

February 1950

The Drilling Clause in Oil and Gas Leases in West Virginia

Robert Tucker Donley

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Robert T. Donley, *The Drilling Clause in Oil and Gas Leases in West Virginia*, 52 W. Va. L. Rev. (1950).

Available at: <https://researchrepository.wvu.edu/wvlr/vol52/iss2/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

THE DRILLING CLAUSE IN OIL AND GAS LEASES
IN WEST VIRGINIA*

ROBERT TUCKER DONLEY**

INTRODUCTION

The Drilling Clause. The purpose of the drilling clause is to secure prompt exploration and testing of the land or, in lieu thereof, the lessee's obligation for payment of a stipulated sum (called delay rental or commutation money) to the lessor for the privilege of deferring drilling for an agreed period—in which case it is denominated the “drill or pay” type of clause. The consequences of the lessee's failure to do either will be discussed in subsequent sections. The second—and perhaps now the more commonly used—type of drilling clause is the “unless” provision, whereby the lessee does not obligate himself either to drill or to pay delay rental, but his failure to do either results in the automatic termination of his exploratory privileges; the lease comes to an end. It is therefore apparent that with this type of clause the lessee does not need the protection of a surrender clause in order to escape liability for failure to drill. He may simply do nothing and let his leasehold estate terminate and there is an end to the relationship between the parties. However, in the drill or pay type of clause, the lessee does need the device of a surrender clause in order that he may avoid liability for nonperformance of either of his alternative promises where it appears that the field is a nonproductive one. With either type of clause the lessor is protected, but not in quite the same way. In the former, he is assured either that his land will be tested or that he will receive compensation in lieu thereof; and in addition, it is common to add the protection of a forfeiture clause¹ enabling the lessor to declare a termination of the lease for failure either to drill or to pay. In the unless type, he is assured either that his land will be tested or that it will be freed of the lease.

* This article is the tentative draft of a chapter in a book now in the course of preparation by the author, on the West Virginia Law of Coal, Oil and Gas. Copyrighted, 1950, by Robert T. Donley.

** Professor of law, West Virginia University; member of the Monongalia County bar.

¹ In the absence of a forfeiture clause in a drill or pay type, the lessee may lose his rights under the doctrine of abandonment, *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1005 (1910). But in the absence of a forfeiture clause the lease cannot be forfeited merely for nonpayment of delay rental; there must be either surrender, abandonment or expiration of the term. *Reserve Gas Co. v. Carbon Black Mfg. Co.*, 72 W. Va. 757, 79 S. E. 1002 (1913).

The Drill or Pay Clause. In ordinary leases, upon the completion of a producing well, the drilling clause is eliminated from further consideration; it has served its purpose. However, in *Engel v. Eastern Oil Co.*,² it was provided that "The completion of a well shall stop the [delay] rental only on one-third of this tract of land, and it is further agreed that if the [lessees] fail to pay rental as and when due, this lease shall become null and void." After the completion of a well, the lessees innocently failed to pay the reduced delay rental in advance for two quarters, and the lessor refused a later tender thereof and sued in equity to enforce the forfeiture. Relief was denied, it being held that upon discovery of gas the lessees acquired a vested estate; that a court of equity will not enforce a forfeiture of a vested estate merely for failure to pay rent when the default is not wilful and application for relief (by way of the lessee's answer, offering to pay past-due rentals with interest) is seasonably made.

In addition, the court stated (although not embodied in the syllabi) that the lessor had a statutory remedy for the enforcement of a forfeiture,³ and that the lessee had a statutory remedy for relief against such forfeiture.⁴ Assuming that this statement is a binding precedent,⁵ it would seem that the provisions of the statute, quoted in the footnotes, are certainly broad enough to cover cases in which there has been no discovery of mineral and the lessee is either wilfully, or nonwilfully, at fault in failing to pay delay rentals. If so, the "vested estate" doctrine of the *Engle* case was not necessary to

² 100 W. Va. 301, 130 S. E. 491 (1925). *Accord*, where lessee drilled producing well: *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363 (1892).

³ W. VA. CODE c. 37, art. 6, §19 (Michie, §3669): "Any person who shall have the right of reentry into the lands by reason of any rent issuing thereout being in arrear, or by reason of the breach of any covenant or condition, may serve a declaration in ejectment . . . or may commence an action of unlawful detainer . . . and recover judgment." Service of process, in person or by publication, "shall be in lieu of demand and reentry."

