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Mines and Minerals--Specific Performance--Effect of Acceptance of Delay Rental

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MINES AND MINERALS — SPECIFIC PERFORMANCE — EFFECT OF ACCEPTANCE OF DELAY RENTAL. — The lessor under a term “drill or pay” oil and gas lease sued for specific performance of the lessee’s implied covenant “to protect from drainage”, within the last quarter for which delay rental had been paid and accepted by him with knowledge of the asserted drainage. The lessor claimed a fraudulent depletion of his gas estate by drainage through wells, operated by the lessee on adjoining tracts. *Held*: Lessor not estopped from suing for specific performance of the implied covenant “to offset drainage”, by his acceptance of the delay rental, where the lessee is alleged fraudulently to be draining the gas through the lessee’s wells on adjoining leaseholds. *Trimble v. Hope Natural Gas Co.*¹

In the absence of an express covenant, in an oil and gas lease “to drill offset wells to protect from drainage”, it has been generally recognized that a covenant to this effect may be implied.² The West Virginia courts have also held, however, that when a lease for a specific term imposes the alternative duty to drill or pay delay rental, there is no implied covenant to drill offset wells, to prevent drainage, the delay rental being regarded sufficient consideration for postponement of such operations,³ but that there is an implied condition, that in the event of such drainage, or imminent danger thereof, the lessee will upon demand of the lessor and his refusal to accept further rental payments, drill the necessary offset wells.⁴ Furthermore, in the event of the lessee’s failing so to drill, the lessor is protected by the disposition of a court of equity, to declare a forfeiture of the lease for breach of such condition.⁵ Heretofore, at least the West Virginia court has

¹ 169 S. E. 529 (W. Va. 1933).

² *Allegheny Oil Co. v. Snyder*, 106 Fed. 764 (C. C. A. 6th, 1900); *Brewster v. Laynon Zinc Co.*, 140 Fed. 801 (C. C. A. 8th, 1905); *Blair v. Clear Creek Oil and Gas Co.*, 148 Ark. 301, 230 S. W. 286 (1921); *Hughes v. Busseyville Oil and Gas Co.*, 180 Ky. 545, 203 S. W. 515 (1918); *Eastern Oil Co. v. Beatty*, 71 Okla. 275, 177 Pac. 104 (1918); *Kleppner v. Lemon*, 176 Pa. 502, 35 Alt. 109 (1896); *Texas Co. v. Ramsower*, 7 S. W. (2d) 872 (Tex. Civ. App. 1928); *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124 (1910).

³ *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 112 (1916); *Chambers v. Perrine*, 81 W. Va. 321, 94 S. E. 381 (1917).

⁴ *Carper v. United Fuel Gas Co.*, *supra* n. 3, at 441. Yet in a later case, apparently disregarding the distinction between implied covenants and implied conditions, drawn by Judge Poffenbarger in the *Carper* case, the West Virginia Supreme Court of Appeals, granted specific performance of the implied covenant to offset “fraudulent” drainage, where no delay rentals had been accepted. *Lamp v. Lock*, 89 W. Va. 138, 108 S. E. 889 (1921).

⁵ *Cf. Union Gas and Oil Co. v. Indiana-Tex Petroleum Co.*, 203 Ky. 521, 263 S. W. 1 (1924); *United Fuel Gas Co. v. Adams*, 198 Ky. 283, 248 S. W. 841 (1923).

somewhat limited the doctrine of implied conditions, ruling that acceptance of delay rental waives the operation of this condition; and that there is no enforceable obligation to protect from drainage, within the rental period,⁶ *first*, for the breach of which the lessor can recover damages,⁷ or *second*, for which a suit to declare a forfeiture or cancellation may be brought.⁸ In other words, the lessee, relying upon the *Wilson*, *Carper*, and *Stanley* decisions, has in practice assumed that payment of delay rentals, which were received without objection by the lessor, would postpone the alternative obligation to develop; should the lessor refuse to accept rentals and demand drilling, the lessee could then determine whether to go ahead and develop the leased land, or voluntarily surrender up the lease as being likely to prove unprofitable. Thus, the lessee conducting extensive operations might safely keep in reserve considerable amounts of undeveloped territory, without being obliged to expend capital or to waste natural resources in premature development.⁹

