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IMPLIED DUTY OF LESSEE UNDER AN OIL AND GAS LEASE TO DRILL "PROTECTION" WELLS

This discussion has been carefully limited to the law concerning the implied obligation to drill "protective" or "off-set" wells, making no attempt to consider other implied duties of the lessee such as further development of the premises when oil is found in paying quantities.¹ In the absence of an express covenant, it is uniformly held that there is such an implied duty of the lessee to drill "off-set" wells to prevent drainage from the leased premises by wells on adjoining lands.² This legal implication is based on: (1) a desire to subserve the original purpose and intent of the parties to operate the premises profitably to both parties and (2) the fugitive nature of gas and oil.³

In the *Carper* case,⁴ the West Virginia court held that the payment and acceptance of delay rentals for any period operated as a waiver of this implied duty during that period. In the absence of such waiver the duty prevails even in the face of the provision for delay rentals and the lessor by refusing to accept further delay rentals and demanding protection may place the lessee in default if he fails to act within a reasonable time.⁵ To this doctrine of the *Carper* case the court added a further qualification in the first *Trimble* decision.⁶ In that case the lessor under a "drill or pay" oil and gas lease sued for specific performance of the lessee's implied covenant to protect the land from drainage occurring during a period for which delay rental had been paid and accepted. The lessor alleged that the lessee was fraudulently draining the land through wells on adjoining lands. The court held on demurrer to the bill that the lessor was not estopped to sue by acceptance of delay rental where the lessee is alleged to be fraudulently draining

¹ SUMMERS, OIL AND GAS (1927) § 129 and cases cited thereunder; see cases cited in Notes (1935) 41 W. VA. L. Q. 290; (1934) 40 W. VA. L. Q. 175; (1934) 93 A. L. R. 460; (1921) 14 A. L. R. 967.

² *Steel v. American Oil Development Co.*, 80 W. Va. 206, 92 S. E. 410 (1917); *Stanley v. United Fuel Gas Co.*, 78 W. Va. 793, 90 S. E. 344 (1916); *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12 (1916); *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S. E. 368 (1913); *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124 (1912); SUMMERS, OIL AND GAS § 130 and cases cited thereunder; see cases cited in Notes (1922) 19 A. L. R. 437; (1929) 60 A. L. R. 950.

³ See *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 220, 80 S. E. 368, 370 (1913).

⁴ *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12 (1916).

⁵ *Id.* at 443, 89 S. E. at 16.

⁶ *Trimble v. Hope Natural Gas Co.*, 113 W. Va. 839, 169 S. E. 529 (1933).

the land. Thus the *Carper* case applies only to situations involving non-fraudulent drainage. Apparently all that is necessary to constitute fraud in West Virginia is a willful taking of oil by the lessee through wells on adjoining and neighboring leases and refusing the lessor's demand for protection.⁷

There is no breach of this implied obligation to drill off-set wells unless there is actual or threatened drainage in a substantial sense;⁸ the test generally applied by the courts seems to be whether drilling such an off-set well would be profitable to both lessor and lessee considering the close proximity of adjoining wells, quantity of oil or gas produced by them, and expenses of drilling and operating;⁹ *i e.*, the lessee is apparently held to a standard of reasonable diligence under the circumstances.

As to how this standard of diligence shall be determined, there seems to be a division of judicial opinion. By one view the judgment of the lessee is considered as final in the absence of fraud or bad faith.¹⁰ The other view approved by Oklahoma, Texas, Illinois, and Louisiana favors the judgment of neither lessor nor lessee but applies the criterion of the ordinary prudent business man under the circumstances.¹¹ In the recent case of *Trimble v. Hope Natural Gas Co.*,¹² the West Virginia court adopted the former view without reservation.¹³

⁷ *Lamp v. Locke*, 89 W. Va. 133, 103 S. E. 889 (1921); *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S. E. 368 (1913); see *Trimble v. Hope Natural Gas Co.*, 113 W. Va. 839, 843, 169 S. E. 529, 531 (1933); *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 85, 76 S. E. 124, 125 (1912).

⁸ *Trimble v. Hope Natural Gas Co.*, 187 S. E. 331 (W. Va. 1936); *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124 (1910); *Pelham Petroleum Co. v. North*, 78 Okla. 39, 188 Pac. 1069 (1920); *Eastern Oil Co. v. Beatty*, 71 Okla. 275, 177 Pac. 104 (1918).

