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Oil and Gas--Mineral Royalty Deed--Implied Condition That Temporary Cessation of Production After Fixed Term Does Not Terminate Right to Royalties

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type of legislation which is anticipatory in nature wherein the parties affected fully realize the results that will follow when the provisions of the Act are invoked against them. This, as previously noted, has given a measure of protection and advantage to one of the private parties rather than the public. The district courts are then called upon, apparently not to adjudicate the rights of the parties and to grant appropriate relief, but merely to "rubber stamp" administrative determinations. To forestall such results in the future it is suggested that the L.M.R.A. be amended. Massachusetts has enacted a type of legislation of an *ad hoc* nature which appears to produce a more desirable settlement of disputes affecting the public interest.

The Massachusetts legislation places the power of discretionary action upon the parties in dispute in the executive branch of the government. The legislation grants the governor wide discretion in approach to settlement, even to the extreme of government seizure. Under this legislative approach the parties in dispute do not anticipate the full import of their actions. Consequently, the vague threat of active government intervention, without warning, has proved conducive to speedy settlement of injurious strikes or lockouts. For a full discussion of this legislative approach, authored by the late Sumner Slichter of Harvard, see Schultz, *The Massachusetts Choice-of-Procedures Approach to Emergency Disputes*, 10 IND. & LAB. REL. REV. 359 (1956-57).

Until such time as Congress shall legislate a different approach in regards National Emergency disputes and concomitant protections of both the public interest and that of free collective bargaining, the mandate, once requisite findings are made, is upon the judiciary *to act* as surely as it is upon the interests limited by the issuance of the injunction *to acquiesce.*

C. H. H. II

OIL AND GAS—MINERAL ROYALTY DEED—IMPLIED CONDITION THAT TEMPORARY CESSATION OF PRODUCTION AFTER FIXED TERM DOES NOT TERMINATE RIGHT TO ROYALTIES.—Petitioners held a term royalty deed entitling them to mineral royalties for fifteen years and so long thereafter as minerals were produced in paying quantities. Paying production was continuous beyond the primary term, until two law suits between respondents and a certain lessee, plus concomitant mechanical failures, caused a cessation thereof for 174 days. Petitioners sued for a declaratory judgment that their

mineral royalty interest had not expired due to the temporary cessation of production. *Held,* in the absence of express provisions it was necessarily implied in the royalty deed that a temporary interruption of production would not terminate the interest. *Midwest Oil Corp. v. Winsauer,* 322 S.W.2d 944 (Texas 1959).

Because a review of the West Virginia cases has revealed no great amount of litigation concerning the particular type of royalty instrument in issue, a brief discussion of its nature and function may be helpful to set the perspective for what follows.

A term royalty deed conveys an interest in the gross production of a mineral tract, without the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under mineral leases executed by the owner of the mineral fee estate. For this reason the interest is commonly referred to as a non-participating royalty interest. It should be borne in mind that the owner of a mere royalty interest has neither a present nor a prospective possessory interest in the land; that he owns no part of the minerals (as such) in place and that he does not become a cotenant in the mineral estate. *Arnold v. Ashbel Smith Land Co.,* 307 S.W.2d 818 (Tex. Civ. App. 1957). The term royalty has thus been properly characterized as a right only to share in the royalties of existing or future leases, or as a right only to share in future production. Bliss, *Production Under Term-Royalty and Term-Mineral Deeds,* 36 Texas L. Rev. 486 (1958). The conveyance of royalty for a term may be in one of two forms: a fixed term only, or a fixed term and as long thereafter as minerals are produced in paying quantities. It was the latter type with which the court was concerned in the principal case.

The Texas court noted that there were no cases in its jurisdiction discussing the problem of temporary cessation of production after the fixed term, production being had within that term, under habendum clauses of term royalty *deeds.* But the dearth of cases exactly in point posed no great stumbling block for the court, for an easy resort was had to litigation involving the precise question in *leases;* consequently, the case has a dual effect. It constitutes a strong precedent for any future cases involving term royalty deeds with this point in issue and it amounts to an equally solid addition to the law that allows a bona fide temporary cessation of production under a lease without the severe result of termination of the lessee's estate.

Disregarding the fact that they applied to a term royalty deed rather than a lease (to both of which they are equally and properly applicable), the principles upon which the decision was based are certainly not unique. The discernible pattern in this area has been one of judicial mitigation of the harshness of automatic termination through construction and estoppel. SULLIVAN, OIL AND GAS LAW, § 43 (1955). Even though a literal interpretation of the habendum clause would dictate otherwise, it is now a well-established principle that a temporary cessation of production during the indefinite term owing to mechanical or physical difficulties does not terminate the lease. 2 SUMMERS, OIL AND GAS § 305 n.19 (2d ed. 1959).

Equally discernible is a pattern of judicial carelessness in the drive for liberal interpretations of habendum clauses. This carelessness stems from a failure to distinguish between cases involving temporary cessation of production during the indefinite term, production being had within the definite term (in which case the liberal treatment in favor of non-termination is justified) and, on the other hand, cases extending the lease into the indefinite term even though no production was had within the definite term. The necessity of making this distinction is of vital legal importance, as a brief resumé of West Virginia cases will show.

