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Oil and Gas--Construction of "Forfeiture Clause" in Unless Lease-- Necessity of Notice for Termination of Lease

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to disregard all these proceedings and start over again in another court where the same law applies, the same result will be reached, and the net effect will be added expense and delay. So, to the normal rule should be grafted an exception that whenever the state court can settle disputed titles adequately and more economically, it should be within the sound discretion of the federal court to permit it to do so.¹⁶

OIL AND GAS — CONSTRUCTION OF "FORFEITURE CLAUSE" IN UNLESS LEASE — NECESSITY OF NOTICE FOR TERMINATION OF LEASE. — An oil and gas "unless lease" in normal form had incorporated in it, at the end, an assignment provision which among other matters included a requirement of ten days notice as a prerequisite to a forfeiture of the lease. The term of the unless provision having expired, the lessee's assignee attempted to resist termination on the ground that no notice had been given. *Held*, that the notice provision, being repugnant to the unless clause, was void, and the lease terminated automatically at the end of the term. *Clowis v. Carson Oil & Gas Co.*¹

In the normal "drill or pay lease", the delay rentals provision is expressed in covenant form,² and a breach thereof gives rise to an action for damages. An express forfeiture provision, if included, is generally held to operate at the option of the lessor who may, upon breach of the covenant by the lessee, declare the lease forfeited, or waive the forfeiture and treat the lessee as still in operation.³

The continued existence of an "unless lease", however, as its terms expressly provide, is conditioned upon the lessee's drill-

¹⁶ This assumes both federal and state courts will apply the same rule in determining title. A serious situation may arise if they differ in either rules of law or evidence. For the chaotic result of different federal and state laws in mineral cases, see *NORE* (1934) 40 W. VA. L. Q. 258.

¹ 11 F. Supp. 797 (1935).

² *Perry v. Acme Oil Co.*, 44 Ind. App. 207, 88 N. E. 859 (1909); *Union Gas and Oil Co. v. Wiedeman Oil Co.*, 211 Ky. 361, 277 S. W. 323 (1925); *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582 (1926); *Northwestern Oil and Gas Co. v. Branine*, 71 Okla. 107, 175 Pac. 533, 3 A. L. R. 344 (1918); *Wilson v. Goldstein*, 152 Pa. 524, 25 Atl. 493 (1893); *Leatherman v. Oliver*, 151 Pa. St. 646, 25 Atl. 309 (1892); *Reserve Gas Co. v. Carbon Black Mfg. Co.*, 72 W. Va. 757, 765, 79 S. E. 1002 (1913); *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754 (1890); *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95 (1898). *THORNTON, OIL AND GAS* (1912) § 151.

³ *Supra* n. 2. *Oil Co. v. Crawford*, 55 Ohio St. 161, 44 N. E. 1093 (1896). *SUMMERS, OIL AND GAS* (1927) § 108.

ing or paying within the time limit set forth in the lease,⁴ the unless clause functioning as a limitation of an estate.⁵ This termination has been erroneously referred to as a forfeiture in a few jurisdictions. Indeed some West Virginia cases seem to have employed that viewpoint.⁶ It is submitted, however, that these decisions ignore the Statute of Frauds when they permit an extension of the lease by conduct other than that prescribed by the statute.⁷

The problem is complicated in the principal¹ case by the fact that the presence in the lease of two apparently inconsistent provisions as to "termination" or "forfeiture" presents a difficult question of construction, as to which at least three possible answers suggest themselves. First, the notice provision could be considered void on the grounds of repugnancy to an antecedent clause in the lease, and the court so dealt with it. Second, it could be ignored as immaterial to the present controversy, it being only intended to modify the lessor's privilege of seeking a forfeiture in equity for breach of the lessee's implied obligations.⁸ Third, the requirement might be construed as a modification, operative in case of assignment, of the unless clause to which the parties referred by a loose usage of the word "forfeiture", thereby making

⁴ *McDaniel v. Hager-Stevenson Oil Co.*, *supra* n. 2; *McNamer Realty Co. v. Sunburst Oil and Gas Co.*, 76 Mont. 332, 247 Pac. 166 (1926); *Van Etten v. Kelly*, 66 Ohio St. 605, 64 N. E. 560 (1902); *Eastern Oil Co. v. Smith*, 80 Okla. 207, 195 Pac. 773 (1921); *McKinley v. Feagins*, 82 Okla. 193, 193 Pac. 997 (1921); *Skien v. Junction Oil and Gas Co.*, 80 Okla. 41, 193 Pac. 988 (1920); *Northwestern Oil and Gas Co. v. Branine*, 71 Okla. 107, 175 Pac. 533, 3 A. L. R. 344 (1918); *Frank Oil Co. v. Belleview Gas and Oil Co.*, 29 Okla. 719, 119 Pac. 260 (1911); *Deming Investment Co. v. Lanham*, 36 Okla. 773, 130 Pac. 260, 44 L. R. A. (N. S.) 50 (1913). Note (1920) 26 W. VA. L. Q. 149; Note (1920) 18 MICH. L. REV. 652.