⁹ See *Hall v. South Penn Oil Co.*; *Pelham Petroleum Co. v. North*; *Eastern Oil Co. v. Beatty*, all *supra* n. 8; *Goodwin v. Standard Oil Co.*, 290 Fed. 92, 94 (C. C. A. 8th, 1923).

¹⁰ *Allen v. Colonial Oil Co.*, 92 W. Va. 689, 115 S. E. 842 (1923); *Jennings v. Southern Carbon Co.*, 81 W. Va. 347, 94 S. E. 363 (1917); *Steel v. Development Co.*, 80 W. Va. 206, 92 S. E. 410 (1917); *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S. E. 368 (1913); *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128 (1902); *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004 (1900).

¹¹ See *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 814 (C. C. A. 8th, 1905); *SUMMERS, OIL AND GAS* 439, n. 21.

¹² 187 S. E. 331 (W. Va. 1936).

¹³ However, the court in a former decision used language which seemed to indicate an approval of the test laid down in *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 814 (C. C. A. 8th, 1905). See *Glass v. Big Creek Development Co.*, 75 W. Va. 719, 728, 84 S. E. 750, 753 (1915). This case concerned the duty to further develop and did not turn on the duty to drill protective wells.

Where the courts have found a breach of this implied duty to drill "protection" wells, they have permitted the lessor a diversified selection of remedies. When the duty has been viewed as an implied covenant of the lease, an action for damages for its breach is allowed.¹⁴ The extreme equitable remedies of specific performance and mandatory injunction to enforce this obligation when treated as a covenant also will apparently be allowed.¹⁵ Where fraud exists¹⁶ or the implied obligation is treated as a condition rather than a covenant,¹⁷ some form of equitable relief such as partial cancellation or forfeiture¹⁸ is proper.¹⁹ However, in one Texas case²⁰ where the lessor drilled the off-set well himself upon the lessee's refusal to act, he was held liable to account to the lessee for the latter's share of the oil produced, less drilling and operating expenses, thus seemingly denying the remedy of self-help.

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¹⁴ *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662 (1901); *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004 (1900); *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128 (1902); *Doddridge County Oil & Gas Co. v. Smith*, 154 Fed. 970 (N. D. W. Va. 1907); *Kellar v. Craig*, 126 Fed. 630 (C. C. A. 4th, 1903); *Blair v. Clear Creek Oil & Gas Co.*, 148 Ark. 301, 230 S. W. 286 (1921).

¹⁵ Where extreme hardship was shown a mandatory injunction was granted the joint-owners of the royalties who had no other remedy. *Lamp v. Locke*, 89 W. Va. 138, 108 S. E. 889 (1921). In *Trimble v. Hope Natural Gas Co.*, 187 S. E. 331 (W. Va. 1936) specific performance was sought as an alternative remedy to cancellation and was granted without comment on the propriety of either remedy.

¹⁶ See *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 85, 76 S. E. 124, 125 (1912); *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S. E. 368 (1913).

¹⁷ *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12 (1916). In this case the court treated the obligation as an implied condition on the following principle: "If either [a covenant or a condition] will accomplish the purpose obviously intended, and one is less burdensome to either of the parties than the other, the adoption of the less onerous one is made obligatory by the rule applicable to the addition of terms to contracts on the theory of implication."¹⁷

¹⁸ In *Peerless Carbon Black Co. v. Gillespie*, 87 W. Va. 441, 463, 105 S. E. 517, 526 (1921) the court said there could be no forfeiture for violation of an implied condition or covenant citing as authority for this proposition: *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595, 600, 64 S. E. 1027, 1029 (1909); *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128 (1902); *Harness v. Eastern Oil Co.*; *Ammons v. South Penn Oil Co.*, both *supra* n. 14. However, a careful examination of these cases indicates an exception to the foregoing rule, *i. e.*, where fraud is averred and fully proven equity will declare a forfeiture even when the duty arises by implication alone.

¹⁹ *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S. E. 368 (1913); see *Note* (1934) 40 W. VA. L. Q. 177 and cases cited therein.

²⁰ *O'Neil v. Sun Co.*, 58 Tex. Civ. App. 167, 123 S. W. 172 (1909).