⁴ W. VA. CODE c. 37, art. 6, §20 (Michie, §3670); "Should the defendant . . . not pay the rent in arrear, with interest and costs, nor file a bill in equity for relief against such forfeiture, within twelve months after execution executed, he shall be barred of all rights, in law or equity, to be restored to such lands or tenements." Section 22 provides that the lessee shall not be entitled to enjoin the lessor's action of ejectment or of unlawful detainer unless, within thirty days after the filing of the lessor's answer, he deposits the sum claimed to be in arrear. Section 23 provides that the lessee may stop the proceeding in ejectment or in unlawful detainer at any time before trial by paying or tendering the rent and arrears, with interest and costs.

⁵ In *Beech Fork Coal Co. v. Pocahontas Corp.*, 109 W. Va. 39, 45, 152 S. E. 785 (1930) it was said: "This right of relief from a forfeiture for failure to pay the rent in arrear is also specifically recognized in section 17, Chapter 93 of the Code."

its decisions. Moreover, if the statement is sound law, the consequence is that it is impossible in West Virginia (but for the recently enacted statutory method of cancellation, hereinafter discussed) to draft a drill or pay clause, the nonperformance of which will result in termination of the lease beyond the power of the lessee to reinstate it. If so, from the standpoint of the lessor, the unless type of clause may be preferable because nonpayment of delay rentals results in the extinction of the lease; there is no forfeiture to enforce or to relieve against. Which type the lessor should choose will probably depend upon whether he is primarily interested in receiving the delay rentals, or in having his land promptly tested.

Relief from Forfeiture—Effect of Statute. But it is by no means clear that an oil and gas lessee is in every instance, and irrespective of the circumstances, entitled to relief, under the statute, by paying or offering to pay the past-due delay rentals. The statute is an old one, enacted before the development of the oil and gas industry and has been but slightly modified by the 1931 Code. Its application was denied in *Hukill v. Guffey*.⁶ The facts were that, in a former case,⁷ a lease provided that the lessee should commence operations within nine months or thereafter pay to the lessor \$1.33-1/3 per month until work was commenced, and that a failure to do either should work an absolute forfeiture of the lease. Upon the nonperformance by the lessee, the lessor executed a new lease. The second lessee obtained judgment in an action of unlawful detainer against the first lessee. Then, within one year after this judgment, the first lessee instituted a suit in equity against the second lessee praying for an injunction restraining execution of the writ of possession issued on the aforesaid judgment in unlawful detainer, and for relief from the forfeiture of the first lease. It was held that the *fact* of the forfeiture was *res judicata* and could not be relitigated in the equity suit, and—more important to the present discussion—that “under the circumstances of the case, the senior lessee, and those claiming under him, are not entitled to be relieved against the forfeiture by paying [the past-due delay rentals]. The damages to be looked to are the damages resulting from the breach of the covenant to bore for oil, and not the failure to pay one dollar and thirty-three and one-third cents per month in lieu thereof; and the damages resulting from the failure to do the specified things, viz., to bore for oil, not

⁶ 37 W. Va. 425, 16 S. E. 544 (1892).

⁷ *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754 (1890).

being susceptible of pecuniary measurement, and therefore not compensable, the relief from such forfeiture is denied.”

The leased land was in a highly productive field and the court pointed out that if a well had been drilled the lessor might have obtained royalties amounting in one day to the entire delay rental for one year; and the lessee “cannot base his claim to relief from forfeiture by asking a court of conscience that it may be done by the enforcement of the *quasi* penalty of making the lessor take the unsubstantial alternative commutation money because it is so contracted for in the forfeited lease which he wishes to restore to life on equitable grounds.”

The *Hukill* case stands unreversed and unmodified by any later decision of the court.⁸ It was not cited in the *Engle* case which rather casually, even cavalierly, stated without limitation or qualification that statutory relief from forfeiture is a remedy available to the lessee. It will be noted that the statute is phrased negatively,⁹ *i.e.*, it does not provide that if the lessee pays the rent in arrears, or files a bill in equity, he will thereupon be entitled to relief; but that if he does neither he shall be barred of any right to relief. Thus, it is possibly little more than a statute of limitation, leaving the substantive ground of relief to be determined in accordance with equitable principles generally. Nor, does Section 22 purport to confer affirmatively any unequivocal right to equitable relief, but merely to set forth certain conditions precedent to the granting of it.¹⁰ But Section 23 does confer upon the lessee the right to stop the lessor's action of ejectment or of unlawful detainer at any time before the trial.

