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## No-Term Oil and Gas Leases and the Rule Against Perpetuities

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passed on severance of the reversion would not be overthrown. This rule as to a "presumption" that the royalty passes subject to be overcome by the "equity and justice" gives no definite rule of law by which lawyers and the public generally may be guided. Apparently no one could be reasonably sure of his rights in a particular case until suit was brought and the case was decided by the court. The merit of the rule suggested by the dissenting opinion is that it is a definite rule of law which will do substantial justice in a great majority of the cases and upon which lawyers and the public generally can rely. It is submitted that the doctrine of the dissenting opinion is in accord with legal principles, is in accord with the weight of authority and is preferable from the standpoint of general justice and welfare.

—J. W. S.

NO-TERM OIL AND GAS LEASES AND THE RULE AGAINST PERPETUITIES.—In the recent case of *Johnson v. Armstrong*<sup>1</sup> the Supreme Court of Appeals has again decided that a no-term oil and gas lease does not violate the rule against perpetuities. The only cases cited by the court in support of its decision on this point in which any question as to the rule against perpetuities was raised are *Thaw v. Gaffney*,<sup>2</sup> and *Wilson v. Reserve Gas Co.*<sup>3</sup> In *Thaw v. Gaffney* it was held that an option in a lessee to renew the lease perpetually is not void as being within the rule against perpetuities. This is in accord with the great weight of authority and has been termed an exception to the rule against perpetuities.<sup>4</sup> A no-term oil and gas lease such as involved in *Wilson v. Reserve Gas Co.* and *Johnson v. Armstrong* gives to the lessee what is in effect an option to renew perpetually, if we disregard for the present the question, discussed hereafter, as to whether there is an implied condition that the lessee explore for oil and gas. In so far as this right to renew the lease perpetually is concerned the above cases are correct. However, as was pointed out in a recent article in this periodical,<sup>5</sup> a no-term oil and gas lease violates the rule against perpetuities for another reason which it seems has never been

<sup>1</sup>94 S. E. 753 (W. Va. 1918).

<sup>2</sup>75 W. Va. 229, 83 S. E. 983 (1914).

<sup>3</sup>78 W. Va. 329, 88 S. E. 1075 (1916).

<sup>4</sup>See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§230, 230a, 230aa. See also cases collected in 25 W. VA. L. QUART. 36, note 24.

<sup>5</sup>"Oil and Gas Leases and the Rule Against Perpetuities," 25 W. VA. L. QUART. 36, 37.

called to the attention of the court. It contains an almost perfect analogy<sup>6</sup> to an option to purchase realty which may be exercised too remotely, and is therefore within the rule laid down in *Starcher Bros. v. Duty*<sup>7</sup> and *Woodall v. Bruen*.<sup>8</sup>

As soon as the ordinary oil and gas lease is executed, the lessee gets two interests in the land, if we accept the construction put upon the instruments by the courts. First, he gets a vested right to enter on the land and search for oil and gas.<sup>9</sup> Second, he gets an estate either in the oil and gas, or in the land, contingent upon his discovering oil or gas in accordance with the provisions of the lease.<sup>10</sup> In a no-term lease this contingent estate may vest beyond the period prescribed by the rule against perpetuities and therefore should be void.

The conclusion of the court in *Johnson v. Armstrong* that the lease is not within the rule against perpetuities can be justified, if, as the court holds, the lessor had a right, at the end of any three months' period, to give the lessee notice of intent to forfeit the lease unless the lessee should drill a well within a reasonable time. If there was such a right in the lessor he could have terminated the lease within a comparatively short time unless the lessee actually discovered oil or gas, and therefore, there could be no objection on the ground that the estate above mentioned might vest too remotely.

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<sup>6</sup>It has been suggested that one having an option to purchase land may in some cases be considered as the substantial owner of the property or as having *dominus* of the property and, therefore, what amounts to a present interest therein. See *KALES, FUTURE INTERESTS*, §260. But this cannot be said where the estate is subject to a condition precedent which imposes a considerable burden on the optionee. In the case of a no-term oil and gas lease there is not only great expense in drilling a well but the vesting of the estate is contingent on finding oil or gas. The lessee may fail to find either of the minerals because they are not present or because, though present, the well did not happen to tap the oil or gas bearing strata. Hence the lessee cannot be said to have *dominus* of the estate.

<sup>7</sup>61 W. Va. 373, 56 S. E. 527 (1907).

<sup>8</sup>76 W. Va. 193, 85 S. E. 170 (1915).

<sup>9</sup>It has been frequently stated that an oil and gas lessee gets no vested estate in the land until he discovers oil or gas. This is clearly erroneous. As soon as the lease is executed there passes to the lessee an exclusive right, for a period, to enter on the land and search for oil and gas. This right being incorporeal cannot be properly protected in a court of law if the lessee is out of possession, but a court of equity will enforce the right either against the lessor and his privies or against strangers. See *Lockwood v. Carter Oil Co.*, 73 W. Va. 175, 80 S. E. 814 (1913); *Smith v. Root*, 66 W. Va. 633, 68 S. E. 1005 (1910); *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836 (1909). If a court of equity will protect this right of exploration by injunction or by specific performance, it is necessarily a vested estate in land.

