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# FORFEITURE, NOTICE AND DEMAND AND JUDICIAL ASCERTAINMENT CLAUSES IN OIL AND GAS LEASES

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## FORFEITURE AND RELATED PROVISIONS OF LEASE<sup>1</sup>

The oil and gas lease has come to include a number of specific provisions concerning forfeiture. A common provision permits the lessor to declare a forfeiture of the lease in the event of breach of any of the substantial terms or conditions of the lease.<sup>2</sup> In some clauses specific mention is made of defaults in royalties and other payments due the lessor as grounds for forfeiture.<sup>3</sup> Some leases provide for forfeiture for failure of the lessee to drill an initial well within a specific period,<sup>4</sup> for failure to complete a well or pay rentals,<sup>5</sup> for failure to

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1. On this subject, see generally, Merrill, *Lease Clauses Affecting Implied Covenants*, Southwestern Legal Foundation, Second Annual Institute on Oil and Gas Law and Taxation 141 (1951).

2. E.g., "If the lessee shall fail or neglect to keep and perform each and all of the obligations incumbent upon it as hereinabove provided, this lease shall become null and void." *Empire Gas & Fuel Co. v. Pendar*, 244 S.W. 184, 186 (Tex. Civ. App. 1922), error dism'd (holding that lessor might waive the forfeiture and recover from the lessee the agreed consideration for the lease).

"Upon the violation of any of the substantial terms or conditions of this lease, the Commissioners of the Land Office shall have the right, at any time after hearing upon ten days notice, given by registered mail to the last known address of such lessee, or by posting notice in writing in a conspicuous place upon the premises, specifying the terms or conditions violated, to declare this lease null and void; . . ." *State ex rel. Comm'rs of Land Office v. Carter Oil Co.*, 336 P.2d 1086, 1090, 10 O. & G.R. 790, 793 (Okla. 1958).

3. E.g., "If lessee shall fail or refuse to make the payment of any sum due by the provisions of this lease, either as rental or royalty on the production, within thirty (30) days after same shall become due, . . . or if any of the material terms of this lease shall be violated, this lease shall be subject to forfeiture by The Board for Lease of University Lands by an order entered upon the minutes of the Board reciting the facts constituting the default and declaring the forfeiture." A lease form used for University of Texas lands.

4. E.g., "If no well be commenced on the above described premises on or before July 1, 1955, this lease shall become null and void." *Moore Oil, Inc. v. Snakard*, 150 F. Supp. 250, 254, 8 O. & G.R. 285, 290 (W.D. Okla. 1957), remanded on joint motion of the parties, 249 F.2d 318 (10th Cir. 1957).

"This lease is made on condition that unless lessee commences or causes to be commenced a test well for oil and gas on either the land covered by this lease or on the adjoining land, known as [description] within ninety days from the date of the execution of this lease and thereafter continues the drilling of such well to a depth sufficient to test the McCloskey lime in that area or to such lesser depth at which oil or gas is found in commercially paying quantities, then this lease shall be void as to both parties. If said first test well is drilled on the [described] land and is a commercially producing well, then unless lessee shall commence the actual drilling of a well on the premises covered by this lease within thirty days after the completion of said well on said [described] land and thereafter drill the same to a depth sufficient to test the McCloskey lime in that area or to such lesser depth at which oil or gas is found in commercially paying quantities, then this lease shall be void as to both parties." *Illinois Mid-Continent Co. v. Tennis*, 122 Ind. App. 17, 21, 102 N.E.2d 390, 391, 1 O. & G.R. 39, 41 (1951).

5. E.g., "It is expressly understood and agreed that the failure to complete a well upon

offset,<sup>6</sup> or for failure to develop the premises.<sup>7</sup> In some instances bankruptcy or insolvency of the lessee is made a basis for a declaration of forfeiture.<sup>8</sup>

An occasional lease will provide that forfeiture is the exclusive remedy of the lessor,<sup>9</sup> others expressly provide that forfeiture shall not be the exclusive remedy but shall be cumulative of other remedies.<sup>10</sup>

On the other hand, many leases in common use, having been drafted by or for lessees, contain provisions designed to protect the lessee against loss of his interest by forfeiture. The most common of such provisions, *viz.*, notice and demand

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the said premises within the time herein specified or to pay the rentals at the time and in the manner herein provided shall ipso facto work a forfeiture of this lease without notice, proceeding or action, and in event of such forfeiture the party of the second part binds itself, its successors and assigns, to execute a proper release of this instrument at its own cost and expense." *Castle Brook Carbon Black Co. v. Ferrell*, 76 W. Va. 300, 303, 85 S.E., 544, 545 (1915).

6. E.g., "The breach or refusal by lessee of his obligation to drill such well or wells to protect lessor's interest or to pay compensatory or offset royalty as hereinabove provided shall cause termination and cancellation of this lease." A Texas lease form.

"If Lessee shall fail or refuse to drill any offset well or wells in good faith, as required herein, . . . this lease shall be subject to forfeiture by the Board for Lease of University Lands by an order entered upon the minutes of the Board reciting the facts constituting the default and declaring the forfeiture." A lease form employed for University of Texas lands.

7. E.g., "It being hereby agreed that failure to be either producing or developing these lands for a period of \_\_\_ months at any one period without the consent of the party of the first part shall act as a forfeiture of all the land except \_\_\_ acres immediately around the well drilled." *Gladys Belle Oil Co. v. Turner*, 12 S.W.2d 847 (Tex. Civ. App. 1929), error *re*'d.

8. E.g., "[S]hould the Grantee at any time during the term hereof be adjudged a bankrupt, either upon Grantee's voluntary petition in bankruptcy, or upon the involuntary petition of Grantee's creditors, or any of them, or should an attachment be levied and permitted to remain for an unreasonable length of time upon or against the interest, rights or privileges of Grantee in or to any oil, gas or other hydrocarbon substances produced from any well or wells drilled by Grantee upon said lands, then all of the interests, rights, and privileges of Grantee in and to all oil, gas or other hydrocarbon substances produced and saved from the [lessor's] lands by reason of Grantee's operations thereon, shall immediately cease, terminate and end, and in such event the [lessor] shall have, and Grantee, by the acceptance thereof, hereby gives the [lessor], the right, option and privilege to cancel and terminate this agreement and all of the terms and provisions granted hereby, and all of the rights and privileges of Grantee in and to or upon the [lessor's] lands, and in and to any oil, gas or other hydrocarbon substances produced and saved from the [lessor's] lands by reason of Grantee's operations thereon, and all of Grantee's rights and privileges granted by this Agreement shall immediately cease and terminate and end upon the [lessor] so exercising its option in writing." *Southwest Exploration Co. v. Comm'r*, 18 T.C. 2955, 2959, 1 O. & G.R. 1483, 1489 (1952) on appeal, *Comm'r v. Southwest Exploration Co.*, 350 U.S. 308, 5 O. & G.R. 839 (1956).

9. E.g., "Lessors shall have no other remedy against lessee for breach of the whole or part of this contract beyond enforcing the forfeiture hereinbefore mentioned and recovering actual damage herein agreed to be paid by lessee." *John v. Elberta Oil Co.*, 124 Cal. App. 744, 745, 13 P.2d 538 (1932).

10. "In case of violation by the Lessee of the provisions of this lease, the remedy by the State by forfeiture shall not be the exclusive remedy, but a suit for damages or specific performance, or both, may be instituted." A form for the leasing of University of Texas lands.

clauses and judicial ascertainment clauses, are discussed hereafter. In many older and in some contemporary leases, other provisions have been included. Thus the lease may provide that the lessee's estate shall not terminate until the lessee has abandoned the premises and the purposes of the lease.<sup>11</sup> Or it may provide that the express and implied covenants of the lease are not to be construed as conditions.<sup>12</sup> The good faith or judgment of the lessee may be made the measure of the performance of lessee's obligations.<sup>13</sup> Or there may be included in the lease a provision that lessee shall not be deemed in default while drilling is pursued<sup>14</sup> or that there shall be no forfeiture for breach of any implied covenant or condition.<sup>15</sup>

Certain construction questions arise frequently in connection with forfeiture provisions. Among these are:

1. Whether the grounds for forfeiture provided in the lease have occurred. In view of the judicial antipathy to forfeiture it may be expected that a court will be ready to find that such grounds have not occurred.<sup>16</sup>

2. Whether the lessor may waive the benefit of the forfeiture clause and seek damages for breach of covenant. It is generally declared that the forfeiture clause of a lease was designed for the benefit of the lessor rather than the lessee and hence the lessor may waive forfeiture and sue to enforce the covenants of the lessee.<sup>17</sup>

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11. E.g., "Title to the minerals vested in grantee under this grant shall not end or revert to grantor until there is a complete, absolute and intentional abandonment by grantee of each and all of the purposes, express or implied, of this grant and every part and parcel of the premises described in this grant." *Ebberts v. Carpenter Production Co.*, 256 S.W.2d 601, 635, 2 O. & G.R. 726, 772 (Tex. Civ. App. 1953).

