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Mines and Minerals--Partial Cancellation of Oil and Gas Lease

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lessee's assignee alleged that the pressure was too low to transport it to a distant market. A more difficult problem arises where adjoining tracts of heterogeneous nature are held under a single lease, and where it is contended that drilling of wells on one tract of the lease is development of all the leased tracts.[14]

The principal case, seemingly, has gone far in permitting the lessee to be the arbiter in determining what is reasonable diligence. So long as mineral is not drained away and lessee has a producing well, he may hold all of the tract for speculative purposes and prevent development, by merely asserting that geological inferences lead to the conclusion that there is not sufficient underlying mineral to warrant drilling. This assertion the court approves, despite knowledge that geological inferences are fallible, and though the effort of the lessee's assignee in court to prevent cancellation is inconsistent with the stand that minerals do not exist in such quantities as to warrant further developing.

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MINES AND MINERALS — PARTIAL CANCELLATION OF OIL AND GAS LEASE

Suit in equity was brought against the lessee holding under a renewal term "or" oil and gas lease, either to obtain cancellation by reason of alleged fraudulent drainage or to compel further development of the property, in addition to the well already drilled by lessee. The trial chancellor, on testimony offered by the heirs of the lessor, decreed the drilling of an additional well, with the possibility of a second, or payment of royalty therefore, — and, in default thereof, that there be cancellation, (R., p. 324), as to all *except* 37 1/3 *acres around the present producing well.* Lessee appealed. *Held*: Where allegations and proof establish with reasonable certainty fraudulent drainage, lessee may be compelled to sink an offset well (and here but one), or "submit to a forfeiture of all, except an acreage around the well theretofore drilled under the lease." Accordingly, lower court decree modified and affirmed. *Adkins v. Huntington Development & Gas Co.*[1]

The instant decision as to partial cancellation must be dis-

[14] Gypsy Oil Co. v. Cover, 78 Okla. 158, 189 Pac. 540 (1920); *cf.* Pierce Oil Corp. v. Schacht, 75 Okla. 101, 181 Pac. 731 (1919).

[1] 168 S. E. 366 (W. Va. 1933).

tinguished sharply from that class of cases in which cancellation or abandonment of the entire lease is decreed, for failure diligently to develop any part of the property.[2] Even in such cases, so drastic a remedy as total cancellation becomes available for an absolute default, only if fraudulent drainage or some similar serious wrong be proven;[3] reluctant courts will usually find grounds for this relief, provided they deem the lessor patently entitled to sympathy.[4] Yet there is a disposition manifest in recent authorities to aid the lessee, when he is in and working on the well.[5] Hence, the rule has definitely been established in West Virginia that "equity will not enforce the forfeiture of a vested estate because of a breach of a subsequent condition."[6] The present litigation falls thus into a second class of cases, in which it is claimed the lessee may not arbitrarily refuse *further* development,[7] assuming that by completion of a paying well, the vested estate has already been gained in the oil and gas underlying the leased premises. Normally there is a requirement of drainage or immediate neighborhood development before court assistance will be forthcoming:[8] moreover, the additional wells must in probability have been to the mutual profit of both lessor and lessee.[9] Still, many outstanding precedents tend frequently to emphasize fraudulent drainage as a determining factor in actual enforcement of any implied obligation in the lessee to give protection.[10] Where then the proof has obviously shown fraudulent drainage in substantial quantities, judicial opinion has favored either specific performance of the implied obligation to develop,[11] — relief by mandatory injunction being an alternative,[12] — or cancellation except as to a definite acreage around the producing well.[13]

[2] Parish Fork Oil Co. v. Gas Co., 51 W. Va. 583, 42 S. E. 655 (1902); Lowther Oil Co. v. Oil Co., 53 W. Va. 501, 44 S. E. 433 (1903). These cases were decided on the narrow issue of abandonment, — or, perhaps more accurately, their inarticulate theory is that of implied surrender.