The conclusion which seems to follow from these considerations is that with the exception of the instance last mentioned, (subject to the statute hereinafter discussed) there is no absolute, unqualified right conferred upon the lessee by the statute to relief against a forfeiture for nonpayment of delay rentals in a lease containing the drill or pay clause. In all other cases, the relief is dis-

⁸ On the contrary, this point of the syllabus has been cited with approval in *Pyle v. Henderson*, 55 W. Va. 122, 125, 46 S. E. 791, 792 (1903); *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 542, 64 S. E. 836, 841 (1909); *Cales v. Ford*, 126 W. Va. 158, 168, 28 S. E.2d 429, 434 (1943).

⁹ *Supra* note 4.

¹⁰ *Id.* This conclusion is further supported by the last sentence of Section 23: “If the person claiming the land shall, upon bill filed as aforesaid, be relieved in equity, he shall hold the land as before the proceedings began, without a new lease or conveyance.” (Italics supplied).

cretionary with the court. Consequently, the statement made in the *Engle* case is not accurate.

Statutory Method of Cancellation for Nonpayment of Delay Rental. The potentialities of the situation above discussed whereunder the lessor may find that he cannot write a drill or pay type of lease in language effective to accomplish his purpose, *viz.*, to destroy irrevocably the right of the lessee by reason of nonpayment of delay rentals, were doubtless part of the background which led to the enactment of a statute in 1943,¹¹ amended in 1947.¹² This statute provides that, "Except in the case where operations for the drilling of a well are being conducted thereunder, any undeveloped lease for oil and/or gas in this State hereafter executed in which the consideration therein provided to be paid for the privilege of postponing actual drilling or development or for the holding of said lease without commencing operations for the drilling of a well, commonly called delay rental, has not been paid when due according to the terms of such lease, or the terms of any other agreement between lessor and lessee, shall be null and void as to such oil and/or gas unless payment thereof shall be made within sixty days from the date upon which demand for payment in full of such delay rental has been made by the lessor upon the lessee therein, as hereinafter provided, except in such cases where a bona fide dispute shall exist between lessor and lessee as to any amount due under such lease.

"No person, firm, corporation, partnership or association shall maintain any action or proceeding in the courts of this State for the purpose of enforcing or perpetuating during the term thereof any lease heretofore executed covering oil and/or gas, as against the owner of such oil and/or gas, or his subsequent lessee, if such person, firm [*etc.*] has failed to pay to the lessor such delay rental in full when due according to the terms thereof, for a period of sixty days after demand for such payment has been made by the lessor upon such lessee, as hereinafter provided." The statute then provides for demand to be made by notice in writing which may be executed by personal service or, in certain instances, by publication. A copy of the notice showing service is then to be filed in the county clerk's office, and as to leases "hereafter executed" the clerk shall stamp upon the margin the words "cancelled by notice", and as to leases executed prior to the passage of the act, the words "enforcement barred by notice."

¹¹ W. Va. Acts 1943, c. 63, W. VA. CODE c. 36, art. 4, §9(a) (Michie, 1949).

¹² W. Va. Acts 1947, c. 93. See Note, Williams, 49 W. VA. L. Q. 156 (1943).

The act concludes: "The continuation in force of any such lease after demand for such failure to pay such delay rental as hereinbefore set forth is deemed by the legislature to be opposed to public policy and against the general welfare. If any part of this act should be declared unconstitutional such declaration shall not affect any other part thereof."

It will be observed that no distinction is made between the "unless" type and the drill or pay type of drilling clause, and, it is submitted, that in so far as the object of the act is to remove the lease as a cloud upon the record title of the lessor, none should be made. But, in so far as termination is concerned, the statute is inapplicable because the "unless" lease automatically expires upon mere failure to pay the delay rental. *Query*, then, in view of the declared purpose of the legislature, does the statute apply at all to "unless" leases? If not, then they would not be cancellable of record. However, the declared primary object is, as above stated, to prevent the continuation of the lease, and, it would appear, only secondarily to clear the record.

The constitutionality of the act, as applied to leases executed before its enactment, is certainly open to serious doubt. If, under the above mentioned provisions of the Code, in the light of the statement contained in the *Engle* case, the lessee had, prior to the passage of the act, a right to relief against forfeiture, it is by no means plain that the doctrine of *Le Sage v. Switzer*,¹³ would not apply. In that case, the court does discuss a distinction between legislation which affects the *obligation* of a contract and that which affects existing *rights of court action*.

