefor as provided by the terms of contract lease. The contention of counsel for the defendant that the remedy of the plaintiffs was by an action against the Carter Oil Company for conversion is untenable. The Carter Oil Company was not notified by the defendant of acquirement of plaintiffs' interests and received the oil under a division order signed by plaintiffs vendor and the defendant. Therefore,without without notice from the defendant,the Carter Oil Company was an innocent purchaser and not guilty of conversion. If the Court will read the division orders,dated August 4th and 11th,1928, it will be seen that the division orders only authorize the purchase until further notice. That being true,immediately upon the purchase by plaintiffs and their notice to defendant,it was the duty of the defendant to immediately revoke the division orders,or contracts of sale, and to deliver to the pipe line company plaintiffs' royalty oil or to account to plaintiffs for its value in money.

The lease contract providing that the lessee or assignee shall not become liable to an assignee of the lessor for royalties until notified of the change of ownership,and that upon notice of change of ownership the lessee or assignee of the lessee becomes liable to the assignee of the lessor is a liability arising upon a written contract,and an obligation or liability arising thereunder is not barred by the statute of limitations until 5 years have elapsed after the accrual of the cause of action thereunder, as provided by Sec.101,Sub-division 1,Laws Oklahom 1931.

The oral testimony of the plaintiffs showed that at or after the time of their purchase that the lands and lease were involved in litigation. There was no proof either by plaintiffs or defendant as to the date of the termination of the litigation. While the litigation was pending plaintiffs,who were not parties to the litigation,could not maintain an independent action for their interests,and their cause of action would not accrue until the determination of the litigation. Probstv Bearman,183 P.887,888, and paragraph 3 of the syllabus.

Plaintiffs petition upon its face does not show that plaintiffs cause of action was barred by the statute of limitations. The defendant affirmatively plead the defense of the statute of limitations. Alles & Boon v Grubbs,298 P.1050. There was no proof either by plaintiff or defendant as to the dates when the royalties sued for became due and payble or whether in a lump sum or separate items due on different dates. The only evidence introduced by either plaintiff or defendant was by agreement of the parties as to the total amounts. Where the statute of limitations is pleaded as an affirmative defense the burden of proving it is on the one who asserts it. Warner v Wickizer 294 P.130,Syllabus 1. Preston v Ed Hockaday Hardware Co,239 P.332,Syllabus 2. In the case of American Ins.Union v Jones,274 P.479,a case upon a written contract,a policy of insurance,the Court discussing the proposition that under the plea of the statute of limitation, the burden was upon the defendant to prove the exact date of the accrual of plaintiff's cause of action,and that the bar of the statute had elapsed prior to the institution of plaintiff's suit,holds:

"This suit was filed on September 27,1926,which was more than five years after the accident,but we can not say that it was more than five years after the loss of the use of plaintiff's leg.

The testimony seems to fix no definite date,and the Court by its general judgment found that the statute of limitations did not bar the action;and,this being a matter incumbent upon the defendant to show,we believe it failed to bring itself within the terms of the statute. The question of whether or not the statute of limitations applies is a question of fact in each case for the Court or jury,and,where there is any testimony reasonably tending to support the finding of the trial court,the same will not be distnrbed on appeal. We believe the testimony supports the finding of the trial court." The failure of the defendant to deliver to the pipe line company the oil royalty belonging to plaintiffs or to pay them its value,after plaintiffs had notified defendant and submitted to defendant the original deeds,constituted a breach of the terms of the oil and gas lease. A breach of the terms and conditions of a treasurer's bond has been held to be a cause of action arising upon a written contract and that the five year statute of limitations was applicable.National Surety Co,239 P.265,and paragraph 7 of the syllabus. State v McCurdy, 819 and paragraph 6 of the syllabus.Abernathy v State of Oklahoma, 31 F.(2nd)550, and paragraph 7 of the syllabus, and in which case the court further held that in view of the fact that the date of the accrual of the cause of action was not established by the record the court would not hold that the cause of action was barred. Home Gas Co of Cushing v Magnolia Petroleum Co,287 P.1033, paragraph 1 of the syllabus. Southern Surety Co v Dolese Bros. Co, 299 P.211,213,214,paragraph 3 of the syllabus and in which it is further held that several breaches of an entire contract constitute only one cause of action. This case would be applicable if there were any evidence in the record showing royalty payments due on different dates.

Brookshire v Burkhart,283 P.571 where the cause of action was fraudulently concealed from the plaintiff,the court held that defendant could not take advantage of its own wrong and plead the statute of limitations against plaintiff's action. The defendant can not negligently,after notice,fail to make proper notations upon its records and deliver plaintiff's oil thereafter produced to other parties,concealing same from the plaintiffs,and avail itself of the benefit of the statute of limitations.

Plaintiffs submit that they are entitled to judgment severally for the amounts shown to be due by the evidence.

All of which is respectfully submitted.

Cornelius Hardy

Attorney for Plaintiffs.