12. E.g., "The covenants of lessee mentioned in this lease, as well as all implied covenants, are not to be understood as conditions, and the breach of one or all of same will not work a forfeiture, abandonment or termination of this lease except the failure to drill or pay rentals provided for in paragraph . . . hereof." *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 274, 277, 171 S.W.2d 339, 341 (1943). A substantially similar clause is quoted in *Morriss v. First National Bank of Mission*, 249 S.W.2d 269, 1 O. & G.R. 1371 (Tex. Civ. App. 1952, error ref'd n.r.e.).

13. E.g., "The judgment of the lessee when not fraudulently exercised in carrying out the purposes of this lease shall be conclusive." *Magnolia Petroleum Co. v. Page*, 141 S.W.2d 691, 693 (Tex. Civ. App. 1940), error ref'd. See also *Coats v. Brown*, 301 S.W.2d 932, 8 O. & G.R. 27 (Tex. Civ. App. 1957).

14. E.g., "Lessee shall not, however, be deemed to be in default while work is in progress in good faith which when completed will constitute compliance with such condition or covenant." A California lease form.

15. E.g., ". . . and no part of this lease shall be forfeited or terminated by reason of the breach of any implied condition of covenants thereof." *Stanolind Oil & Gas Co. v. Christian*, 83 S.W.2d 408, 409 (Tex. Civ. App. 1935), error ref'd.

16. See e.g., *Castle Brook Carbon Black Co. v. Ferrell*, 76 W.Va. 300, 85 S.E. 544 (1915) (holding that express forfeiture clause quoted supra note 5, was inapplicable in the event of nonpayment of royalty; the term "rental" as used in the forfeiture clause was said not to embrace "royalty").

17. See e.g., *Edmonds v. Mounsey*, 15 Ind. App. 399, 44 N.E. 196 (1896) (lessor may waive forfeiture and sue for rentals); *Empire Gas & Fuel Co. v. Pendar*, 244 S.W. 184

3. Whether one concurrent owner may assert forfeiture without joinder by other concurrent owners. Some cases require the joinder by all concurrent owners in a notice of forfeiture or in an action to cancel a lease.<sup>18</sup> The better rule, in our opinion, permits one concurrent owner to sue for forfeiture without the joinder as parties plaintiff of other concurrent owners.<sup>19</sup>

4. Whether adequate notice of breach of condition and demand for performance were given.<sup>20</sup>

Apart from these questions of interpretation of forfeiture provisions, there is the more fundamental question of the effect to be given to clauses that seek to prevent forfeiture upon breach of an obligation of the lessee. In general it would appear that provisions of this type have little significance. One such clause, for example, provides that the lessee's interest shall not end or revert until there has been a complete, absolute and intentional abandonment of all of the purposes of the grant and every part of the demised premises.<sup>21</sup> Such a clause has been held insufficient to prevent termination of a lease by limitation.<sup>22</sup> However, this clause has been used in construing a removal-of-fixtures clause to prevent the

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(Tex. Civ. App. 1922), error dism'd (despite forfeiture clause, breach of the lessee's covenant did not render the lease absolutely void; the lessor may waive the forfeiture and recover from the lessee the agreed consideration for the lease, including the face amount of an oil payment although the lessee had not obtained production).

18. See e.g., *Sun Oil Co. v. Oswell*, 258 Ala. 326, 62 So.2d 783, 2 O. & G.R. 145 (1953) (relying on Oklahoma authority and holding that where several concurrent owners join in a lease or if mineral ownership become divided subsequent to lease, then all of such cotenants are necessary parties plaintiff in an action to cancel the lease); *Jameson v. Chanslor-Canfield Midway Oil Co.*, 176 Cal. 1, 167 Pac. 369 (1917) (construing a notice and demand clause as requiring joinder of all concurrent owners in declaration of forfeiture); *Hawkins v. Klein*, 124 Okla. 161, 255 Pac. 570 (1926), cert. denied, 276 U.S. 588 (1928) (holding that notice of forfeiture given by one concurrent owner alone was a nullity and did not effectuate a forfeiture). The Oklahoma law has changed. See 12 Okla. Stat. 1951, § 230; *Coal Oil and Gas Co. v. Styron*, 303 P.2d 965, 6 O. & G.R. 827 (Okla. 1956).

19. Discussion Notes, 2 O. & G.R. 156 at 157 observes that the rule of *Sun Oil Co. v. Oswell*, supra note 18, "is not sound, as it unreasonably places complaining cotenants at the mercy of those who refused to join as plaintiffs. The better rule is believed to be that if some lessors refuse to join as plaintiffs, it is sufficient to join them as defendants. This is the rule in Kansas, Texas and Arkansas . . . , In California, the point seems not as yet settled."

20. See text at note 87 et seq. infra.

21. E.g., "After discovery of oil, gas or other minerals upon said premises, the title to all minerals in and upon and underlying the surface of the land described in this lease shall remain and be vested in lessee and shall not revert to lessor nor end until there is a complete, absolute and intentional abandonment by lessee of each and all of the purposes, either expressed or implied, of this lease and every part and parcel of the lands described herein. Such abandonment is the only manner by which lessee's title to such minerals can be ended and title to said minerals be reinvested in lessor." *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 274, 277, 171 S.W.2d 339, 341 (1943).

22. *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 274, 171 S.W.2d 339 (1943) (holding that the leasehold estate terminated automatically at the end of the primary term even though a gas well capable of production in paying quantities had been drilled, on the ground that there was then no production and no timely payment of shut-in royalty as a substitute for production. The lease provision quoted in note 21 supra was "held to contemplate a discovery and production of gas in paying quantities in order thereby to vest title to the minerals" in lessees).

forfeiture of title to equipment on the leasehold, despite the fact that nineteen months had elapsed since cessation of production on the premises.<sup>23</sup>

Lease provisions designed to make the lessee's discretion conclusive<sup>24</sup> also have limited significance. Thus in a leading Texas case, the court declared that the discretion of the lessee was not meant to be uncontrolled.<sup>25</sup> Clauses of this kind have been effective, however, to bar a recovery of damages where the lessee's bad faith was not established.<sup>26</sup>

#### PRESERVATION OF ACREAGE OR EASEMENTS FROM FORFEITURE

Contemporary leases typically include some express provision for the preservation of the leasehold as to certain premises or the preservation of easements in the event of cancellation or termination of a lease for any cause. Customarily the lease provides that despite such cancellation or termination of the lease, the lessee's interest shall be preserved as to certain acreage around a producing well or around a well being drilled or reworked or as to acreage included in a drilling or producing unit.<sup>27</sup>

The acreage around such producing, drilling, or unit well as to which the lease is preserved may be greater in the case of a deep well.<sup>28</sup> A related lease

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23. *Vermillion v. Fidel*, 256 S.W.2d 969, 2 O. & G.R. 819 (Tex. Civ. App. 1952). The court emphasized that "appellees never at any time intended to forfeit their claim to the equipment in question and did not intend to abandon the well or lease. . . . Both parties knew or should have known there would be no forfeiture of equipment or abandonment of the lease without an expressed intention by appellees either in words or acts so to do within a reasonable length of time after production ceased because the terms of the lease contract provided in part that 'Title to the minerals vested in grantee under this grant shall not end or revert to grantor until there is a complete, absolute and intentional abandonment by grantee of each and all of the purposes, expressed or implied, of this grant and every part and parcel of the premises described in this grant.'" 256 S.W.2d at 971-72, 2 O. & G.R. at 822, 824.

24. E.g., "The judgment of the lessee when not fraudulently exercised in carrying out the purposes of this lease shall be conclusive." This clause is discussed in Richardson, *Doctrine of Development Covenants Re-Examined in Light of Express Covenants and Conservation Orders*, Southwestern Legal Foundation, Ninth Annual Institute on Oil and Gas Law and Taxation 321, 347 (1958).

25. *Cowden v. Broderick & Calvert*, 131 Tex. 434, 114 S.W.2d 1166 (1938).

26. *Coats v. Brown*, 301 S.W.2d 932, 8 O. & G.R. 27 (Tex. Civ. App. 1957); *Magnolia Petroleum Co. v. Page*, 141 S.W.2d 691 (Tex. Civ. App. 1940, error ref'd).

27. E.g., "Notwithstanding any forfeiture of this lease, the Lessee shall have the right to retain any and all wells being drilled, or producing or capable of producing oil or gas in paying quantities, at the time of such forfeiture." *Danker v. Lee*, 137 Cal.App.2d 797, 802, 291 P.2d 73, 76, 5 O. & G.R. 313, 317 (1955); "In case of cancellation or termination of this lease for any cause, Lessee shall have the right to retain under the terms hereof forty acres of land around each well producing, being worked on, or drilling hereunder, unless there be in force in said area at such time a spacing order or regulation of the Conservation Commissioner or other government agency allocating more than forty acres to each well, in which case Lessee shall have the right to retain around each such well the number of acres allocated to each well under such order or regulation. The tract so retained shall be designated by Lessee in as near a square form as practicable." *Melancon v. Texas Co.*, 230 La. 593 n. 7, 89 So.2d 135 n. 7, 6 O. & G.R. 623 n. 7 (1956).