It will be noted that in the statute under discussion, the first paragraph declares the lease to be void, and the next prohibits any action or proceeding for its enforcement or perpetuation—intending, probably, to take advantage of the distinction suggested in the *Le Sage* case, and to hook the lessee upon one horn if he escape the other one.

On the other hand, if the statute is upheld as to leases made before its enactment (and there is no doubt of its validity as to leases made thereafter) the law will be settled that the lessor can irrevocably enforce a forfeiture for nonpayment of delay rentals. This

¹³ 116 W. Va. 657, 182 S. E. 797 (1935), holding unconstitutional W. VA. CODE c. 55, art. 2. §5 (Michie, 1949), invalidating vendor's liens, deeds of trust, and mortgages after twenty years from the maturity of the debt secured thereby, in so far as purporting to apply to such liens created prior to the passage of the act.

would seem to be a definite gain both from the standpoint of public policy and from that of the lessor in removing the uncertainties of the law, heretofore pointed out, and in affording a simple method of clearing his record title.

Payment of Delay Rentals. Oil and gas leases commonly provide that the delay rentals may be paid either to the lessor or deposited to his credit in a named bank. In the latter case, the bank is considered the agent of the lessor and the lessee is not responsible for the disposition thereof by the bank; nor is the payment ineffectual because accompanied by a receipt to be signed by the lessor if such signature is not made a condition precedent to the crediting of the lessor's account.¹⁴ The payment may be made either in currency or by check or draft or otherwise.¹⁵ If a blank space is left for insertion of the number of days or months for completion of a well before the delay rental becomes payable, testimony of the parties is admissible and the finding of the trial chancellor will not be disturbed unless plainly erroneous.¹⁶ Where a senior lease has been avoided by the execution of a junior lease and the senior lessee thereafter pays delay rentals to the lessor with full knowledge of the facts, he is not entitled to receive the royalties, either at law or in equity.¹⁷

Methods of Enforcing Forfeiture under Drill or Pay Clause. Although there is no right of re-entry reserved, if the lessee has failed either to drill or pay and the lease provides that such failure shall forfeit the lease, the lessor may enforce such forfeiture by the execution of a new lease to a third party, which is a sufficient declaration of forfeiture without demand and re-entry; and the second lessee may maintain an action of unlawful detainer against the first lessee.¹⁸ But where such second lease bears an endorsement: "This lease to be taken subject to [first lease]", the execution of the second lease is not an unequivocal declaration of a forfeiture of the first

¹⁴ Lovett v. Eastern Oil Co., 68 W. Va. 667, 71 S. E. 250 (1911); Yoke v. Shay, 47 W. Va. 40, 34 S. E. 748 (1899).

¹⁵ Friend v. Mallory, 52 W. Va. 53, 43 S. E. 114 (1902).

¹⁶ Yoke v. Shay, *supra* note 14.

¹⁷ Eclipse Oil Co. v. Garner, 53 W. Va. 151, 44 S. E. 131 (1903).

¹⁸ Guffey v. Hukill, 34 W. Va. 49, 11 S. E. 754 (1890), distinguishing Bowyer v. Seymour, 13 W. Va. 12 (1878), upon the ground that there the coal lease created a freehold estate which, at common law, could not be forfeited except by demand and reentry. This rule is now changed by W. VA. CODE c. 37, art. 6, §19 (Michie, 1949), quoted, in part *supra* note 3.

one.¹⁹ And, whether the second lease is a declaration of a forfeiture depends upon the intention of the lessor, it being permissible to show a conditional delivery thereof, *i.e.*, that it was not to become effective if the first lessee objected.²⁰ Sometimes the rule of forfeiture by second lease is confused with abandonment of the lease by cessation of operations for an extended period of time.²¹ No relief from forfeiture by second lease will be granted in equity if sought after an unreasonable delay or if the rights of an innocent third party have intervened.²²

As a matter of interpretation, a clause providing that "the failure to complete a well upon the said premises within the time specified or to pay the rentals at the time and in the manner provided shall ipso facto work a forfeiture of this lease without notice," relates only to delay rentals and not to gas well rental or royalties.²³

