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## Extension of Term of Oil Lease Through Discovery of Oil in Less Than Paying Quantities

J. W. S.

*West Virginia University College of Law*

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EXTENSION OF TERM OF OIL LEASE THROUGH DISCOVERY OF OIL IN LESS THAN PAYING QUANTITIES.—In the syllabus of a recent West Virginia case<sup>1</sup> it is stated that where an oil and gas lease is for a term of one year and so long thereafter as oil or gas is produced from the demised premises, the language used will not limit the lessee to the particular term mentioned in the lease, where he has demonstrated that the land is underlaid with oil or gas and is proceeding with all diligence and in an efficient manner to produce oil or gas therefrom in paying quantities. After reading the opinion one is far from sure that the language of the opinion goes as far as that of the syllabus and that the court really intended this as one of the grounds of the decision. If it did so intend (and such intent is indicated by the fact this point is covered in the syllabus), then the case is in accord with and follows *South Penn Oil Co. v. Snodgrass*<sup>2</sup> in which the above doctrine was first asserted. Whether the doctrine is sound is doubtful. Both in the principal case and in *South Penn Oil Co. v. Snodgrass* the lease involved provided that the term should continue for a fixed period and as long thereafter as oil or gas should be produced, the words “in paying quantities” or language to that effect, which is usually found in oil and gas leases, not being present. Since in both cases some oil was discovered within the fixed term there would have been justification for holding the lessee had complied with the contract because the lease did not require oil or gas to be produced in paying quantities in order to extend the term but merely required that either oil or gas be produced. But *South Penn Oil Co. v. Snodgrass* is not decided on this ground. Instead, the court stated that “produced,” “produced in paying quantities” and “found in paying quantities” must mean about the same thing, and apparently held that though the lease would have terminated on the expiration of the fixed term had not oil been discovered (though admittedly not in paying quantities) yet the mere discovery of oil, regardless as to quantity, vested in the lessee the right to produce oil and gas from the leasehold, and that the lessee by reason thereof had a right to make one more effort to discover and produce oil or gas in paying quantities.

In the principal case the court, in commenting with approval

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<sup>1</sup>Ohio Fuel Oil Co. v. Greenleaf, 99 S. E. 274 (1919).

<sup>2</sup>71 W. Va. 438, 76 S. E. 961 (1913). *Contra*, Murdock-West Co. v. Logan, 69 O. St. 514, 69 N. E. 984 (1904). See also Barnsdall v. Boley, 119 Fed. 191 (1902).

on the *South Penn Oil Case*, says the rule is a rule of construction and adds:

“It is not unreasonable to say that, when the parties made such a contract as this contemplating the production of oil, they had in view that by the happening of some untoward event, or the failure of the lessee’s expectations to be realized within the time that might reasonably be expected, the lessee might be delayed beyond the term of the lease in producing oil or gas in paying quantities, but, if he was diligently and efficiently prosecuting the work of development at the time the particular term ended, according to the language of the contract, and had therefore demonstrated that the land was oil-producing land, the parties contemplated that he might continue at least the operations in which he was then engaged to their completion, and if such operations resulted in the production of oil in paying quantities, they would have the same result under the other clause of the lease extending it beyond the fixed term as though this result had been accomplished during such period.”

The above language tacitly admits what is undoubtedly true, that the term did end according to the usual meaning of the express language of the contract and, if extended, must be extended by implication. It follows that this doctrine must be based on the supposed intent of the parties at the time they executed the lease. It therefore violates what has been taken to be a well-settled rule of construction of oil and gas leases, namely, that the language thereof is to be construed most strongly against the lessee.<sup>3</sup> This implication is contrary to the express language of the lease and is in favor of the lessee.

The rule that the language of an oil and gas lease is to be taken most strongly against the lessee probably is largely based on the fact that the forms of these instruments are usually prepared very carefully by skilled attorneys of the lessees and are therefore apt to be worded so as to favor the lessees as much as possible, and, though an oil and gas lease after it is executed appears to be an instrument made by the lessor, yet in fact the language is the language of the lessee which he persuaded the lessor to adopt. If the lessee at the time the instrument was executed really contem-

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<sup>3</sup>*Huggins v. Daley*, 99 Fed. 606 (1900); *Shaffer v. Marks*, 241 Fed. 139 (1917); *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271 (1896); *Steelsmith v. Gartlin*, 45 W. Va. 27, 29 S. E. 978 (1898); *Paraffine Oil Co. v. Cruce*, 162 Pac. 716 (Okla. 1917).

plated any such situation as arose in *South Penn Oil Co. v. Snodgrass* or in the principal case, he would certainly have provided for it by express language, instead of leaving the matter to a possible favorable implication in case a controversy should subsequently arise. Besides, it is not easy to see why parties executing a lease for a fixed term of ten years should contemplate any such thing. It would seem that ten years would give the lessee abundant time to test the premises for oil and gas if he so desired. Some untoward event might possibly have prevented a diligent lessee from producing oil in paying quantities in the principal case where the fixed term was only one year, but this is no justification for extending the term of the lease by implication where there is a fixed term of ten years.<sup>4</sup>

If the parties can reasonably be said to have contemplated a possible extension of the term in order to permit the lessee at least to finish any work of development in which he may be engaged at the time the fixed term expires, it would seem they would contemplate this regardless as to whether the lessee had found a trace of oil or gas within the fixed term. Apparently, in order to benefit by such implication, the lessee must discover at least a trace of oil or gas within the fixed term. Apparently, he would have no right to such an extension even though he explored diligently during the entire fixed term and his drill was at the time the fixed term expired within a few feet of a stratum of sand which would produce abundantly.