[3] Lowther Oil Co. v. Oil Co., *supra* n. 2, *dicta per* Brannon, J. at at p. 105: .. "Under some circumstances of delay or fraudulent evasion of duty of development equity will cancel an oil lease, as development is regarded as the real intent of the lessor, even if there be no express clause of forfeiture." See Coffinberry v. Sun Oil Co., 68 Oh. St. 488, 67 N. E. 1069 (1903).

[4] Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109 (1896).

[5] Todd v. Light & Heat Co., 90 W. Va. 40, 110 S. E. 446 (1922).

[6] Engel v. Eastern Oil Co., 100 W. Va. 301, 303, 130 S. E. 491 (1925).

[7] Jennings v. Southern Carbon Co., 73 W. Va. 215, 80 S. E. 368 (1913).

[8] Hall v. So. Penn Oil Co., 71 W. Va. 82, 76 S. E. 124 (1910).

[9] Hays v. Bowser, 110 W. Va. 323, 325, 158 S. E. 169 (1931).

[10] Buffalo Valley Oil & Gas Co. v. Jones, 75 Kans. 18, 88 Pac. 537 (1907); Coffinberry v. Sun Oil Co., *supra* n. 3; Kleppner v. Lemon, *supra* n. 4.

[11] Trimble v. Hope Natural Gas Co., 169 S. E. 529 (W. Va. 1933).

[12] Lamp v. Locke, 89 W. Va. 138, 108 S. E. 889 (1921).

[13] Kleppner v. Lemon, *supra* n. 4.

Nevertheless, the latter remedy is in practice seldom granted.[14] There must be an extraordinary case of hardship,[15] occasioned by inexcusable lack of diligence in the extent of development required by the implied obligation, in order to justify partial cancellation. Proof of the requisite allegations must be clear and strong, and "express the opinion of men competent to judge."[16] An invariable condition precedent to such unconditional relief is always the lessor's preliminary demand upon the lessee, with the extension of a reasonable time thereafter within which the lessee may have opportunity to comply with the implied obligation:[17] an alternative conditional decree will occasionally serve the purpose of *locus poenitentiae* for the lessee.[18] With these restrictions amply hedging around the vested estate against over-hasty "forfeiture", the spatial safeguard of providing sufficient acreage[19] surrounding the producing well becomes of secondary importance in disposition of such issues: but, as a most vital consideration, it does receive careful scrutiny, so that adequate acreage will in every instance be allocated.[20]

Granted the specified requisities of extraordinary hardship, clear proof of necessary allegations and prior demand upon the

[14] The present decision seems to be the first West Virginia result, decreeing alternatively partial cancellation. However, Oklahoma courts appear to employ the device of partial cancellation in most liberal fashion. See, Pelham Petroleum Co. v. North, 78 Okla. 39, 188 Pac. 1069 (1920); Carder v. Blackwell Oil & Gas Co., 83 Okla. 243, 201 Pac. 252 (1921); Papoose Oil Co. v. Rainey, 89 Okla. 110, 213 Pac. 882 (1923). See also Indiana Oil & Develop. Co. v. McCrory, 42 Okla. 136, 140 Pac. 610 (1914); Blackwell Oil & Gas Co. v. Whitesides, 71 Okla. 41, 174 Pac. 573 (1918); Junction Oil & Gas Co. v. Pratt, 99 Okla. 14, 225 Pac. 717 (1924). *Cf.* Day v. Kansas City Pipe Line Co., 87 Kans. 617, 125 Pac. 43 (1912).

[15] The leading American authority as to "forfeiture" is, of course, Brewster v. Lanyon Zinc Co. (C. C. A. 8th) 140 Fed. 801, 72 C. C. A. 213 (1905), *per* Van Devanter, Circuit J. By "forfeiture" for breach of an implied obligation, either the remedy of cancellation, total or partial, is usually meant, — or the particular court is by some devious course arriving at the result of "abandonment", (*i. e.* implied surrender).

[16] Jennings v. So. Carbon Co., 81 W. Va. 347, 351, 194 S. E. 363 (1917), (second appeal).