Duty to Pay Delay Rental. Drill or Pay Clause. It is evident that the drill or pay clause is simply an instance of a promise in the alternative whereby the lessee promises that he will do one of two things, *viz.*, either commence (or complete) a well within a stipulated period of time, or, thereafter pay rental until it is commenced (or completed). It follows, of course, that he is liable for breach of contract in failing to do either and consequently it is uniformly held that until surrender by the lessee, the lessor may recover the amount of the delay rentals in an action of covenant, assumpsit or other appropriate form of contractual remedy²⁴; and this is irrespective of the presence of a forfeiture clause, which is a condition inserted for the benefit of the lessor which he may waive²⁵. It is

¹⁹ *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501 (1890). Parol evidence of the meaning of such endorsement was held inadmissible, but there may be taken into consideration the situation of the parties and the surrounding circumstances.

²⁰ *Thomas v. Hukill*, 34 W. Va. 385, 397, 12 S. E. 522, 526 (1890), distinguishing *Guffey v. Hukill*, *supra* note 18.

²¹ *Sult v. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307 (1908).

²² *Westerman v. Dinsmore*, 68 W. Va. 594, 70 S. E. 707 (1911); note, however, that here the lessor executed the second lease and notified the first lessee of that fact *after* the lessee had tendered payment of the past due rental.

²³ *Castle Brook Carbon Co. v. Ferrill*, 76 W. Va. 300, 85 S. E. 544 (1915).

²⁴ *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95 (1898). The provisions of this lease were contradictory, first stating that if the lessee failed to pay delay rentals no right of action should accrue to either party. This was followed by a surrender clause. The court properly held that this was nonsensical since the only object of the surrender clause is to enable the lessee to avoid liability for further rentals. *Accord*, as to right to recover delay rentals: *Weaver v. Akin*, 48 W. Va. 456, 460, 37 S. E. 600, 602 (1900) *semble*.

²⁵ Similarly a clause in a coal lease providing for forfeiture may be waived by the lessor, *Hamrick v. Nutter*, 93 W. Va. 115, 116 S. E. 75 (1923).

immaterial that the lessee does not enter upon the land within the term fixed for completion of the well unless prevented from doing so by the lessor.²⁶

Defenses of Lessee. If the lessee cannot safely enter because of a defect in the lessor's title, he may defeat recovery of delay rentals even though he has failed to surrender the lease.²⁷ Where a receiver is appointed for the lessee, such receiver has a reasonable time after his appointment either to accept or to surrender the lease, and if he elects the latter the delay rentals accruing under the unoperated and undeveloped lease cannot be paid as operating expenses of the receivership; and, in the absence of special equities, the lessor is not entitled to priority over other lienors for rentals accruing between the date of the appointment of the receiver and the date of the surrender of the lease.²⁸

A statement by the lessor's heir, made to an assignee of the lease that all prior delay rentals had been paid, prevents declaration of a forfeiture for nonpayment of such rentals.²⁹ When the lessor consents that the delay rental need not be paid when due, he may not enforce the forfeiture clause, and after such rental has accrued and is unpaid, if the lessor having knowledge thereof, receives the rentals, he waives the right to enforce the forfeiture.³⁰ So also, where a married woman's lease is invalid, acceptance of delay rentals after becoming *sui juris* prevents her from repudiating it.³¹

In an action of assumpsit to recover delay rentals under a lease executed by a husband and wife, both must be joined as plaintiffs, and there must be either a special count or a common count suitable to the case.³² The lessor may be estopped by statements that accrued rentals have been paid and by acceptance of a smaller sum than stipulated in the lease.³³

An unusual clause is found in *Hefner v. Light, etc. Co.*,³⁴ which provided that the lessee shall complete a well within a stipu-

²⁶ *Lawson v. Kirchner*, 50 W. Va. 334, 40 S. E. 344 (1901); and the burden of proving lack of title is upon the lessee, *Addison v. Downing Gas Co.*, 120 W. Va. 401, 198 S. E. 131 (1938).

²⁷ *Hager v. Wolfe*, 111 W. Va. 449, 162 S. E. 481 (1932).

²⁸ *Waddell v. Shelton Gasoline Co.*, 101 W. Va. 468, 133 S. E. 75 (1926).

²⁹ *Monarch Gas Co. v. Roy*, 81 W. Va. 723, 95 S. E. 789 (1918).

³⁰ *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151 (1892); *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762 (1909).

³¹ *Hanley v. Richards*, 116 W. Va. 127, 178 S. E. 805 (1935).