28. E.g., ". . . except that Lessee shall have the right to retain all wells then producing or in the course of drilling or having work done on them, as to which Lessee is not in de-

clause provides that in the event of partial termination of the lease, the land released from the lease shall continue to be burdened with certain easements for the benefit of land remaining under lease.<sup>29</sup>

Effect has been given to clauses of this sort in a number of instances. However, if, in bad faith, the lessee wilfully refuses to perform some substantial obligation imposed by the lease he may be deprived of the benefit of such clause.<sup>30</sup> Thus in a Louisiana case where the lessee wilfully refused for a substantial period of time to remit royalties due the lessor, the presence in the lease of provision for retention of acreage around a producing well was held not to prevent cancellation of the entire leasehold even though there was a producing well thereon. The lease provision was described as "an equitable provision for the benefit of the lessee and applies to those cancellations involving a bona fide dispute as contemplated in" the judicial ascertainment clause of the lease.<sup>31</sup>

#### NOTICE AND DEMAND AND JUDICIAL ASCERTAINMENT CLAUSES<sup>32</sup>

In some states notice of breach of covenant and demand for performance, allowing for a reasonable time to cure the breach, are prerequisites of an action by the lessor to forfeit the lease<sup>33</sup> or to recover damages for the

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fault, together with twenty (20) acres for each well producing or being drilled for oil or one hundred sixty (160) acres for each well producing or being drilled for gas with full right to drill new wells on the lands so retained and to operate, produce, redrill, deepen or plug back to any depth, and to perforate casing at any depth believed to be in an oil or gas zone, and properly to maintain all such wells subject to all provisions of this lease, so long as such wells respectively shall produce oil or gas in quantities deemed paying by Lessee. . . . For the purpose of this paragraph, any well producing below a depth of seven thousand five hundred feet (7,500') or being drilled to a depth below seven thousand five hundred feet (7,500') shall be deemed to be two (2) wells." A lease form used in California.

29. E.g., "Notwithstanding any partial termination of this lease, whether by surrender, forfeiture, or otherwise, Lessee shall have such rights-of-way over, upon, and across the land with respect to which this lease has terminated as are necessary or convenient for Lessee's operations hereunder on the leased land retained by it." A California lease form.

30. See e.g., *Baldwin v. Kubetz*, 148 Cal.App.2d 937, 307 P.2d 1005, 7 O. & G.R. 407 (1957) (despite provision in lease for retention by lessee of 10 acres surrounding each producing well in event of forfeiture of the lease, it was held that lessee was not entitled to retain such acreage by reason of his wilful and wilfully persistent default in performance of the obligation to maintain and operate the well in conformity with customary oil field practices and modern methods despite notices given him by lessor and regardless of the pendency of the action to declare the lease forfeited).

31. *Melancon v. Texas Co.*, 230 La. 593, 624, 89 So.2d 135, 146, 6 O. & G.R. 623, 635 (1956).

32. For discussion of these clauses see Merrill, *Lease Clauses Affecting Implied Covenants*, Southwestern Legal Foundation, Second Annual Institute on Oil and Gas Law and Taxation 141, 181-87 (1951); Terry, *Miscellaneous Clauses in Oil and Gas Leases*, Southwestern Legal Foundation, Second Annual Institute on Oil and Gas Law and Taxation 237, 247 (1951).

33. See e.g., *Fey v. The A.A. Oil Corp.*, 129 Mont. 300, 316, 285 P.2d 578, 586, 4 O. & G.R. 1324, 1333 (1955): "The rule is clear that the lessor who intends to claim forfeiture, where development is an element, has the duty to demand that development proceed or commence."; *Kunc v. Harper-Turner Oil Co.*, 297 P.2d 371, 377, 5 O. & G.R. 1028, 1035 (Okla. 1956): "The rule is well established that where lessors seek the cancellation of a lease on the ground that it has not been properly developed, the lessors must give

breach.<sup>34</sup> If after notice and demand the lessee manifests a positive intention not to comply, the allowance of a reasonable time to perform is not required and the action may be commenced immediately.<sup>35</sup> Notice and demand need not precede an action to cancel a lease for abandonment<sup>36</sup> or to terminate a lease under one of the clauses of special limitation.<sup>37</sup>

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notice that they demand the drilling of an additional well or wells and that failure to comply by the lessee will result in an action to declare the undeveloped portion of the lease forfeited and cancelled, and that the lessee is entitled to a reasonable time after such notice to commence operations to comply with the notice and demand.”; *Hoover v. General Crude Oil Co.*, 147 Tex. 89, 94, 212 S.W.2d 140, 143 (1948): “[I]t would be manifestly inequitable for the respondent suddenly to turn about and demand a forfeiture, without notice and without giving them a reasonable time within which to comply with the requirements of the lease.”; *Swiss Oil Corp. v. Howell*, 199 Ky. 763, 251 S.W. 1007 (1923), (finding that lessee was not afforded a reasonable opportunity to comply after receipt of notice and demand); *Young v. Dunn*, 302 Ky. 223, 194 S.W.2d 378 (1946) (holding that lease was not subject to forfeiture for failure to market in absence of notice and demand). See *Meyers, Two Drilling Covenants Implied in Oil and Gas Leases*, 38 Minn.L.Rev. 127, 138 (1954); *Merrill, Covenants Implied in Oil and Gas Leases* §§ 192-198 (2d ed. 1940).

34. In *Martin v. Graf*, 289 Ky. 272, 158 S.W.2d 637 (1942), notice and demand was said to be a prerequisite to a suit for damages. Generally, however, it appears that notice and demand is not a prerequisite to such an action. See e.g., *General Crude Oil Co. v. Harris*, 101 S.W.2d 1098 (Tex. Civ. App. 1937) (the lease contained a notice and demand clause providing that the service of 60 days notice shall be precedent to the bringing of any action on said lease for any cause. The court said that “we do not think the written notice was a necessary prerequisite to the right of the lessors to, or the liability of the lessees for, the damages so sustained; that is to say, that that notice is not thought to be an essential element of the cause of action—in other words, that the stipulation may not be construed as a waiver of all damages sustained prior to the giving of such notice.”) *Id.* at 1101. Walker has observed that “It is difficult to see any justification of a requirement that, as a predicate for a suit for damages, the lessor must notify the lessee in possession operating the premises of the existence of drainage since the lessee, under these circumstances, should have more information about the drainage than the lessor.” 2 Walker, *Cases on Oil and Gas* 651 (1949).

35. Where the lessee after demand by lessor manifests a definite and positive intention not to comply with such demand, lessor may immediately begin an action without waiting for the passage of a reasonable time after notice to permit performance by the lessee. *Indian Territory Illuminating Oil Co. v. Haynes Drilling Co.*, 180 Okla. 419, 69 P.2d 624 (1937).

36. See e.g., *B. & B. Oil Co. v. Lane*, 249 S.W.2d 705, 706, 1 O. & G.R. 1164, 1166 (Ky. 1952) (observing that notice and demand are required as prerequisite to action for non-diligent development of lease but are not required before a suit can be maintained to cancel the lease on the ground of abandonment. “There can be no reason for notifying one who has abandoned a lease that suit will be filed. If he has abandoned it, he knows that fact and is entitled to no notice; while if lessee is only remiss or dilatory in the manner in which he is developing or operating the property, he is entitled to notice that he must improve his operations, and should he fail to heed the notice, suit will be brought to cancel the lease.”); *Tanner v. Reeves*, 249 S.W.2d 526, 1 O. & G.R. 1181 (Ky. 1952) (to the same effect); *Smyth v. Koplin*, 294 S.W.2d 525, 6 O. & G.R. 1318 (Ky. 1956) (same); *Benedum-Trees Oil Co. v. Davis*, 107 F.2d 981, 986, (6th Cir. 1939) (“The rule . . . that before a lease can be terminated by the lessor for failure to develop, notice must be given lessee, is inapplicable here. Such notice or demand is unnecessary where termination of the lease may be inferred from the fact the lessee has been in default for an unreasonable time or has intentionally breached the express or implied obligations of the contract.”)

37. See *infra* note 59 et seq.



The reason for requiring that notice and demand precede a suit for cancellation of the lease for breach of covenant is easy enough to discover. Whether the action be considered as one for extraordinary relief in equity or as one to enforce a right of entry for breach of a condition subsequent, forfeiture is the relief sought and accordingly the action is cognizable in equity. Since equity dislikes forfeiture and since one seeking equity must do equity, notice, demand and an opportunity to cure the breach are required. An action for damages, on the other hand, is not cognizable in equity and fairness and justice do not require that notice, demand, and opportunity to cure the breach be given the lessee. If the lessee's breach of duty has already inflicted damage on the lessor, notice, demand, and opportunity to cure would seem to be irrelevant to an action to recover for such damage. No action by the lessee to repair the breach could affect the lessor's right to compensation for the damage that has already occurred. So far as future damage is concerned, the filing of suit is adequate notice to the lessee, if indeed notice be required.