In *South Penn Oil Co. v. Snodgrass* the court attaches great importance to its holding that the discovery of a mere trace of oil vests in the lessee the right to produce oil and gas from the premises, whereas prior to such discovery he had only the right to explore. The right to explore for oil and gas is as much a vested right as the right to produce oil or gas after discovery though the two rights may differ in character.<sup>5</sup> It must be remembered that we are dealing here with a provision fixing the term and not with

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<sup>4</sup>In *South Penn Oil Co. v. Snodgrass*, the lessee apparently did not begin to drill a well until during the latter part of the last year of the ten-year term. Thus, although it had paid a large sum as delay rentals and had spent a considerable sum on this well it cannot be said to have been diligent. It paid the rentals in order to get the right to postpone operations; so must be taken to have gotten value for such money. After waiting nine years and a half before beginning to test the land, why should it be entitled to the right to sink a second well when it knew it could barely finish one in the remaining time?

<sup>5</sup>See 25 W. VA. L. Q. 316-320 where the matter is discussed and many cases are cited.

a mere condition, a breach of which may give the lessor a right to forfeit the lease if he so desires. In the first place it is hard to see how any right to produce oil vests when the only well which the lessee drilled was substantially a dry hole and would not produce enough oil to pay the cost of pumping. The court admits this is not production within the meaning of the lease. Why should a well that produces a few gallons of oil put the lessee in any better situation than a dry hole? Admitting that a right to produce does vest on discovery of a trace of oil or gas, why is there any particular magic in that? It always has been the law that any interest in land conveyed for a term will terminate in accordance with the language used in the conveyance and a substantial vested estate terminates just as effectively as a less substantial one. Hence a vested right to produce oil should not be favored above other vested estates in land.<sup>6</sup>

It is submitted that no provision ought to be implied which is contrary to the contract of the parties as expressed by their own language. If a provision is contrary to public policy or its presence is due to fraud or misrepresentation it might well be declared null and void, but where the language is clear and there has been no fraud shown it ought not to be nullified by implications contrary thereto. The rule that where the parties have expressly covered a point there can be no implication ought to apply here as in other cases.<sup>7</sup> In the case under consideration the parties expressly fixed the term of the lease and when it should terminate and their contract ought not be changed by the court. It is certain that the parties when they executed the lease involved in *South Penn Oil Co. v. Snodgrass* never contemplated such an extension of its term as the court made. One cannot help feeling that the case was decided more on what has sometimes been termed "fireside equities" than on sound principle. It is submitted that it would be far better to base a case like *South Penn Oil Co. v. Snodgrass* on the strict construction of the word *produced* and thus permit the lessee to proceed to develop the premises after the end of the fixed term so long as he acted diligently, than to imply a covenant which is contrary to the ordinary meaning of the language of the lease.

<sup>6</sup>Even a base or terminable fee simple estate is still terminable on the happening of a contingency unless the Statute of *Quia Emptores* has prevented this result. See GRAY, RULE AGAINST PERPETUITIES, §§31-42.

<sup>7</sup>*Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12 (1916). Other cases are collected in 25 W. Va. L. Q. 238, note 13.

In the principal case the chief ground of decision is that the lessor by his acts estopped himself from treating the lessee's rights under the lease as at an end and, under the circumstances, the decision of the court is undoubtedly sound on that point.

—J. W. S.

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## BOOK REVIEWS

BARNES' FEDERAL CODE containing all federal statutes of a general and public nature now in force. Edited by Uriah Barnes. Charleston, West Virginia. Virginian Law Book Co. 1919. pp. civ, 2831.

Barnes' Federal Code, the latest one-volume edition of the federal statutes, seems to be the most successful effort as yet made either by Congress or by private enterprise to bring within moderate compass the enormous amount of federal legislation of a public nature in force at the time of publication. Congressional legislation has always been so prolific that as early as 1874 Congress sought to remedy the difficulty encountered in the use of the seventeen bulky volumes of Statutes at Large which had been issued to that date by providing for a thorough revision of the federal laws. Pursuant to this Act the first edition of the Revised Statutes was published in 1875 in one volume, embracing all the laws in force to December 1, 1873, as contained in the Statutes at Large to and including volume 17. In 1878, a second edition of the Revised Statutes appeared, containing acts passed by Congress subsequent to December 1, 1873. In 1891, a Supplement to the Revised Statutes was published, covering the period from 1874 to 1891 and embracing the laws then in force contained in volumes 18-26 of the Statutes at Large. In 1901, a second volume of the Supplement was published, covering the period down to 1901 and embracing the laws contained in volumes 27-31 of the Statutes at Large. Since 1901 the federal government has published no further Revisions or Supplements. Therefore, the official public statutes of the United States are now contained in the Revised Statutes, one volume, the Supplements to the Revised Statutes, two volumes, and some ten extremely large volumes of the Statutes at Large.