³² *Sandusky v. West Fork Oil Co.*, 63 W. Va. 260, 59 S. E. 1082 (1907).

³³ *Monarch Gas Co. v. Roy*, 81 W. Va. 723, 95 S. E. 789 (1918).

³⁴ 77 W. Va. 217, 87 S. E. 206 (1915).

lated period or if not then completed pay \$225.00 quarterly thereafter until oil is produced; and if no well is drilled the lessee shall pay to the lessor \$1,000.00. The lease was dated January 18, 1902, and was for the term of ten years with the usual thereafter clause. The assignee of the lessee paid delay rentals to October 18, 1910, and at the expiration of the lease on January 18, 1912, no other covenants had been performed. The assignee offered to surrender the lease on October 24, 1910, at which time the delay rental which was due six days before was unpaid. It was held that the promise to pay delay rentals was independent of the promise to pay \$1,000 if no well was drilled, wherefore, payment of the former does not excuse nonpayment of the latter, and the lessor was entitled to recover rentals maturing between October 18, 1910, and January 18, 1912, plus the \$1,000.00. The lessor was justified in refusing to accept an instrument of surrender so worded as to discharge the assignee of all liability under the lease.

Recovery of Rentals Paid by Lessee. If the lessor's title to the whole leased tract is defective the lessee who pays delay rentals without knowledge of the facts rendering it so defective may recover them.³⁵ However, in order to justify recovery there must have been a total failure of consideration, and thus if the lease purports to cover 288 acres but the lessor owns only an undivided half interest in the oil under 67 acres, the lessee cannot recover upon a declaration in assumpsit containing only the common counts and a special count alleging total failure of consideration.³⁶ But recovery can be had upon a special count alleging partial failure of consideration, of such proportion of the total delay rental paid as the lands as to which title was defective bears to the total acreage leased.³⁷

The Unless Clause. The distinctive feature of the unless drilling clause is that the lessee does not promise to do anything. The provision is that unless he commences (or completes) a well within a stipulated period or pays delay rental, the lease shall come to an end. Consequently, failure to do either simply terminates the leasehold estate and the lessee is not liable for payment of the delay rentals.³⁸

³⁵ Gaffney v. Stowers, 73 W. Va. 420, 80 S. E. 501 (1913).

³⁶ The Philadelphia Co. v. Shackelford, 83 W. Va. 280, 98 S. E. 568 (1919).

³⁷ Hope Natural Gas Co. v. Jarvis, 88 W. Va. 396, 106 S. E. 889 (1921).

³⁸ Snodgrass v. South Penn Oil Co., 47 W. Va. 509, 35 S. E. 820 (1900), approved in Weaver v. Akin, 48 W. Va. 456, 37 S. E. 600 (1900); Smith v. South Penn Oil Co., 59 W. Va. 204, 53 S. E. 152 (1906), holding that if, after drilling an unproductive well the lessee is permitted, without further payments, to drill another, he is not liable in an action of assumpsit for use and occupation measured by the amount of the delay rentals; nor for the delay rentals as such.

The failure to observe this distinction has resulted in loose and inaccurate expressions in some of the cases.³⁹ In *Pyle v. Henderson*,⁴⁰ it was urged by counsel, quite correctly, that there is no such thing as the "forfeiture" of an unless lease, and that the only way in which to extend it is by the execution of a new lease. The very able Judge Brannon said "this distinction is quite refined and unpractical", and proceeded to treat the lease as one of the drill or pay type in which the lessor could waive a forfeiture—a plainly erroneous conclusion. In *Weaver v. Akin*⁴¹ it was provided that if no well is commenced within thirty days from date the lease should become void unless the lessee paid \$300.00 annually for each year thereafter that such completion is delayed. The court said that the lease, after the expiration of the thirty-day period was "a mere option determinable at the will of the lessor . . . the lessor could void it at his pleasure . . . As long as the rent was paid the lease would run. To destroy its optionary character the rent must be paid in advance." This statement is obviously erroneous, for if the rental were not paid in advance the leasehold estate would instantly be wiped out; the lessor would have no option to keep it alive at his pleasure. Any future dealings between the parties would be simply a verbal arrangement or oral lease which, as elsewhere pointed out, is now ineffective under the Statute of Conveyances.⁴²

To Whom Delay Rentals Are Payable. If one cotenant executes a lease purporting to cover the whole of the commonly owned property, his cotenants are not entitled to share in the delay rentals paid by the lessee unless they ratify or acquiesce in the lease; and a demand for discovery and accounting does not amount to such ratification.⁴³ It has been held that the grantee of an undivided interest in oil and gas which is then subject to a lease, and who was also granted the right to lease the entire tract and to receive all delay rentals accruing under subsequent leases, cannot even by express language assign such right to a third person.⁴⁴ This decision is criticized elsewhere.⁴⁵ Where lands are subject to oil and gas leases

³⁹ In *Henne v. South Penn Oil Co.*, 52 W. Va. 192, 43 S. E. 147 (1902), the court speaks of the forfeiture clause in a case involving an "unless" drilling clause.

