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Developments in the Doctrine of Carper v. United Fuel Gas Company

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OIL AND GAS

DEVELOPMENTS IN THE DOCTRINE OF *CARPER v. UNITED FUEL GAS COMPANY*

The United States Supreme Court in a strong decision has reversed the *Sauder* case,[1] heretofore discussed in this Quarterly.[2] The effect of the final decision is to declare that an oil and gas lessee cannot, after drilling a few off-set wells on a very small portion of the leased land, hold the rest of the tract indefinitely without any attempt at production, despite his contention that geological information indicates that this remaining portion could not be developed profitably. This effect is reached by the court's holding that the lessee's leaving the greater portion of the land idle, for seventeen years here, is a breach of the so-called implied covenant of diligent development, for which breach the lessor is entitled to cancellation of the lease as to the undeveloped portion.

This decision is one of the very few by the United States Supreme Court which directly decides an important problem of oil and gas law.[3] Thus the fact that such a decision has been rendered invites attention to the present status in West Virginia of the oil and gas law on the question of the respective rights of lessor and lessee as those rights are affected by the implying of covenants and conditions in the oil and gas lease. And the determination of these rights in West Virginia to-day will depend upon a re-examination of the leading case of *Carper v. United Fuel Gas Company*,[4] with a view to ascertaining to what extent the doctrine of that case obtains in the jurisdiction at the present time.

In order that the problem of the *Carper* case may be fully appreciated and its result fully understood, it is necessary to examine for a moment the nature of the rights of the parties to an oil and gas lease. There is a relational obligation between the

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[1] Sauder v. Mid-Continent Petroleum Corp., 54 S. Ct. 671 (1934). The Circuit Court of Appeals' opinion is Mid-Continent Petroleum Corp. v. Sauder, 67 F. (2d) 9 (C. C. A. 10th, 1933).

[2] The effect of the Circuit Court of Appeals' decision on oil and gas development is discussed in Note (1934) 40 W. VA. L. Q. 175; the effect of it as a Swift v. Tyson decision is the subject of a note in (1934) 40 W. VA. L. Q. 258.

[3] The only other important oil and gas case from the Supreme Court is Guffey v. Smith, 237 U. S. 101, 35 S. Ct. 526 (1915), concerning the granting of an injunction against destruction of an oil leasehold.

[4] 78 W. Va. 433, 89 S. E. 12 (1916) L. R. A. 1917A 171.

lessor and lessee of an oil and gas lease, although, strictly speaking, the relation of landlord and tenant does not obtain.[5] Then, as to the duty of the lessee to develop the land under a drill or pay clause or an "unless" clause,[6] there were two possible results for the courts to reach in the construction of leases containing such a clause. They could construe an implied covenant to drill, for breach of which the lessor would have an action at law for damages against the lessee for breach of the covenant, or a suit in equity for specific performance of the covenant. On the other hand, the courts could construe an implied condition to drill, in which case the relief would be a suit for cancellation of the lease because of breach of the condition. Up until 1916 the law in West Virginia on the point was very unsettled, with the courts using the terms "covenant" and "condition" seemingly indiscriminately.[7] Then in 1916 the *Carper* decision was rendered, in which the Supreme Court of Appeals of West Virginia chose to consider the duty to drill an implied condition rather than a covenant.[8] It is submitted that the reasoning of the court in concluding to adopt that construction is sound, namely, that it is less onerous to the lessee while still affording the lessor adequate protection.[9]

After this definite stand had been taken by the West Virginia court on the point, the oil and gas law of the state ran a more settled course. The cases of *Stanley v. United Fuel Gas Company*[10] and *Chambers v. Perrine*[11] followed closely on the heels of the *Carper* case, citing it as a very important precedent, approving it wholeheartedly and adopting its doctrine *in toto*. The first even slight criticism of the *Carper* case appeared in a dictum

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[5] See Carper v. United Fuel Gas Co., *supra* n. 4, 439 *ff*. Also, as to the nature of the relationship between oil and gas lessor and lesser, see SUMMERS, OIL AND GAS (1927) 154 *ff*. The oil and gas "lease" is in actuality the giving of a profit *a prendre*.

[6] A clause whereby the lessee covenants to drill within a certain specified time *or* to pay delay rentals in lieu of drilling. As to the general effect of these clauses, see SUMMERS, *op. cit. supra* n. 5, at 330 *ff*.

[7] See Note (1920) 26 W. VA. L. Q. 248, discussing this unsettled condition of the law prior to the Carper decision and also the effect of that decision.

[8] See the language in the opinion, *supra* n. 4, at 441 and 442, also the *syllabi* 3 and 6. The court still talks about a "conditional covenant" in some places, however. See pages 436 and 437.

[9] The court was undoubtedly influenced by the realization that to hold to the opposite construction would spell virtual ruin to the oil and gas industry of the state, as the producing companies would soon be bankrupt if they were compelled to drill wells on all leased lands, many of which would not be sufficiently productive to pay for the very high expense of sinking a well. Of course, the "surrender" clause would be some protection.

[10] 78 W. Va. 793, 90 S. E. 344 (1916).