The conceptual differences between enforcing a covenant by the extraordinary remedy of cancellation (permitted because of the inadequacy of the legal remedy) or terminating a lease by exercise of a right of entry for breach of a condition subsequent and the automatic expiration of a lease under a special limitation explain why notice and demand are not required in suits based on the latter theory. No forfeiture is involved, so it is said, when a lessor seeks to cancel a lease that has expired under its own terms. One might well question whether this conceptual distinction squares with the practicalities of the industry. If justice requires notice and demand before a suit to cancel a lease for failure to drill an offset or development well, it would seem equally to require such notice and demand before cancellation of a lease for underpayment of delay rentals through mistake or for cessation of paying production in the secondary term. However, in this respect, conceptualism is still supreme, and notice and demand are not required, absent express lease provisions, to terminate under a provision classified as a special limitation.

Although there is a substantial body of law requiring notice and demand as a prerequisite to forfeiture, some states seem not to have the requirement and in others the nature of the requirement is unclear.<sup>38</sup> Moreover, with regard to damage actions, neither theory nor most decisions impose such a requirement.<sup>39</sup> Therefore it has come to be the practice to include in oil and gas leases an express

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38. See e.g. *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609, 10 O. & G.R. 947 (1959) (absolute cancellation of a lease for mining gravel for breach of the covenant of reasonable development; no mention in the opinion of lessor's having given notice and demand).

39. *Lafitte Co. v. United Fuel Gas Co.*, 177 F.Supp. 52, 11 O. & G.R. 977 (E.D. Ky. 1959) seems to be one of the few cases that in the absence of an express clause nevertheless requires notice and demand as a prerequisite to a damage action for breach of implied covenant.

provision that the lessee's interest shall not be forfeited (nor the lessee liable to the lessor in damages for breach of covenant) by reason of breach of condition or covenant until a specified condition precedent has been satisfied. The condition precedent in many leases is notice of breach and demand for performance followed by the passage of a period of time during which the lessee may commence the performance of its obligations—a "Notice and Demand Clause."

In some instances, no doubt, lessors made demands of lessees where there was a reasonable difference of opinion as to whether the lessee was required to comply with the demand. Under such circumstances the lessee was put to a difficult decision. If, relying on his construction of the instrument, he refused the demand made, it might be judicially determined that the lease was terminated by failure of timely compliance with a proper notice and demand. On the other hand, compliance with the demand might be quite expensive and therefore something to be avoided if possible.

The judicial ascertainment clause has come into use at the instance of lessees to relieve them of the burden of this difficult decision. By the terms of this clause the lessee's reasonable opportunity to satisfy its obligation begins not with notice and demand by the lessor but with judicial ascertainment of the obligation. Representative examples of the clause are given in the footnote.<sup>40</sup>

As might be expected, variations in the form of notice and demand and judicial ascertainment clauses are numerous. Among the more important are the following:

#### 1. Whether reference is made to nonpayment of rentals or royalties. Some

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40. E.g., "It is agreed that this lease shall never be forfeited or cancelled for failure to perform, in whole or in part, any of its implied covenants, conditions, or stipulations, until it shall have been first finally judicially determined that such failure exists, and after such final determination, lessee is given a reasonable time therefrom to comply with any such covenants, conditions, or stipulations." *Lameczyk v. Allen*, 8 Ill.2d 547, 550, 134, N.E.2d 753, 754, 6 O. & G.R. 290, 292 (1956); *Indian Territory Illuminating Oil Co. v. Haynes Drilling Co.*, 180 Okla. 419, 69 P.2d 624 (1937); *Steffes v. Allen*, 295 Mich. 510, 295 N.W. 245 (1940).

"After the discovery of oil, gas or any other mineral in paying quantities on the premises, this lease shall not be subject to loss or forfeiture, in whole or in part, except after final judicial ascertainment of grounds sufficient to warrant forfeiture and after a reasonable opportunity has been afforded lessee to save the lease after such judicial ascertainment." *Smith v. Sun Oil Co.*, 165 La. 907, 910, 116 So. 379, 380 (1928); "This lease shall never be forfeited, cancelled or terminated for failure by lessee to perform in whole or in part any of its implied obligations, nor while oil or gas is being produced in paying quantities for this lease, each producing well and ten acres surrounding it to be selected by the lessee. Lessee shall not be liable in damages for breach of any implied obligation." *Willingham v. Bryson*, 294 S.W.2d 421, 422, 6 O. & G.R. 1094, 1095 (Tex.Civ.App. 1956).

clauses are applicable to nonpayment of rentals<sup>41</sup> or royalties.<sup>42</sup> Others are applicable to good faith failure to pay rentals.<sup>43</sup> Many are silent concerning rentals and royalties.

## 2. Whether the clause is applicable to all conditions and covenants of the

41. E.g., "... and this lease shall never be forfeited for non-payment of any rental due until after at least 10 days' written notice." *Elliott v. Pure Oil Co.*, 10 Ill.2d 146, 154, 139 N.E.2d 295, 300, 7 O. & G.R. 228, 234 (1956); "Upon failure of the lessee to comply with conditions of this lease, or to make any of the payments above provided for delay in completing a well on the date upon which the same shall become due, the lessor shall have a right to declare a forfeiture of this lease if such payment be not made within 30 days after written notice to pay the same." *Brack v. McDowell*, 182 Kan. 368, 372, 320 P.2d 1056, 1060, 8 O. & G.R. 874, 878 (1958); "Upon failure of the lessee to make any of the payments above provided for delay in commencing a well on the date upon which the same becomes due, the lessor shall have the right to declare a forfeiture of this lease if such payment be not made within six months after written notice to pay the same, said notice to be sent to said lessee, his heirs, executors, administrators, successors, and assigns by registered mail." *Schumacher v. Cole*, 131 Mont. 166, 177, 309 P.2d 311, 314, 8 O. & G.R. 565, 569 (1957); "It is agreed that neglect or failure to pay rentals when due shall not operate to forfeit or cancel this lease, until lessor gives lessee notice by registered mail of said failure to pay rental; whereupon lessee shall pay same within 10 days of receipt of said registered letter, or this lease is void." *Lewis v. Grininger*, 198 Okla. 419, 179 P.2d 463 (1947); "Default. In case of default in payment of the rental or royalty payable hereunder, or in case of breach or nonperformance on the part of the Lessee of any of its covenants herein, Lessor may give Lessee Thirty (30) days' written notice in the case of default in such payment, or Ninety (90) days' written notice in the case of breach or non-performance of covenants, requiring it to remedy such default, breach or nonperformance, and if Lessee shall fail to remedy same within said respective periods of notice, this lease shall be terminated excepting as to each well then being worked on or producing said substances and the Legal Subdivision on which each such well is situate." *Chipp v. Hunt* [1955] 16 West. Weekly R. (n.s.) 209, 4 O. & G.R. 1859, 1860 (Alberta Sup. Ct.).

42. E.g., "Upon the violation of any of the terms or conditions of this lease by the Lessee and failure to remedy the same within ninety (90) days (except as to commencement of operations for the drilling of the first well and as to the payment of royalties, in each of which cases the period shall be ten days) after written notice from Lessors so to do, then at the option of the Lessors this lease shall forthwith cease and terminate and all rights of said Lessee in and to said land shall be at an end." *Danker v. Lee*, 137 Cal. App.2d 797, 798, 291 P.2d 73, 74, 5 O. & G.R. 313, 314 (1955); "Failure of the Lessee to make each royalty payment at the time and in the manner herein provided and to abide by and perform each and all of the covenants and conditions on the part of the Lessee to be kept and performed, in the manner and at the times herein specified, unless excused by some provision of this lease, shall constitute a default by Lessee and shall, at the option of the Lessors, be cause for termination, as follows: The Lessors, in the event of any such default and exercise of the option to terminate this lease, shall mail a notice to the Lessee stating that the lease shall be terminated thirty (30) days from the date of mailing of said notice unless the default be fully cured within said thirty-day period. If, within said thirty-day period, the default is not corrected, the lease shall be at an end and all right of the Lessee upon said premises shall cease and said lease be thereupon terminated. In such event Lessee shall deliver immediate, peaceable possession of the premises to Lessors, but shall have sixty (60) days in which to remove tools, machinery and equipment belonging to Lessee. A waiver by the Lessors of a particular default shall not be deemed or held to be a waiver of or to affect any other default or to impair the Lessors' rights resulting therefrom." *Poore*, *Hard Mineral Leases With Forms*, Rocky Mountain Mineral Law Foundation, Third Annual Rocky Mountain Mineral Law Institute 417, 437 (1957).

43. E.g., "If Lessee shall, in good faith and with reasonable diligence, attempt to pay

lease or only to particular obligations of the lessee. Most notice and demand clauses are broadly phrased so as to be applicable to a great variety of covenants and conditions.<sup>44</sup> Others, however, are applicable only in the case of breach of some particular covenant, *e.g.*, development.<sup>45</sup>

3. Whether the clause is applicable to a breach occurring before production is obtained. Some clauses are by terms applicable only "after production" has been secured;<sup>46</sup> clearly such clauses are inapplicable to events occurring prior to production. Other clauses are applicable to all breaches of obligations of the

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any rental, but shall fail to pay or incorrectly pay some portion thereof, this lease shall not terminate unless Lessee, within thirty (30) days after written notice of its error or failure, shall fail to rectify the same." *Woolley v. Standard Oil Co.*, 230 F.2d 97, 99, 5 O. & G.R. 1394, 1396 (5th Cir. 1956) (in making rental payment to the depository bank, the lessee gave erroneous instructions with respect to the allocation of the rental among interested parties. Held, the lease did not terminate. The trial court expressed doubt as to the validity of this clause but held for the lessee on the ground of equitable estoppel; the Court of Appeals held that this clause was valid and prevented termination of the lease.)