⁴⁰ 65 W. Va. 39, 63 S. E. 762 (1909).

⁴¹ 48 W. Va. 456, 460, 37 S. E. 600, 602 (1900).

⁴² The analysis of this point is beyond the scope of this article.

⁴³ *McNeely v. South Penn Oil Co.*, 58 W. Va. 438, 52 S. E. 480 (1905); *Patterson v. Clem*, 79 W. Va. 666, 91 S. E. 654 (1917); *Lewis, Adm'r v. Milam*, 113 W. Va. 549, 169 S. E. 70 (1933).

⁴⁴ *Rawling v. Fisher*, 101 W. Va. 253, 132 S. E. 489 (1926).

⁴⁵ The discussion of this case is beyond the scope of this article.

executed by a personal representative pursuant to the authority of a will, and the devisees convey undivided interests in royalties and for a period of twenty-two years the grantees thereof accept royalties and make no claim to delay rentals, they are estopped to make such claim.⁴⁶ Where the lessee's promise to pay delay rentals is made to the husband and wife as lessors, even though she has but an inchoate dower interest, it is a promise to joint obligees and she must be made a party plaintiff in an action to recover such rentals.⁴⁷ In a case involving a lease to mine sand, it was provided that if the mining ceased for a period of two years at any time or if the lessee failed to pay \$100.00 annually, which was to be deducted from the first royalty, the lease should be void. The lessor thereafter contracted to convey the land reserving the rents and profits until a specified date. It was held that a tender of the "rent" to the lessor within such period of time was sufficient.⁴⁸

What Is "Commencement" of a Well. A lease provided that the lessee would commence "operations" for a test well within one year and complete the same within 18 months from such commencement, and in the event that the lessee failed "to so commence and complete said test well, the lease shall be forfeited." Before the expiration of the one-year period the lessee located the well, hewed the timbers which were afterward used in building the derrick, contracted for the drilling and ordered machinery to be hauled to the location, but neither the timber nor the machinery were delivered there before the expiration of the year by reason of the impassable condition of the roads. The well was completed within 18 months from the date of the lease. It was held that the lessee could not be ejected from the premises; that "commencement"

⁴⁶ Guffey Oil & Gas Royalties, Inc. v. Marshall, 109 W. Va. 180, 153 S. E. 291 (1930).

⁴⁷ Sandusky v. Oil Co., 73 W. Va. 260, 59 S. E. 1082 (1907); cf. Bowen v. W. Va. Gas Corp., 121 W. Va. 403, 3 S. E.2d 629 (1939); cf. Freeman v. Swiger, 83 W. Va. 425, 98 S. E. 440 (1919), where the principle of joint obligation is applied to the contract of a husband and wife to execute a lease. See also Allen v. South Penn Oil Co., 72 W. Va. 155, 77 S. E. 905 (1913), holding that a deed by husband and wife conveying oil and gas and providing for payment to the "grantor" in the future, of part of the purchase money, creates a joint obligation.

⁴⁸ Pheasant v. Hanna, 63 W. Va. 613, 60 S. E. 618 (1908). The payment was called "commutation" money by the court. Query, whether it was not simply minimum royalty with a condition of forfeiture attached? Cf. Sun Lumber Co. v. Nelson Fuel Co., 88 W. Va. 61, 106 S. E. 41 (1921), payment to grantor of timber for privilege of extending right to remove it, held sufficient where land had been conveyed to third party without the knowledge of the grantee.

does not require the actual penetration of the strata by the drill where the lessee is required to commence "operations."⁴⁹