[17] Carper v. United Fuel Gas Co., 78 W. Va. 433, 89 S. E. 112 (1916); Wapa Oil & Develop. Co. v. McBride, 84 Okla. 184, 201 Pac. 984 (1921); Papoose Oil Co. v. Rainey, *supra* n. 14; United Fuel Gas Co. v. Adams, 198 Ky. 283, 248 S. W. 841 (1923).

[18] Alford v. Dennis, 102 Kan. 403, 170 Pac. 1005 (1918). The present decree is of this alternative nature.

[19] There seems to be no dispute in the present case over the oblong area of 37 1/3 acres allotted around the producing well, having regard to its location and to the terrain.

[20] Estimates of necessary acreage will, of course, vary. One authority has suggested that an area of five to ten acres around an ordinary oil well

lessee have all been met satisfactorily in the present case, the result seems eminently sound both in principle and upon authority.[21] With partial cancellation so sharp a weapon, courts are chary of its use unless the "equities" of the situation incline the scales over to the lessor's side:[22] the decree here seems to fall well within these limits of judicial discretion. No doubt, the whole theory of implied obligation to develop has been invented by judges, but, even so, it is simply the enforcing of what is merely a reasonable incident imposed by law onto the lessor-lessee relation, said to be created by the oil and gas "lease".[23] If the relational obligation is to have any binding force whatsoever, the sanction of partial cancellation must be upheld.[24]

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should be adequate, though a similar gas well might require protection ranging from seventy to ninety acres, depending upon the configuration of the land.

In elementary detail, one may find an average distance of five hundred feet between oil wells in the ordinary West Virginia quincunx arrangements: the Oklahoma quadrangular arrangement may go farther and set the average distance between oil wells at six hundred and sixty feet. Similarly, the West Virginia quincunx arrangement of gas wells may average something more than two thousand feet between wells and about eighteen hundred feet between rows, allowing each well a drainage territory of eighty-five acres.

[21] Indeed, the chief controversy in the case at bar had to do with the adequacy of the lessors' proof. The lessee was content in the lower court to stand on the technical ground that the plaintiff had failed to make out a case, (168 S. E. 369). The present discussion presumes the correctness of the decision holding the proof adequate.

[22] *Cf.* the *Trimble* decision, *supra* n. 11. See Note (1933) 40 W. VA. L. Q. 72, criticizing that case. *Contra*, see Note (1929) 7 TEX. L. REV. 438, 440: ". . . . Some courts have found difficulty in applying the implied duty to drill protection wells during the period for which the lessee has paid a delay rental, but it seems that the implication should arise regardless of such delay rental, since rental is for delay and not destruction, and does not in anywise compensate the lessor for probable drainage," — citing Texas Co. v. Ramsower, 7 S. W. (2d) 872 (Tex. Comm. App. 1928), 255 S. W. 466 (Tex. Civ. App. 1923).

[23] The so-called "oil and gas lease" is hardly within the common law category of leasehold estates, but is rather in the nature of the conveyance of a *profit a prendre*.

[24] See Note (1926) 1 INDIANA L. J. 96, discussing the implied obligation for further development, as raised by White v. Green River Gas Co., 8 Fed. (2d) 261 (C. C. A. 6th, 1925) (decreeing partial cancellation). If there be a Federal rule, it is probably represented by the White v. Green River Gas Co. case.

For further judicial discussion of the topic of cancellation and, generally, implied obligations, see Grass v. Big Creek Development Co., 75 W. Va. 719, 84 S. E. 750 (1915); Steele v. American Oil Development Co., 80 W. Va. 206, 92 S. E. 419 (1917); Allen v. Colonial Oil Co., 92 W. Va. 689, 115 S. E. 842 (1923); United Fuel Gas Co. v. Smith, 93 W. Va. 646, 117 S. E. 900 (1923); Bowers v. Products Co., 100 W. Va. 278, 130 S. E. 284 (1925). *Cf.* Colgan v. Forrest Oil Co., 194 Pa. 234, 45 Atl. 119 (1899); Texas Co. v. Waggoner, 239 S. W. 354 (Tex. Civ. App. 1922).