44. *E.g.*, "If the Lessee shall fail for a period of sixty (60) days after written notice given to it by the Lessor to comply with any provision of this lease, the Lessor may, at his option terminate this lease." *Renner v. Huntington Hawthorne Oil & Gas Co.*, 238 P.2d 35, 38, 1 O. & G.R. 18, 21 (1951) (alternative holding that lease did not expire by reason of failure to produce in paying quantities because the required notice had not been given), *rev'd*, 39 Cal.2d 93, 244 P.2d 895, 1 O. & G.R. 1063 (1952) (holding that the term of the lease had expired despite failure of the lessor to give notice under this clause); "In the case of the breach or non-observance or non-performance on the part of the Lessee of any covenant, proviso, condition, restriction or stipulation herein contained and which ought to be observed or performed by the Lessee and which has not been waived by the Lessor, the Lessor may give to the Lessee written notice requiring him to remedy such defect and in the event of the Lessee failing to remedy such default within a period of Ninety (90) days from receipt of such notice, this Lease shall thereupon terminate and it shall be lawful for the Lessor, into and upon the said lands (or any part thereof in the name of the whole), to re-enter and the same to have again, repossess and enjoy, anything herein contained to the contrary notwithstanding." *East Crest Oil Co. v. Strohschein*, [1952] 4 West Weekly R. (n.s.) 553, 2 O. & G.R. 1655, 1657 (Alberta Sup. Ct., App. Div.).

45. "If the obligation for reasonable development should require the drilling of a well or wells, lessee shall have . . . days after ultimate judicial ascertainment of the existence of such obligation within which to begin the drilling of a well. . . ." *Haynes v. Southwest Natural Gas Co.*, 123 F.2d 1011 n. 1 (5th Cir. 1941).

46. *E.g.*, "After production of oil, gas, sulphur or other mineral has been secured from the land covered hereby, this lease shall not be subject to forfeiture or loss, either in whole or in part, except after judicial ascertainment that the Lessee has failed to perform and discharge its obligations hereunder and has been given a reasonable opportunity thereafter to prevent such loss or forfeiture by complying with and discharging its obligations as to which Lessee has been judicially determined to be in default." *Melancon v. Texas Co.*, 230 La. 593, 607, 89 So.2d 135, 139 n. 7, 6 O. & G.R. 623, 627 n. 7 (1956); "In the event of a breach of any of the terms or provisions of this lease by the Lessee, before Lessor may terminate the lease for such reasons, he shall be obligated to serve a notice on Lessee, specifically stating the purported breach . . . and demand such breach be remedied. Upon failure of Lessee so to do within 60 days after receipt of such notice, this lease may be terminated at the election of Lessor by such notice, and thereupon all rights of the Lessee shall be at an end under the terms of this lease. This paragraph relates to breaches occurring after production is obtained." *Ware v. Stafford*, 148 Cal.App.2d 840, 841, 307 P.2d 950, 951, 7 O. & G.R. 416, 417 (1957).

lessee whether occurring before or after production is obtained.<sup>47</sup> Still others lack specificity in this regard and hence there may be a question as to whether notice and demand or judicial ascertainment is prerequisite to an action based on a breach of covenant occurring before production is obtained.

4. Whether the clause is applicable during the primary term only<sup>48</sup> or during the secondary term only<sup>49</sup> or is applicable during both.

5. Whether the clause is applicable to cancellation actions alone or to those actions and to damage actions as well.<sup>50</sup>

In general, notice and demand and judicial ascertainment clauses are enforced as written (except under exceptional circumstances),<sup>51</sup> and notice and demand will be viewed as a prerequisite to an action to cancel the lease.<sup>52</sup> A notice given prematurely will not support forfeiture.<sup>53</sup> Where cancellation is made of a lease with a judicial ascertainment clause, the decree will typically be conditional; that is, the decree will provide for cancellation unless lessee within a stated period complies with his obligations.<sup>54</sup> It has been vigorously asserted by

47. E.g., "In the event lessor considers that lessee has not complied with all its obligations hereunder, both expressed and implied, *before production has been secured or after production has been secured*. . ." (emphasis supplied). *Barbee v. Buckner*, 265 S.W.2d 869, 871, 3 O. & G.R. 1111, 1114 (Tex. Civ. App. 1954), error ref'd n.r.e.; *General Crude Oil Co. v. Harris*, 101 S.W.2d 1098 (Tex. Civ. App. 1937), error dism'd.

48. Thus in *Logan v. Blaxton*, 71 So.2d 675, 3 O. & G.R. 791 (La. App. 1954), the court held that a particular notice and demand provision was applicable only to a breach occurring during the primary term and was inapplicable to a breach occurring during the secondary term of the lease in question.

49. E.g. "If, after the expiration of the primary term, Lessor considers that operations are not at any time being conducted in compliance with this lease, Lessor shall notify Lessee in writing of the facts relied upon as constituting a breach hereof, and Lessee, if in default, shall have sixty (60) days after receipt of such notice in which to commence compliance with the obligations imposed by virtue of this instrument."

"If, after the end of the primary term, the obligation for reasonable development should require the drilling of a well or wells, Lessee shall have 90 days after ultimate judicial ascertainment of the existence of such obligation within which to begin the drilling of a well. . ." Two Texas lease forms.

50. In *Billeaud Planters v. Union Oil Co. of California*, 245 F.2d 14, 7 O. & G.R. 798 (5th Cir. 1957) the clause was held applicable to damage actions.

See also *Lafitte Co. v. United Fuel Gas Co.*, 177 F. Supp. 52, 11 O. & G.R. 977 (E.D. Ky. 1959) (requiring notice and demand in a damage case in the absence of an express clause).

51. See note 79 *infra*.

52. See e.g., *Sun Oil Co. v. Oswell*, 258 Ala. 326, 62 So.2d 783, 2 O. & G.R. 145 (1953); *Kirker v. Shell Oil Co.*, 104 Cal.App.2d 497, 231 P.2d 905 (1951); *Scheel v. Harr*, 27 Cal.App.2d 345, 80 P.2d 1035 (1938); *Lawrence Oil Corp. v. Metcalfe*, 266 Ky. 819, 100 S.W.2d 217 (1936); *Sohio Petroleum Co. v. Miller*, 229 La. 581, 86 So.2d 201, 7 O. & G.R. 262 (1956); *Burnett v. R. Lacy*, 293, S.W.2d 674, 6 O. & G.R. 846 (Tex. Civ. App. 1956), error ref'd, n.r.e. See also *Eitel v. Alford*, 127 Colo. 341, 257 P.2d 955, 2 O. & G.R. 1016 (1953) (dictum); *Billeaud Planters v. Union Oil Co. of California*, 245 F.2d 14, 7 O. & G.R. 798 (5th Cir. 1957) (clause applied to damage actions).

53. See e.g., *Welpport Oil Co. v. Fairfield*, 51 Cal.App.2d 533, 125 P.2d 97 (1942).

54. See e.g., *Romeo v. Humble Oil & Refining Co.*, 93 F. Supp. 117 (E.D.La. 1950), modified, *Humble Oil & Refining Co. v. Romero*, 194 F.2d 383, 1 O. & G.R. 358 (5th Cir. 1952); *Willingham v. Bryson*, 294 S.W.2d 421, 6 O. & G.R. 1094 (Tex. Civ. App. 1956).

a Texas court that the judicial ascertainment clause is void;<sup>55</sup> however, the clause has been sustained and applied in too many cases for much credence to be given to this view.

#### EFFECT OF NOTICE AND DEMAND AND JUDICIAL ASCERTAINMENT CLAUSES ON LIMITATION PROVISIONS OF LEASE

The habendum clause and the delay rental clause of the oil and gas lease contain words of special limitation defining the duration of the lessee's interest in the premises. For example, the habendum clause may limit the duration of a lease to "five years and so long thereafter as oil or gas is produced." The delay rental clause contains additional words of special limitation, *e.g.*, "if no well be commenced on said premises within one year from date, this lease shall terminate unless. . . ." By operation of these clauses of limitation the leasehold estate may terminate automatically, *viz.*, on an anniversary date of the lease by reason of nonpayment of rentals or at the expiration of the primary term by reason of failure of production.

