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Oil and Gas--Construction of Drill of Pay Covenant for Further Development--Effect of Payment of Delay Rentals

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evidence of criminal convictions in civil cases.[16] However insupportable that rule may be, it is strongly entrenched judicially and we may expect it to be relaxed only through legislation[17] upon the very subject and not by remote implication.

Under the common law test of the instant decision an unlawful intentional non-felonious slayer would be barred from taking the proceeds. While an unlawful intentional homicide, not felonious in character, is not conceivable,[18] yet if such a result could be reached in the criminal trial, the statute as construed by the court would not govern the distribution of the proceeds. Were the killing unintentional the beneficiary should prevail both at law and in equity.

—HOUSTON A. SMITH.

OIL AND GAS — CONSTRUCTION OF DRILL OR PAY COVENANT FOR FURTHER DEVELOPMENT — EFFECT OF PAYMENT OF DELAY RENTALS. — A covenant in an oil and gas lease required the lessee to drill a well within one year, and if that well was a paying and producing well which would deliver at least ninety thousand feet of gas daily into the line, the lessee was to drill a second well within twenty-four months or pay rentals quarterly thereon. The first well was drilled and produced gas. On being requested by the plaintiff lessor, a year later, to take action under the covenant as to further development, the lessee began paying rentals. The defendant who had come into possession of the lease by assignment ceased payment, whereupon the plaintiff brought this suit for rentals due and unpaid. *Held*, the covenant was operative if at any reasonable time after its completion, the first well was capable of delivering the required amount of gas into the line, but the payment of rentals by the lessee constituted an election which bars the defendant from raising non-occurrence of the contingency as a de-

[16] Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S. E. 301 (1922); Shires v. Boggess, 72 W. Va. 109, 77 S. E. 542 (1912). See Note (1924) 31 A. L. R. 262.

[17] The rule has not been frequently relaxed by judicial decision. In Eagle S. & B. D. Ins. Co. v. Heller, 149 Va. 82, 142 S. E. 314 (1927), the court held that the criminal judgment against the defendant is *res adjudicata* as to him in the civil trial. See admitting such judgment as *prima facie* evidence in the civil trial, but saying that further departures must be by legislation, Schindler v. Royal Ins. Co., 258 N. Y. 310, 179 N. E. 711 (1932).

[18] An unintentional (*i. e.*, a negligent) killing might be wrongful though not necessarily felonious.

fense after payment of seven rentals. *Kinder v. Southeastern Gas Co.*[1]

Normally the lessee's duties in the matter of further development are governed by an implied term of the lease.[2] Occasionally there is a provision in a lease requiring the drilling of additional wells, but there is rarely provision for commutation through payment of rentals,[3] as in the covenant in the principal case.[4]

The contingency on which liability under this covenant depends is peculiar in that the usual broad requirement that the test well produce in "paying quantities"[5] is modified by the specification of a minimum capacity of the test well. In defining the term "paying quantities" in the more typical covenant, the courts have kept in mind the obvious purpose of the parties, which is to require the lessee to continue development only if the output of the test well indicates that this may be done profitably. They, therefore, hold that a well to be a paying well within the meaning of such a provision should bid fair to repay the lessee, not only his operating costs, but his drilling costs as well.[6] It would seem that the mere specification of a minimum amount should not change this term of the lease to the extent favored by the court in the principal case. A construction whereby the contingency is met if the test well is capable of producing the required amount

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[1] 177 S. E. 193 (W. Va. 1934).

[2] SUMMERS, OIL AND GAS (1927) § 129 and cases cited thereunder; see cases cited in Notes (1934) 93 A. L. R. 460; (1921) 14 A. L. R. 959; (1934) 40 W. VA. L. Q. 175.

[3] These provisions are usually inserted for the purpose of securing actual development. "Desiring development of their property, the lessors declined to execute a lease providing for delay and payment of commutation." Petty v. United Fuel Gas Co., 76 W. Va. 268, 85 S. E. 523 (1915).

[4] The objection put forth in n. 3 does not apply in this instance since the rental paid for commutation is equivalent to the amount the lessor would receive if a second well had been drilled.

[5] This is the usual stipulation in this type of covenant. SUMMERS, OIL AND GAS § 124, n. 5. See for other examples: Kellar v. Craig, 126 Fed. 630 (C. C. A. 4th, 1903); Manhattan Oil Co. v. Carrell, 164 Ind. 526, 73 N. E. 1084 (1905); Osburn v. Finkelstein, 189 Ind. 90, 126 N. E. 11 (1919); Swiss Oil Co. v. Risner, 223 Ky. 397, 3 S. W. (2d) 777 (1928); Aycock v. Paraffine Oil Co., 210 S. W. 851 (Tex. Civ. App. 1919); Nystel v. Thomas, 42 S. W. (2d) 168 (Tex. Civ. App. 1931).