The present case purports to limit without overruling, the doctrine of the *Carper* case to suits to cancel or for damages, where there is no "fraudulent drainage" involved.¹⁰ The West Virginia court has clearly set out what constitutes fraud in oil and gas leases,¹¹ and has granted relief by specific performance therefor upon the implied covenant to protect from drainage¹² and by cancellation.¹³ In none of these cases, however, could it be contended that the injury inflicted was compensated by a money payment.¹⁴ It is respectfully submitted that the *Carper* case contains, however, both a situation of fraudulent drainage, and a money

⁶ *Carper v. United Fuel Gas Co.*, *supra* n. 3, at 444; *Wilson v. Reserve Gas Co.*, 78 W. Va. 329, 88 S. E. 1075 (1916); *Stanley v. United Fuel Gas Co.*, 78 W. Va. 793, 90 S. E. 344 (1916).

⁷ *Carper v. United Fuel Gas Co.*, *supra* n. 3; *Stanley v. United Fuel Gas Co.*, *supra* n. 6.

⁸ *Wilson v. Reserve Gas Co.*, *supra* n. 6; *Chambers v. Perrine*, *supra* n. 3.

⁹ Note (1920) 26 W. VA. L. Q. 248.

¹⁰ *Trimble v. Hope Natural Gas Co.*, *supra* n. 1, at 532.

¹¹ *Hall v. South Penn Oil Co.*, *supra* n. 2; *Jennings v. Carbon Co.*, 73 W. Va. 215, 80 S. E. 109 (1913); *Lamp v. Lock*, *supra* n. 4; following *Kleppner v. Lemon*, *supra* n. 2. In the *Lamp* case the court said, "A lessee in the operation of his lease must act in good faith, where he owns adjoining lands; he has no right in the guise of ownership to drain the land leased by putting down wells on the adjoining property, without sinking offset wells on the lease, sufficient to protect it from drainage, when the lessor is entitled to royalties in oil or gas taken from the leased premises".

¹² *Lamp v. Lock*, *supra* n. 4.

¹³ *Jennings v. Carbon Co.*, *supra* n. 11.

¹⁴ *Trimble v. Hope Natural Gas Co.*, *supra* n. 1, at 531.

payment in the form of delay rental accepted as compensation.¹⁵ Unfortunately the former pertinent fact, (*i. e.*, fraudulent drainage) is omitted from the case as reported.¹⁶ Undoubtedly, investment has occurred upon the assumption that the *Carper* case had become a rule of property law covering all drainage suits, even including alleged fraudulent drainage. In accordance therewith, presumably, lessees have conducted their business of leasing and developing, relying on the "qualified condition", as explained by Judge Poffenbarger.¹⁷

The practical effect of the *Trimble* decision seems actually to overrule and to confine the *Carper* doctrine within the narrower limits of situations involving non-fraudulent drainage, to which limits the court deciding the earlier case did not so restrict it. It can scarcely be contended that the unsettling effect upon the business of oil and gas development resulting from the *Trimble* rule, is consistent with the object which the court had in mind in the *Carper* case.¹⁸

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¹⁵ See pages 12, 13, 28, 108 of the Record of the *Carper* case. Page 13, *Stipulation of Fact*: "It is stipulated and agreed that the defendant, the United Fuel Gas Co., the owner of the lease and gas wells thereon known as the Well 115 on the G. R. Pettit farm, Well 231 on the V. R. Abbott farm, Well 233 on the M. E. Carper farm . . .". The writer believes a decision should stand for all facts contained in the printed record, which are involved in the disposition of the case, in addition to the holding and the opinion of the court.

¹⁶ *Carper v. United Fuel Gas Co.*, *supra* n. 3.

¹⁷ *Carper v. Gas Co.*, *supra* n. 3, at 443. "The qualified condition is the mildest and most equitable of the three provisions. It protects the lessor and affords the lessee an opportunity to determine questions of expediency and hazard arising upon a contingency. It cannot be reasonably assumed the lessee would have bound himself to drill without a demand, it must be assumed he would have preferred to subject himself to the qualified condition, dividing the duty and hazard between himself and the lessor, and having it optional with him to say whether he would risk the expenditure incident to the drilling of a well" . . . or surrender.

¹⁸ *Supra* n. 3, at 442. The *Carper* decision establishes the following mutual duties: (1) The duty upon the lessor to give notice that he will no longer receive rental in lieu of development and to make a demand upon the lessee to drill. (2) The duty upon the lessee, upon receipt of the lessor's notice, to drill or surrender or accept a right of forfeiture for failure to drill on demand.