To be distinguished from clauses of limitation are so-called "forfeiture" clauses which authorize the lessor to re-enter upon the premises and terminate the lessee's interest upon the happening of certain events, *e.g.*, upon the lessee's failure to perform certain covenants contained in the lease. Such clauses create in the lessor what is known as a power of termination or a right of re-entry. We have indicated earlier certain of the consequences of classifying a termination provision as a limitation or a condition.<sup>56</sup> The most important of these is that a special limitation causes an interest to expire automatically without the necessity of any action by the lessor (who is viewed as having a possibility of reverter) whereas some affirmative action is required of the owner of a right of re-entry

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55. *Frick-Reid Supply Corp. v. Meers*, 52 S.W.2d 115, 118 (Tex. Civ. App. 1932). The court said of the judicial ascertainment clause: "We think this stipulation is void. If its terms were observed, Meers and wife would be required to file a suit in the district court for the purpose of adjudicating the questions as to whether there had been a breach of any implied obligation and whether oil or gas was being produced in paying quantities. By the terms of the stipulation, that would end the suit, even though the facts should be determined against the lessees. The court would be precluded from rendering judgment upon such findings. Except in certain instances prescribed by statute, courts do not try cases by piecemeal. . . . Observance by the court of the terms of this stipulation would require a trial in which only the facts named in the stipulation could be judicially ascertained. Upon the determination of such facts, the lessee, according to the stipulation, is given a reasonable time thereafter to comply with his obligations or surrender the lease, reserving any producing well and ten acres surrounding it. This would require at least two trials and two final judgments. It would require, contrary to the provisions of article 2209, a postponement of the rendition and entry of the judgment upon the facts ascertained, subject to the option and caprice of the lessee. Agreements relating to proceedings in civil cases and involving and providing for anything inconsistent with the full and impartial course of justice therein are illegal. . . . While both common-law and statutory arbitrations are favored by the courts, and questions of fact may be conclusively settled in that way, the parties cannot by original contract or otherwise convert the trial and appellate courts into mere boards of arbitration."

56. See text *supra* at note 37 et seq.

or power of termination before an interest subject to a condition subsequent can be extinguished.<sup>57</sup>

Ordinarily neither the notice and demand nor the judicial ascertainment clause refers to nonpayment of rentals; under such circumstances the lease will terminate automatically upon the failure of the lessee to make timely payment of rental (absent drilling operations on the anniversary date)<sup>58</sup> without the necessity of notice by the lessor and demand for payment.<sup>59</sup> In some instances, however, a notice and demand or a judicial ascertainment clause will make reference to nonpayment of rentals. Some courts have viewed such a clause as repugnant to the rental clause and have refused to require notice and demand or judicial ascertainment prior to termination of the lease by reason of nonpayment of rental.<sup>60</sup> At least one court has given effect to such clauses, however, and has

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57. The characteristics and consequences of clauses of limitation and of condition are discussed in 2 Powell, *Real Property* §§ 187-88 (1950).

58. See e.g., *Berman, Dry Hole, Drilling Operations, and 30 Day-60 Day Drilling Operations Clauses*, 38 *Tex. L. Rev.* 270 (1960).

59. See e.g., *Norris Oil Co. v. Von Glahn*, 104 *Cal.App.2d* 159, 230 *P.2d* 885 (1951); *Richfield Oil Corp. v. Bloomfield*, 103 *Cal.App.2d* 589, 229 *P.2d* 838 (1951); *Steffes v. Allen*, 295 *Mich.* 510, 295 *N.W.* 245 (1940); *Langlois v. Canadian Superior Oil Co. of Calif. Ltd.* [1957], 23 *West Weekly R.* (n.s.) 401, 8 *O. & G.R.* 517 (Manitoba Queen's Bench and Court of Appeal); *East Crest Oil Co. v. Strohschein* [1952], 4 *West. Weekly R.* (n.s.) 553, 2 *O. & G.R.* 1655 (Alberta Sup. Ct. App. Div.).

60. See e.g., *Clovis v. Carson Oil & Gas Co.*, 11 *F. Supp.* 797 (E.D. Mich. 1935), noted 42 *W.Va.L.Q.* 163 (1936) (finding the delay rental and the notice clauses inconsistent and repugnant and thereupon giving pre-eminence to the first of the two clauses, viz., the delay rental clause. "It necessarily results that, on the failure of the plaintiff lessees to drill the well or make the payments prescribed by the term clause of this lease, such lease by the express language of such clause automatically terminated, notwithstanding the failure of the defendant lessors to give the ten-day notice already mentioned . . .") 11 *F. Supp.* at 799; *McDaniel v. Hager-Stevenson Oil Co.*, 75 *Mont.* 356, 243 *Pac.* 582 (1926) (holding that a lease terminated automatically by reason of nonpayment of rental without the necessity of notice and demand; the notice and demand clause was viewed as useless and as irreconcilable with the general intent of the lease).

*Lewis v. Grininger*, 198 *Okl.* 419, 420, 179 *P.2d* 463, 464 (1947) (declaring that a notice and demand clause was in conflict with the delay rental clause and indefinite in its terms. "It would extend the lease for a period of at least ten days beyond the term of twelve months as provided in paragraph five [the delay rental clause] without payment of any sum to lessor, and for such further indefinite and uncertain length of time until lessee shall receive by registered mail a notice by lessor of lessee's failure to pay, and then at the option of lessee to expire by its terms unless lessee chose to make payment . . . Under the provisions of paragraph five the lease had terminated before the provisions of paragraph fifteen [the notice and demand clause] could become operative. If paragraph fifteen was effective for any purpose, it was not effective to prevent termination of the lease under paragraph five above quoted."); *Chipp v. Hunt* [1955] 16 *West. Weekly R.* (n.s.) 209, 4 *O. & G.R.* 1859 (Alberta Sup. Ct.) (declaring that a notice and demand clause applicable to a "default" in payment of rental did not affect the automatic operation of the limitation provision of the delay rental clause; if nonpayment constituted a "default" within the meaning of the notice and demand clause then such clause must be rejected as repugnant to the delay rental clause). In *Standard Oil Co. v. Clark*, 133 *F. Supp.* 346, 5 *O. & G.R.* 117 (E.D. Tex. 1955), the court expressed considerable doubt as to the validity of a notice and demand provision applicable to nonpayment of rentals on the ground that such clause may be repugnant to and inconsistent with the delay rental clause. On appeal, however, the

said that notice and demand may be required before a lease will terminate by reason of nonpayment of rentals.<sup>61</sup>

A related question is whether a notice and demand or judicial ascertainment clause affects the operation of the limitation provision in the habendum clause. The usual unless-type lease is for a term of years and so long thereafter as there is production (or so long thereafter as certain operations are prosecuted on the premises). Upon the failure of production at or after the end of the primary term the lease terminates by operation of this limitation clause. Does the notice and demand or judicial ascertainment clause have the effect of converting this clause of limitation into a clause of condition so that the lease will not terminate absent notice and demand or judicial ascertainment? A district court of appeal in California reasoned that the notice and demand clause had this effect.<sup>62</sup> On appeal the Supreme Court of California made a contrary ruling.<sup>63</sup> Other case authority supports the conclusion that the notice and demand or judicial ascer-

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Court of Appeals viewed this provision as valid. *Woolley v. Standard Oil Co.* 230 F.2d 97, 5 O. & G.R. 1394 (5th Cir. 1956).

61. *Woolley v. Standard Oil Co.*, 230 F.2d 97, 5 O. & G.R. 1394 (5th Cir. 1956). The court declared that the provisions of the notice and demand clause, quoted supra note 43, "operate as a limitation upon the provisions in Paragraph 4 [the delay rental clause] for termination for non-payment of delay rentals. It is therefore obvious that the parties intended to and did contract against the harsh rule of automatic termination which the Texas courts enforce upon the failure of a lessee to meet the stipulated conditions in an ordinary and unmodified 'unless' type of lease. While it is doubtless true that no appellate court in Texas has had occasion to construe a lease such as is presented here, we find nothing in the Texas law which suggests that the Supreme Court of Texas would adopt a different construction if and when it were called upon to construe a lease containing like provisions." 230 F.2d at 103, 5 O. & G.R. at 1401.

62. *Renner v. Huntington Hawthorne Oil & Gas Co.*, 238 P.2d 35, 1 O. & G.R. 18 (1951). At the end of the primary term the lease was not producing in paying quantities as such term was defined by the lease but the lessor failed to give notice and demand. The court concluded that "cancellation of the lease could not take place without written notice of default since the lessee under the circumstances shown had the right to assume that the continued production of the Miller well on the same scale for many years was satisfactory and that the lessee would not be put in default until the expiration of the specified written notice of sixty days and its failure to remedy the breach if any existed." *Id.* at 39, 1 O. & G.R. at 21.

Dictum in a Louisiana case, *Smith v. Sun Oil Co.*, 165 La. 907, 116 So.379 (1928), suggested the possibility that a judicial ascertainment clause might be applicable in the case of a claim that a lease had expired by failure of production at the end of the primary term.

63. *Renner v. Huntington Hawthorne Oil & Gas Co.*, 39 Cal.2d 93, 244 P.2d 895, 1 O. & G.R. 1063 (1952). The court declared that "The oil lease, with its 'and so long thereafter' phrase in the habendum clause, created a determinable fee interest. . . . A determinable fee terminates upon the happening of the event named in the terms of the instrument which created the estate; no notice is required for, and no forfeiture results from, such termination." 39 Cal.2d at 98, 244 P.2d at 898-99, 1 O. & G.R. at 1066.