[11] 81 W. Va. 321, 94 S. E. 381 (1917).

in the case of *Carbon Black Company v. Gillespie*[12] in 1920, in a statement rather forced by the petition for rehearing, and in the circumstances the statement does not at all weaken the authority of the *Carper* case.[13] The case of *Lamp v. Locke*[14] in the following year should be mentioned in passing, as there a mandatory injunction was granted to compel the lessee to drill an off-set well; the case is clearly distinguishable from the *Carper* case, however, as the suit was brought by one not a party to the lease, but merely a joint owner of the royalties, and there was no other remedy to be given, as there was no chance of changing a forfeiture over the lessee's head since the lessor was in collusion with the lessee in the fraudulent drainage scheme.[15] The *Carper* case is cited again in 1923 in *United Fuel Gas Company v. Smith*,[16] but the case at hand is distinguished from the fact situation of the *Carper* case. Finally comes the case of *Trimble v. Hope Natural Gas Company*[17] in 1933 followed by that of *Dillard v. United Fuel Gas Company*[18] in 1934, which set the limitation on the *Carper* doctrine that it is to be applied only to situations of non-fraudulent drainage, stat-

[12] 87 W. Va. 441, 105 S. E. 517 (1920).

[13] The Carper case was not mentioned in the original opinion, doubtless because it was not directly in point. The facts of the Gillespie case were simply not strong enough for a forfeiture, as the lessee was merely contended to have failed to exercise a "high degree" of diligence in the development of the property, and have failed to use the method of operation most likely to produce the stipulated amounts of gas, but he had been "reasonably" diligent and operated in a manner consistent with usage and custom and his duty to the lessor. But evidently because it was strongly relied upon by the briefs on the petition for rehearing, the court added this statement to its opinion in refusing the petition for rehearing: "The conclusion that breach of an implied covenant or condition constitutes no ground of forfeiture does not conflict with any actual decision of this court. It is at variance with an *obiter dictum* found in Carper v. United Fuel Gas Co., 78 W. Va. 433; but that case involved no claim or question of forfeiture. It was a mere action for damages for failure to drill wells. The observation was made only argumentatively, in the course of interpretation of the lease involved, and was not essential to the conclusion arrived at and announced. It would have sufficed to say a demand for the drilling of off-set wells was a prerequisite to a right of action for damages, instead of a condition precedent to right of forfeiture. On the other hand, the observation may be correct and yet not inconsistent with the position taken here in conformity with previous actual decisions. Denomination thereof as a mere dictum is all that the present situation requires." Carbon Black Co. v. Gillespie, *supra* n. 12, 468.

[14] 89 W. Va. 138, 108 S. E. 889 (1921).

[15] The court does not mention the Carper case, but it explains carefully the difference in this case from the usual fraudulent drainage case, and characterizes this case as "one of necessity and extreme hardship". Lamp v. Locke, *supra* n. 14, 147.

[16] 93 W. Va. 646, 656, 117 S. E. 900 (1923).

[17] 169 S. E. 529 (W. Va. 1933).

[18] 173 S. E. 573 (W. Va. 1934).

ing that where there is fraudulent drainage, the lessee is not estopped from suing for specific performance of the implied "covenant" to "off-set drainage" by his acceptance of delay rentals, or of royalties in the *Dillard* case.[19] And besides this group of West Virginia cases, it is interesting to notice that there are cases from almost all of the other leading oil fields of the country which cite the *Carper* case as the leading precedent on the implied duties of oil and gas lessee, and approve and follow its doctrine.[20]

In concluding this discussion which brings the *Carper* case down to date, it is submitted that the doctrine which the case has made so widespread is a sound doctrine and accomplishes a salutary result for the normal situation that exists in the great oil and gas fields of the country, especially in so far as it tends to minimize over-production, and especially in its application to the gas industry. It is further submitted, however, that the wisdom of applying the doctrine too freely in the West Virginia oil cases because of the peculiar situation in the West Virginia oil fields, may be doubted, if it tends to limit production of the remarkably pure Pennsylvania crude oil.

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[19] Some of these later cases use the term "covenant" loosely again. For a discussion of the Trimble case, see Note (1933) 40 W. VA. L. Q. 72. Also see Note (1929) 7 TEX. L. REV 438, 440, 441, showing an anticipation of the Trimble doctrine.

[20] In Arkansas there is the case of Blair v. Clear Creek Oil and Gas Co., 148 Ark. 301, 230 S. W. 286 (1921), 19 A. L. R. 438 (1922), which cites the Carper case, and "quotes with approval" from it, but which is distinguished from it on the facts. Then in Kentucky there is a line of decisions which recognize that the principle of the Carper case is the currently accepted authority, and they enunciate that principle and follow it: Warren Oil & Gas Co. v. Gilliam, 182 Ky. 807, 207 S. W. 698 (1919); Plumber v. Southern Oil Co., 185 Ky. 243, 214 S. W. 896 (1919); McNutt v. Whitney, 192 Ky. 132, 232 S. W. 386 (1921); Swiss Oil Corp. v. Howell, 199 Ky. 763, 251 S. W. 1007 (1923). From Louisiana come two recent cases upholding the Carper case: McCoy v. State Line Oil & Gas Co., 175 La. 231, 143 So. 58 (1932), and Lindow v. Southern Carbon Co., 5 F. Supp. 818 (W. D. La. 1932), the latter decision being based entirely upon the Carper case and its companion West Virginia cases and commending elaborately the principles of justice as laid down by the West Virginia Supreme Court. Then the Oklahoma case of Eastern Oil Co. v. Beatty, 71 Okla. 275, 177 Pac. 104 (1918) is a leading case in the field, and it is directly founded upon the West Virginia precedent, citing the Carper case and following its principles. The Carper case is also cited in the cases from Oklahoma of Southwestern Oil Co. v. McDaniel, 71 Okla. 142, 175 Pac. 92 (1918), and Orr v. Comar Oil Co., 46 F. (2d) 59 (C. C. A. 10th, 1930). And in the Tennessee decision of Morris v. Messer, 156 Tenn. 54, 299 S. W. 782 (1927) the West Virginia cases are generally referred to and their principle followed.