In two later West Virginia cases (to be discussed presently), *Ammons v. Toothman*, 59 W. Va. 165, 53 S.E. 13 (1906), has been cited as authority for the proposition that a temporary interruption after production in the primary term will not cause a termination of the right to oil royalties. In that case a producing well had been drilled within the specific term. After the expiration of the term, the well ceased to produce and the lessee diligently set to work to sink the well still deeper into another producing sand. There was an actual cessation of production, but no abandonment on the part of the lessee and, at heavy cost, the lessee proceeded to restore production; however, the relative worth of the case is questionable because the controversy arose between the land owners and the lessee's right to produce oil from the lower stratum was not litigated. The cases subsequent to *Ammons* are slightly more helpful.

In *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S.E. 961 (1912), oil was discovered within the fixed term, but production was in token quantities only. Nonetheless, the court held that the diligent efforts of the lessee in trying to increase production and in

trying to find other sources, continued the lease in force after the primary term and that the failure to produce in the indefinite term did not constitute a termination. The clause "as oil or gas is produced" was interpreted in light of the entire lease to mean "as long as the premises are diligently and efficiently operated, provided minerals shall have been discovered within the fixed term." Representing what seems to be the outside limit in construction, the court at 457 stated that: "'Produced,' 'produced in paying quantities' and 'found in paying quantities' must mean about the same thing, else substance will be subordinated to shadow or mere technicality."

Anderson v. Schaffner, 90 W. Va. 225, 110 S.E. 566 (1922), while holding that absolute cessation terminated the lease in question, admitted that non-compliance therewith was excused when a high degree of diligence was exercised by a lessee under circumstances presumed to have been foreseen and contemplated by the parties.

The West Virginia cases just discussed are the representative ones in support of the doctrine of the principal case—that a temporary interruption during the indefinite term, production having been had within the fixed term, will not cause a termination of the lease. Admittedly they are not as strong as one might desire, but they at least show the tendency of the court. Now the discussion turns to cases where judicial interpretative liberalism is manifested with at least one important fact difference—there was no production within the primary term. The results in these cases are the same—continuance of the lease—but the foundations upon which these results must rest are of questionable validity.

In *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S.E. 836 (1908), the lessee started drilling operations two months before the end of the fixed term and, about one month later, struck a gas well with substantial producing potential; however, the lessee decided to drill more deeply, but struck no more gas until one day after the expiration of the fixed term. It was held that the discovery of the gas in the upper stratum created a vested estate in the lessee, which estate was not lost by further drilling without production. The lessor's employees had interfered with the operation during the initial term. How much influence this interference had in the outcome of the case is purely a matter of conjecture.

McGraw Oil Co. v. Kennedy, 65 W. Va. 595, 64 S.E. 1027 (1909), concerned a lease for five years and as long thereafter as

there was production. A large gas well was drilled within the fixed term but the gas was not marketed owing to the lack of a pipe line, and the well was capped. Subsequently the lessor accepted seven payments of the annual rental. The court held that a capped well was equivalent to a producing well so long as the flat well-rentals were paid. A similar result was reached where the lessee shut off the gas for want of a market. *McCutcheon v. Enon Oil and Gas Co.*, 102 W. Va. 345, 135 S.E. 238 (1926).

A federal case in this area, *Hutchinson v. McCue*, 101 F.2d 111 (4th Cir. 1939), refused to follow the trend of the West Virginia cases, although it purported to follow local law in its decision. In that case, three producing wells ceased operating three years before the end of the term. Three of the lessor's heirs rejected tenders of rent and sought cancellation. It was held that the lease had terminated as to the three malcontents. The decision has been strongly criticized, Williams & Goodwin, *Oil and Gas Law in the Federal Court*, 46 W. Va. L. Q. 154 (1940), but there is ample room for arguing that the decision was grounded upon permanent, rather than temporary, cessation and from this point of view is not at variance with local law.

The latter West Virginia cases stand for the proposition that payment of rentals or mere discovery of oil or gas are sufficient to vest an estate in the lessee and thus extend the lease. But there is no ambiguity in the clause "is produced" and the failure to have "produced" should preclude any vesting. The difference in the two sets of cases is that in the former, estates have vested through production in the primary term whereas in the latter the necessary condition precedent for vesting has not occurred. In one, continuance of the vested estate in the face of temporary interruptions is quite proper, the only problem being a question of fact, i.e., is the interruption really temporary? In the other, there is actually no estate to be continued. Cognizance has been taken of this disparity in a most incisive manner in DONLEY, THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA §§ 70, 72 (1951). But as so often happens, salient criticism to the contrary, the cases represent the law in this jurisdiction. And, notwithstanding their incongruities, they serve as a good indication that our court would have little difficulty in reaching the conclusion of the principal case on similar facts.

E. P. K.