⁵ *Caruthers v. Leonard*, 254 S. W. 779 (Tex. Com. App. Sec. B. 1923).

⁶ *Cordell v. Enis*, 162 Ark. 41, 257 S. W. 375 (1924); *Epperson v. Hebron*, 145 Ark. 566, 225 S. W. 345 (1920); *Farlow v. Frankson, Tucker v. Same*, 110 Kan. 197, 203 Pac. 299 (1922); *Kays v. Little*, 103 Kan. 461, 175 Pac. 149 (1918); *Bloom v. Rugh*, 98 Kan. 589, 160 Pac. 1135 (1916); *Westerman v. Dinsmore*, 68 W. Va. 594, 71 S. E. 250 (1911); *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762 (1909); *Smith v. South Penn Oil Co.*, 59 W. Va. 204, 53 S. E. 152 (1906); *Snodgrass v. South Penn Oil Co.*, 47 W. Va. 509, 35 S. E. 820 (1900).

⁷ W. VA. REV. CODE (1931) c. 36, art. 1, § 1. This statute purports to specify the only methods by which an interest of this nature may be conveyed. See *Drake v. O'Brien* 99 W. Va. 582, 130 S. E. 276 (1925) as to Code 1923, c. 77, § 1, the predecessor of the statute cited above.

⁸ This proposition is weakened by the fact that courts tend to speak of this termination for failure to drill or pay as a forfeiture. Those courts might well lean toward construing this provision to be a modification of the "forfeiture" clause.

termination of the lease conditional upon the lessor's giving the proper notice.

It is submitted that in oil and gas law, the use and effect of the "unless" clause has become so universally recognized that courts will go far in giving it, where possible, predominance over all conflicting clauses, as is the case with the granting clause in the ordinary conveyance.⁹

PUBLIC POLICY — RULE OF *Swift v. Tyson* — ATTORNEY'S FEE PROVISION IN PROMISSORY NOTE. — Residents of West Virginia executed and delivered notes in Virginia which contained a provision, valid under the laws of Virginia, for the payment of a ten per cent. attorney's fee in case of default. In a suit on the notes in the District Court of the United States for the Southern District of West Virginia, recovery on this provision was denied on the ground that the public policy of West Virginia, as declared by the Supreme Court of Appeals,¹ forbade the enforcement of such a provision by the courts. Plaintiff appealed. *Held*, that this was a matter of general law, as to which, by the rule of *Swift v. Tyson*,² the federal courts exercise their independent judgment and apply their own conclusion, and that such provisions are not contrary to public policy. Reversed. *Citizens National Bank of Orange, Va. v. Waugh*.³

Here West Virginia had no substantial connection with the contract whereby to invoke her public policy. On the bare facts, the case would be determined by a United States Supreme Court decision in which the court enforced a contractual limitation which was valid in Tennessee, the state where made, but invalid

⁹ 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1622. *Ward v. Ward*, 176 Ga. 849, 169 S. E. 120 (1933); *Rhodes v. Black*, 170 S. C. 193, 170 S. E. 158 (1933); *Groce v. Southern Ry. Co.*, 164 S. C. 427, 162 S. E. 425 (1932); *Wolverton v. Hoffman*, 104 Va. 605, 52 S. E. 176 (1905); *Temple's Adm'r v. Wright*, 94 Va. 333, 26 S. E. 844 (1897). But *cf.* *Bartlett v. Petty*, 93 W. Va. 608, 117 S. E. 551 (1923); *Maddy v. Maddy*, 87 W. Va. 581, 105 S. E. 803 (1921).

¹ *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332 (1914); *First National Bank of Mannington v. Bank of Mannington*, 76 W. Va. 356, 85 S. E. 541 (1915); *First National Bank of Pineville v. Sanders*, 77 W. Va. 716, 88 S. E. 187 (1916); *Campan Brothers v. Stewart*, 106 W. Va. 247, 145 S. E. 381 (1928).

² 41 U. S. (16 Pet.) 1, 4 S. Ct. 128 (1842).

³ 78 F. (2d) 325 (C. C. A. 4th, 1935).