See also to the same effect *Ware v. Stafford*, 148 Cal. App. 2d 840, 844, 307 P.2d 950, 953, 7 O. & G.R. 416, 419 (1957) ("no notice of termination was actually necessary. At the end of the six-month period by reason of his failure to place the well on production, appellant became a tenant by sufferance."); *Valer Oil Co. v. Souza*, 12 O. & G.R. 860 (1960). *Alexander v. Oates*, 100 Cal.App.2d 266, 233 P.2d 264 (1950).



tainment clause is inapplicable to the limitation provision of the habendum clause.<sup>64</sup> An able writer has taken the same position.<sup>65</sup>

Our own conclusions concerning the effect of a notice and demand or judicial ascertainment clause upon a limitation provision of a lease may be summarized as follows:

(1) In view of the clear language of limitation in the habendum clause and the delay rental clause of the typical lease, a notice and demand or judicial ascertainment clause referring generally to "forfeiture,"<sup>66</sup> "default," "obligations," "breach," or using similar language,<sup>67</sup> should not be construed as modi-

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64. Thus in Louisiana it has been held repeatedly that a common notice and demand clause found in Bath's Form No. 12, Louisiana, refers to drilling operations within the term of the lease and does not prevent the termination of the lease by operation of a limitation clause even though no notice is given. *Logan v. Blaxton*, 71 So.2d 675, 3 O. & G.R. 791 (La.App. 1954); *Taylor v. Kimbell*, 219 La. 731, 54 So.2d 1 (1951); *Sittig v. Dalton*, 195 La. 765, 197 So. 423 (1940); *Producers Oil & Gas Co. v. Continental Securities Corp.*, 188 La. 564, 177 So. 688 (1937); *Joyce v. Wyant*, 105 F. Supp. 979, 1 O. & G.R. 1216 (W.D.Mich. 1952) (without discussing a notice and demand clause, the court held that a lease expired automatically by operation of a clause of limitation), *aff'd*, 202 F.2d 863, 2 O. & G.R. 693 (6th Cir. 1953); *Eitel v. Alford*, 127 Colo. 341, 257 P.2d 955, 2 O. & G.R. 1062 (1953) (defense of non-marketable title rejected because the judicial ascertainment clause was inapplicable to special limitations of an oil and gas lease); *Lamczyk v. Allen*, 8 Ill. 2d 547, 134 N.E.2d 753, 6 O. & G.R. 290 (1956) (without discussing the significance of a judicial ascertainment clause in the lease the court affirmed a judgment that a lease had expired automatically at the end of the primary term by reason of failure of production despite the contention of lessee that the lease was continued in force by operation of a shut-in well clause and a clause authorizing discontinuance of production under certain conditions); *Stephenson v. Calliham*, 289 S.W. 158, 159 (Tex. Civ. App. 1926) (holding that a notice and demand provision phrased in terms of "forfeiture" did not apply where a lease expired by limitation; ". . . by the terms of this lease it was fully and irrevocably terminated upon cessation of drilling operations, and . . . appellees properly brought and may maintain this action to cancel without first giving notice to appellants of the intention to cancel.")

65. Thus in commenting upon the District Court of Appeal decision in the Renner case, *supra* note 62, Professor Masterson "submitted that that part of the decision holding notice to the lessee to be necessary is erroneous. If the lease terminated by its own terms, as was contended, the lease provision requiring notice by lessors of an intent to terminate would seem inapplicable." Discussion Notes, 1 O. & G.R. 24-25.

66. See e.g., *Eitel v. Alford*, 127 Colo. 341, 257 P.2d 955, 2 O. & G.R. 1062 (1953) (declaring that a judicial ascertainment clause phrased in terms of forfeiture on account of failure in performance of implied covenants has nothing whatsoever to do with the primary term of the lease or the covenants with respect to the payment of rent and the drilling of wells); *Frick-Reid Supply Corp. v. Meers*, 52 S.W.2d 115 (Tex. Civ. App. 1932) (alternative holding).

Occasionally the context of the instrument may reveal that the term "forfeiture" as employed therein has reference to the operation of a limitation clause. See *Brack v. McDowell*, 182 Kan. 368, 320 P.2d 1056, 8 O. & G.R. 874 (1958).

67. See e.g., *Lamczyk v. Allen*, 8 Ill.2d 547, 134 N.E.2d 753, 6 O. & G.R. 290 (1956) (lease terminated by reason of failure of production at end of primary term despite judicial ascertainment clause phrased in terms of "failure to perform . . . any of its implied covenants, conditions, or stipulations."); *Barbee v. Buckner*, 265 S.W.2d 869, 873, 3 O. & G.R. 1111, 1115-16 (Tex. Civ. App. 1954), *error ref'd*, n.r.e. (holding that failure to drill a well caused termination of a lease by operation of a clause providing that in the event drilling operations are not commenced before a given date then the lease shall

ying the limitation provisions of the lease.<sup>68</sup> It has long been understood that a leasehold created by an unless lease terminates automatically without any requirement of notice or judicial ascertainment in the event of failure of production at or after the end of the primary term or in the event of failure to make timely payment of delay rentals during the primary term. Under such circumstances it is unreasonable to conclude that the parties, by including in the lease a vaguely phrased notice and demand or judicial ascertainment clause, intended to modify the operation of these limitation clauses.

(2) On the other hand, it is clear that the usual limitation provisions of the lease may be modified by shut-in well clauses, drilling operations clauses, and the like. Such clauses, in effect, define or describe the event which will cause the lease to be terminated. A lease in simple form, for example, may provide that the lease shall terminate automatically at the end of the primary term if there is then no production. A more complex lease provides that the lease shall terminate automatically at the end of the primary term if there is then no production *and if* shut-in royalty has not been paid *and if* drilling operations are not being prosecuted on the land *and if* there is no production from a unit in which all or a portion of the leasehold has been included *and if* . . . , etc. The notice and demand or judicial ascertainment clause could be viewed as adding an additional "and if" phrase; that is, the lease shall terminate automatically at the end of the primary term if there is then no production *and if* the lessee fails to obtain production within a reasonable time after the lessor has given notice and demand or after judicial ascertainment.<sup>69</sup> We are not aware of any reported decisions

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terminate and be null and void. The notice and demand clause was said to be inapplicable "to the original consideration paid and to be performed, and does not alter the terms or conditions of the written contract to drill a well by a specified date."); *East Crest Oil Co. v. Strohschein* [1952] 4 West. Weekly R.(n.s.) 553, 2 O. & G.R. 1655, 1657 (Alberta Sup. Ct., App. Div.) (lease terminated by reason of failure to make timely payment of delay rental despite notice and demand clause phrased in terms of "default" or "breach or non-observance or non-performance . . . of any covenant, proviso, condition, restriction or stipulation herein contained and which ought to be observed or performed by the Lessee . . .").

68. Such terms as "default" connote neglect to do what duty or law requires. A conceptual argument that such "default" clauses do not apply to the "limitation" provisions of the lease is found in the fact that a limitation never involves a duty. See Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 8 Texas L. Rev. 483, 488 (1930) ("Anything that the grantee or lessee, is under a *duty* to do, or to refrain from doing, cannot constitute the subject matter of a special limitation. A limitation cannot in its very nature impose a duty because the happening of the event named in the limitation clause automatically terminates the estate, and the law will not countenance the absurdity of holding that a man may be discharged of a duty by his very act of breaching it.")

Thus in the *East Crest Oil Co.* case, *supra* note 67, it was observed that "The use of the word 'ought' shows clearly that clause 18 [the notice and demand clause] refers to those provisions which bind the lessee and have no application to the failure to do something he may or may not do as he pleases. The clause deals with 'default' and, as I have said, there is no default in not doing something one is not obliged to do." 2 O. & G.R. at 1661-62. See also to the same effect *Chipp v. Hunt* [1955] 16 West. Weekly R.(n.s.) 209, 4 O. & G.R. 1859 (Alberta Sup. Ct.).

69. Cf. *Consolidated Gas Co. v. Reickhoff*, 116 Mont. 1, 6, 151 P.2d 588, 590 (1944).

adopting this position, and we do not regard it as a sound one. The effect and operation of the limitation provisions of the habendum and delay rental clauses are well known. Addition of a generally phrased notice and demand or judicial ascertainment clause does not warrant a finding of an intention to avoid the usual automatic termination provided for by these clauses. To accomplish this result, more particular language should be required.