<sup>10</sup>This is too well established to require a citation of authorities. A number of cases to this effect are cited in *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12 (1916).

This right of the lessor, while not so designated, must be an implied condition. According to the court the lessee must, on demand of the lessor, begin to drill a well within a reasonable time after the termination of the period for which the lessor has accepted delay rentals. It is respectfully submitted that no such condition ought to be implied.<sup>11</sup> Each of the leases involved in this case was given on a consideration of one dollar and each contained a provision as follows:

“In case no well is completed within three months, then this grant shall become null and void, unless the second party pay to the first party thirty-four dollars in advance for each three months thereafter such completion is delayed.”

This expressly gives the lessee an option at the end of each three months' period to pay the delay rental and thus extend the time for drilling a well. It is not intimated that this option is invalid for any reason or that there is not adequate consideration for it. If invalid the result would be that the lessor would have an immediate right to forfeit the lease as soon as any period expired for which delay rental had been accepted. If the option is valid the implied condition under which the lessee may be compelled to drill a well or forfeit the lease is inconsistent with the intent of the parties as expressed in the language of the lease. In the carefully considered case of *Carper v. United Fuel Gas Co.*,<sup>12</sup> it was said that no covenant to explore for oil and gas can be implied, where the lease gives the lessee the option to drill a well or to pay a sum periodically in lieu thereof, and that a condition might be implied only in case the oil and gas were being drained from the premises.<sup>13</sup>

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<sup>11</sup>Apparently the first case in this state in which it was said that such a condition would be implied was *Wilson v. Reserve Gas Co.*, *supra*. The authority relied upon was *Venedocia Oil & Gas Co. v. Robinson*, 71 O. St. 392, 73 N. E. 222 (1905), but this case contains nothing but a rather weak *dictum* which tends to support the proposition for which it is cited, and two quotations which purport to be taken from it are not to be found there. The writer has been unable to discover the source of these quotations but it is highly improbable that they are taken from any opinion of the Supreme Court of Ohio. It is unfortunate that such a disturbing element should have been injected into the law of this state at a time when the body of the law relating to oil and gas leases seemed to be in a fair way to be quite satisfactorily settled.

<sup>12</sup>78 W. Va. 433, 89 S. E. 12 (1916).

<sup>13</sup>To the effect that if express provisions as to forfeiture are set out in the lease, no new and inconsistent grounds can be implied, see *Kachelmacher v. Laird*, 92 O. St. 324, 110 N. E. 933 (1915); *Harris v. Ohio Oil Co.*, 57 O. St. 118, 48 N. E. 502 (1897); *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46 (1908); *Rose v. Lanyon Zinc Co.*, 68 Kan. 126, 74 Pac. 625 (1903).

The latter exception was made because the court considered that it could not have been the intent of the parties that the oil and gas be removed from the land except through wells on the premises, and a condition might properly be implied which would require the lessee to protect the leasehold from drainage on penalty of forfeiting the lease. This is quite different from implying a condition which destroys the express provisions of the lease as is the case in *Johnson v. Armstrong*. If the lessor is willing to accept money in lieu of development why assist him to break his contract so long as the oil and gas remains undisturbed beneath his land? If the lease was obtained through fraud, why not cancel the lease for fraud? Because the lessor has made a bad bargain should a court make a better one for him by resorting to implications contrary to the express language of the contract? *Johnson v. Armstrong* does not even appear to be a case where there would have been any particular injustice to the lessor. It is submitted that the language of the parties in an oil and gas lease ought to be given its ordinary and usual meaning and that any other policy leads to confusion and uncertainty as to important property interests. The implied condition above mentioned logically applies to every oil and gas lease which purports to give the lessee an option to drill or pay delay rentals. It is submitted that it is unwise thus to upset what have been considered for a long time as settled principles of the law of real property.

—J. W. S.

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RIGHTS IN A LIFE INSURANCE POLICY OF A BENEFICIARY WHO HAS NO INSURABLE INTEREST.—It is held that one may not in his own name and at his own expense procure insurance for his own benefit on the life of another without having what is known as an insurable interest in the life.<sup>1</sup> On the other hand, it is held by a heavy preponderance of authority that one who procures insurance on his own life on his own initiative and at his own expense may name as beneficiary one who has no insurable interest in the

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<sup>1</sup>*Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185; *Griffens v. Equitable Assurance Soc.*, 119 Ky. 856, 84 S. W. 1164 (1905); *Ruse v. Insurance Co.*, 23 N. Y. 516 (1861); *Burbage v. Windley*, 108 N. C. 361, 12 S. E. 839, 12 L. R. A. 409 (1891); *Crismond v. Jones*, 117 Va. 34, 37, 83 S. E. 1045 (1915) (*dictum*).