What Is "Completion" of a Well. Drilling clauses, whether in the "unless" type of lease or in the drill or pay type, quite commonly provide that a well must be completed within a specified time. No decision has been made in West Virginia upon the precise point. However, it has been held that under a drilling contract the sinking of a well to a specified sand is a completion within the meaning of the contract, and that where the language of a written guaranty of the contract is ambiguous, parol evidence is admissible to show that the words "completion of a well now drilling" were not meant to include extra work done after reaching the stipulated sand.⁵⁰ And, in an agency and option contract authorizing sale or purchase of property at an agreed price until a well then being drilled was "drilled in and completed", the time limit extends to the time immediately before the drilling in and completion of such well into and through all the oil and gas bearing sands in the vicinity of the well; the words "drilled in" and "completed" being synonymous.⁵¹

Effect of Completion of an Unprofitable Well. In *Steelsmith v. Gartlan*⁵² a lease for a term, of five years and as long thereafter as oil or gas is produced in paying quantities, provided that in the event no well was completed within one month the lease should be void unless the lessee paid \$50.00 per month rental in advance until a well was completed. Within two months the lessee drilled a well to a depth of 180 feet and found no oil or gas, following which he removed the tools, left the property and discontinued the monthly payments. It was held that the lease had terminated. The result is quite sound in view of the abandonment of the lease. But the court seemed to interpret the lease as requiring such a decision in order to avoid the conclusion that, otherwise, the lessee could complete an unproductive well and then continue to hold the premises for the remainder of the five-year term without doing anything more. This would not follow because of the implied obligation of the lessee fully to develop the property.

⁴⁹ *Fleming Oil & Gas Co. v. South Penn Oil Co.*, 37 W. Va. 645, 17 S. E. 203 (1893).

⁵⁰ *Henderson v. Kessel*, 93 W. Va. 60, 116 S. E. 68 (1923).

⁵¹ *Chambers v. Simmons*, 76 W. Va. 174, 85 S. E. 182 (1915).

⁵² 45 W. Va. 27, 29 S. E. 978 (1898).

In *Parish Fork Oil Co. v. Bridgewater Gas Co.*,⁵³ a fifteen-year term drill or pay type of lease provided that when the first well was completed, then all delay rentals should cease. The court questioned whether this provision means "that such cash rental shall cease only when a *producing* well is completed and *operated* on the premises, or that the completion of a nonproducing well extinguishes the obligation to pay rent and places the lease within the principle announced in *Steelsmith v. Gartlan*." It was decided that the latter interpretation was the correct one; that if the parties intended that a producing well was necessary in order to terminate the delay rental they should have expressly so stated. It is obvious that the completion of a producing well *ipso facto* ends the obligation to pay delay rental; therefore, there would be no point in having a clause that completion of a "well" ended it unless the parties meant thereby that a nonproducing well should so operate. Thus, it was held that, under such a provision, the completion of a nonproducing well ends the obligation to pay delay rental. Another mode of expressing the same intention is to provide that "the completion of a well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease."⁵⁴ It follows, therefore, and was so decided in *Smith v. South Penn Oil Co.*,⁵⁵ that in the absence of a "liquidation of rentals clause" or its equivalent, the completion of a nonproductive well does not absolve the lessee from payment of delay rental in order to keep alive an "unless" lease. However, the court went further and held that the words "unless a well shall be completed" and "until a well is completed" are ambiguous, saying: "What kind of a well? Some are productive, and some are unproductive" Therefore it was held that the conduct of the parties whereby the lessor permitted the lessee to drill a second well without requiring the payment of additional delay rental, is conclusive under the doctrine of practical construction, in an action of assumpsit by the lessor to recover for use and occupation of the land. It is submitted that the court was correct in denying such a recovery. It cannot be conceded, however, that the quoted words are ambiguous. They cannot be so for one purpose and not for another, and admittedly in an "unless" lease the completion of

⁵³ 51 W. Va. 583, 42 S. E. 655 (1902).

⁵⁴ Quoted from *Henne v. South Penn Oil Co.*, 52 W. Va. 192, 43 S. E. 147 (1902).

⁵⁵ 59 W. Va. 204, 53 S. E. 152 (1906).

a dry hole would not prevent termination, as a matter of law⁵⁶—not as a matter of fact to be decided by reference to the conduct of the parties.

⁵⁶ *Id.* At page 206 it was said, "The lease contains, not a covenant to pay rent, but only a clause, giving the lessee the option or privilege of paying a specific sum every three months in advance, as a means of keeping the lease alive and operative. It was not bound to do so and could, without violation of any terms in the lease, allow its rights to be forfeited [meaning to expire] and to cease and determine by failure to drill a well or pay said sum."