[6] A distinction is made between the meaning of the term "paying quantities" when it appears in a covenant for further development, as opposed to the habendum clause as to whether drilling costs may be considered. Manhattan Oil Co. v. Carrell, *supra* n. 5; Osburn v. Finkelstein, *supra* n. 5; Swiss Oil Co. v. Risner, *supra* n. 5; Ardizonne v. Archer, 72 Okla. 70, 178 Pac. 262 (1919); Pelham Petroleum Co. v. North, 78 Okla. 39, 188 Pac. 1069 (1920); Keechi Oil and Gas Co. v. Smith, 81 Okla. 266, 198 Pac. 588 (1921); Young v. Forest Oil Co., 194 Pa. 243, 45 Atl. 121 (1899); Aycock v. Paraffine Oil Co., *supra* n. 5; SUMMERS, OIL AND GAS § 124; THORNTON'S LAW OF OIL AND GAS (1925) § 149c.

into the line for a short time only prevents this covenant from being a reasonable term in the lease, making it comparable to a mere wager. The fact that the covenant for further development is in drill or pay terms should not cause the construction thereof to be any less favorable to the lessee, for delay rentals are merely commutation payments by way of excuse for not drilling, and hence immaterial as to the question of the original duty to drill.[7]

It would seem, therefore, that the contingency should be said to have occurred when the test well appeared capable of meeting the minimum requirement and of producing over a long enough period of time to reimburse the lessee for his drilling and operating expenses.

In the principal case, however, the court refused to allow the lessee to deny the occurrence of the condition. This ruling might be based on the theory that the defendant has waived the defence of non-occurrence of the contingency as the result of his paying rentals, thus indicating an intent to consider himself bound. The waiver would become binding through the change of position on the part of the plaintiff, thereby induced, namely, his failure to obtain evidence of the production capacity of the well.[8] This would seem to be sounder ground than either estoppel or election. An estoppel is based on a representation of an existing fact[9] whereas the only representation here is as to future conduct. An election is based on the theory that a party who has accepted benefits under a deed, will, or contract should not be permitted to repudiate it.[10] It is difficult to see what benefit the lessee has received in this instance that he would not have received were his contention that the contingency had never occurred correct. Since

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[7] That rentals are not an equally important alternative performance seems clearly inferable from the fact that the lessor is bound to accept them only so long as there is no drainage. Trimble v. Hope Natural Gas Co., 113 W. Va. 839, 169 S. E. 529 (1933); Carper v. United Fuel Gas Co., 78 W. Va. 433, 89 S. E. 12 (1916); Stanley v. United Fuel Gas Co., 78 W. Va. 793, 90 S. E. 344 (1913); Note (1920) 26 W. VA. L. Q. 248.

[8] Waiver of requirement of performance of a condition precedent which does not involve the actual consideration of the contract may be based on words or conduct inducing reliance and a change of position by the other party. Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151 (1891); Peninsular Land Trans. and Mfg. Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237 (1891); Galloway v. Standard Fire Ins. Co., 45 W. Va. 237, 36 S. E. 969 (1898); Houseman v. Home Ins. Co., 78 W. Va. 203, 88 S. E. 1048 (1916); Piedmont Grocery Co. v. Hawkins, 87 W. Va. 38, 104 S. E. 736 (1920); BIGELOW ON ESTOPPEL (6th ed. 1913) c. 19; 2 WILLISTON ON CONTRACTS (1920) §§ 679, par. 3, and 689.

[9] BIGELOW ON ESTOPPEL § 636; WILLISTON ON CONTRACTS § 1312.

[10] BIGELOW ON ESTOPPEL c. 20; WILLISTON ON CONTRACTS §§ 683-688.

an election, where proper, will operate in the absence of reliance and change of position by the other party,[11] it would seem unwise to employ that theory as the basis of this decision, for that lays down a rule applicable to all cases where the lessee goes ahead and pays rentals under a covenant for further development, and this the court certainly could not have intended.

If the covenant is construed in the manner suggested above, recovery on a waiver theory would be difficult to support, in that there would not be the same paucity of evidence under the requirement of a longer production period, and therefore no damage from the lessor's change of position.

—STEPHEN AILES.

STREETS — DEDICATION BY RECORDED PLAT — CONDITIONS. — *C* real estate company platted a parcel of land into lots and streets. Property was sold with reference to the recorded plat. Prior to paving seven years later, which was the first recognition by the municipality of the street in question as a public thoroughfare, *C* had constructed a railway on a part of the street. Subsequent to this act of acceptance *C* quit-claimed its interests in the railway to *D* railway company. The State Road Commission sued to compel removal of the tracks to the extreme side of the easement to permit enlargement of the street as a state highway. *Held,* before acceptance a dedicator can impose reasonable conditions which are subject to public regulation and control. The condition here was valid but the public interest warrants the issuance of a writ of mandamus commanding the re-location of the tracks. *State Road Commission v. Chesapeake & O. Ry. Co.*[1]

The court adopts the view in this case that the act of the dedicator is nothing more than an offer to dedicate to public use until the public authorities have manifested acceptance. The later West Virginia cases would seem to support this conclusion,[2] but there are earlier decisions, which are, in effect, to the contrary.[3] They have not been expressly overruled.

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[11] Nagle *et al.* v. Syer, 150 Va. 508, 143 S. E. 690 (1928); BIGELOW ON ESTOPPEL c. 20; WILLISTON ON CONTRACTS § 686.

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[1] 177 S. E. 530 (W. Va. 1934).

[2] Town of Glendale v. Glendale Improvement Co., 103 W. Va. 91, 137 S. E. 353 (1927); City of Point Pleasant v. Caldwell, 87 W. Va. 277, 104 S. E. 610 (1920).

[3] City of Elkins v. Donohue, 74 W. Va. 335, 81 S. E. 1130 (1914); Hast v. Railroad Co., 52 W. Va. 396, 44 S. E. 155 (1902).