(3) A notice and demand or judicial ascertainment clause *specifically* applicable to a clause of limitation, *e.g.*, a notice and demand provision specifically applicable to delay rentals, should be given effect by the courts. There is no valid reason for viewing the former as repugnant to the clause of limitation any more than a shut-in royalty clause or a drilling operations clause is repugnant to the clause of limitation. The question is not one of repugnancy but of construing the lease from the four-corners to determine the event (whether simple or complex in character) upon which the lease is to terminate automatically. At least one case is in accord with this position.<sup>70</sup>

#### EFFECT OF NOTICE AND DEMAND AND JUDICIAL ASCERTAINMENT CLAUSES ON ABANDONMENT OF LEASE

In states which take the view that the interest of an oil and gas lessee is subject to abandonment,<sup>71</sup> the question sometimes arises as to the effect on abandonment of a notice and demand or judicial ascertainment clause in the lease. It has been held that abandonment may occur without the giving of notice and demand and without judicial ascertainment.<sup>72</sup>

Where this view prevails, it may be expected that lessors will seek to prove abandonment rather than breach of covenant or condition if the lease contains a

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"The contract is clear that the only contingency which would operate to ipso facto terminate the contract and obviate the necessity of notice would be the failure to commence the well within the term. Since there is no question but that the well was commenced in time, the only thing which can operate to terminate the contract would be a breach of the covenant to diligently perform. Before the question of diligence can be litigated, the plaintiff must, under the terms of the agreement, allege and prove that a notice of default was given and no sufficient effort to remedy the default was made. This was not done and we must therefore hold that the complaint fails to state facts to constitute a cause of action."

70. See *Woolley v. Standard Oil Co.*, 230 F.2d 97, 5 O. & G.R. 1394 (5th Cir. 1956).

71. See 1 *Williams and Meyers, Oil and Gas Law*, § 210.1 (1959).

72. *Romero v. Brewer*, 58 Cal.App.2d 759, 763-64, 137 P.2d 872, 874 (1943). "The purpose of the notice clause to protect lessees from forfeiture of oil leases is well known and understood in the oil industry. It is for the benefit of the lessee who in good faith goes forward in compliance with the terms of his lease. For instance, it would be manifestly unjust and unfair to forfeit the leasehold interest of such a lessee because of some default in the terms of the lease suffered or permitted by his agents or employees and without his knowledge, especially upon the discovery of oil and gas in paying quantities upon the leased premises. It would be equally unjust to allow a lessee who has been in default in the major covenants of an oil lease to the extent that they show abandonment, to insist, as a matter of law, that under all circumstances such a notice must be given. Such construction of its effect would inevitably, finally defeat the purpose of the notice clause and the protection which it gives the bona fide lessee."

judicial ascertainment clause. In an ordinary action for forfeiture of a lease for breach of covenant or condition, the most that plaintiff could hope for normally would be a conditional decree of cancellation, since under the judicial ascertainment clause the lessee is entitled, after judgment, to a reasonable opportunity to remedy the breach. On proof of abandonment or termination of the lease by limitation, the lessor may be entitled to an absolute decree of cancellation.<sup>73</sup>

It may be questioned whether the relief available to a lessor should depend on the legal theory he asserts. Assuming a notice and demand or judicial ascertainment clause broad enough to cover abandonment (and one referring to "forfeiture" would seem to be of such breadth), the lessee should be protected thereby, whether the suit asserts breach of covenant or abandonment. Whichever of the two the action is grounded upon, the gravamen of the complaint is inaction by the lessee, and if he bargained for and deserves notice in one instance, then he should be entitled to the same protection in the other instance.

This point can be illustrated by reference to a line of Kentucky cases. In that state, failure to use due diligence to explore further may be treated as abandonment of part or all the leasehold.<sup>74</sup> It seems clear that the typical notice and demand or judicial ascertainment clause comprehends a suit for breach of the covenant to explore.<sup>75</sup> It would follow, in our judgment, that such clause should also govern an action for abandonment, based on the same facts as the exploration suit.<sup>76</sup> Similarly, where abandonment is used to explain the termination of

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73. See e.g., *Kunc v. Harper-Turner Oil Co.*, 297 P.2d 371, 5 O. & G.R. 1028 (Okla. 1956). The lease here in question provided that if lessee should be judicially determined obligated to drill a well or wells, lessee should have 90 days in which to commence such well or wells. Lessors prayed in this instance that the lease be decreed abandoned and terminated, forfeited and cancelled by operation of law. Professor Kuntz observes in Discussion Notes, 5 O. & G.R. 1037, 1038 that the presence of the judicial ascertainment clause in the lease accounts for the fact "that the plaintiff placed stress upon the abandonment theory. If the leasehold estate had been lost by abandonment, the provisions which would allow 90 days for the lessee to commence a well would not apply but would fall with the lease. Further, the judgment would not amount to a judicial requirement that a well be drilled. On the other hand, if relief is sought on the basis of breach of an implied covenant, the 90 day provision must be considered."

74. *Smyth v. Koplín*, 294 S.W.2d 525, 6 O. & G.R. 1318 (Ky. 1956); *Hodges v. Mud Branch Oil and Gas Co.*, 270 Ky. 206, 109 S.W.2d 576 (1937). See *B & B Oil Co. v. Lane*, 249 S.W.2d 705, 1 O. & G.R. 1164 (Ky. 1952).

75. *Sohio Petroleum Co. v. Miller*, 229 La. 581, 86 So.2d 201, 7 O. & G.R. 262 (1956); *Lyons v. Robson*, 330 P.2d 593, 9 O. & G.R. 927 (Okla. 1958) (notice requirement imposed without mention of express lease clause).

See *Humble Oil and Refining Co. v. Romero*, 194 F.2d 383, 1 O. & G.R. 358 (5th Cir. 1952); *Burnett v. R. Lacy*, 293 S.W.2d 674, 6 O. & G.R. 846 (Tex. Civ. App. 1956), error ref'd, n.r.e.; *Kunc v. Harper-Turner Oil Co.*, 297 P.2d 371, 5 O. & G.R. 1028 (Okla. 1956) (notice and demand necessary as a matter of law where lease apparently made no such requirement); *Willingham v. Bryson*, 294 S.W.2d 421, 6 O. & G.R. 1094 (Tex. Civ. App. 1954).

76. In *Smyth v. Koplín*, 294 S.W.2d 525, 6 O. & G.R. 1318 (Ky. 1956) the court cancelled a lease for abandonment where the facts showed a breach of the covenant of further exploration. It was stated that notice and demand were unnecessary in a cancellation suit based on abandonment, but in the alternative, the court said proper notice was given. No reference is made to an express notice and demand clause in the lease.

a lease for cessation of production in the secondary term,<sup>77</sup> the notice and demand or judicial ascertainment clause should apply, if it is drafted with such particularity as to apply to termination under special limitations of the lease.

#### EFFECT OF NOTICE AND DEMAND AND JUDICIAL ASCERTAINMENT CLAUSES UPON COVENANTS OF LEASE

Notice and demand clauses and the judicial ascertainment clause had their origin in, and many are still concerned exclusively with, disputes over express and implied promises in the lease. Apart from exceptional circumstances, these clauses are applied as written in actions for breach of covenant, whether the relief sought is cancellation or damages.<sup>78</sup>

Nevertheless, the notice and demand clause and more especially the judicial ascertainment clause have been the subject of concern. Should a party who is subject to express or implied duties (*e.g.*, to pay royalties or to protect from drainage) be permitted to breach such covenants with impunity unless and until there has been notice and demand or a judicial ascertainment of breach? This concern seems to have led the Louisiana court to circumscribe the operation of the judicial ascertainment clause when the lessee was guilty of a bad faith breach of covenant. In *Melancon v. Texas Co.*<sup>79</sup> the lessor sued to cancel the lease for failure to pay accrued royalty. Royalty payments had been wrongfully withheld in an attempt to coerce the lessor to make certain concessions. Despite the fact that the lease contained a judicial ascertainment clause, the court sustained a decree of cancellation by reason of nonpayment of royalties, observing that:

We think the trial judge correctly ruled that the provisions concerning judicial ascertainment apply to a bona fide dispute as to which there is a real disagreement in good faith between the parties; that the effect of the stipulation should be confined to areas of undetermined matters which are the subject of a legitimate dispute, but that a ruling on an issue involving undisputed facts should be final. To hold as contended by counsel for defendant on this point would lead to an anomalous, if not ridiculous, situation, for the lessor would be at the mercy of the lessee; the latter might employ whatever tactics he saw fit to obtain concessions or alterations in connection with the lease, knowing it would never be declared cancelled without his first being given the opportunity to comply after judicial proceedings.<sup>80</sup>

On the other hand, a federal court applying Louisiana law did not hesitate to give effect to a notice and demand clause in a suit for damages for breach of

77. See *Tanner v. Reeves*, 249 S.W.2d 526, 1 O. & G.R. 1181 (Ky. 1952).

78. See note 52 *supra*.

79. 230 La. 593, 89 So.2d 135, 6 O. & G.R. 623 (1956).

80. *Id.* at 624, 89 So.2d at 146, 6 O. & G.R. at 635. McCaleb, J., dissenting, urged that the majority decision "effects a re-writing of the lease by adding . . . a proviso that it (the judicial ascertainment clause) will not apply unless lessee's failure to comply results from a bona fide dispute. But that is not the contract of the parties and the court should

the covenant to protect from drainage, where there was no suggestion of bad faith on the part of the lessee.<sup>81</sup> Thus the court held that the lessee was not liable for damages for drainage occurring prior to lessee's receipt of notice of breach of covenant and demand for performance.

A review of the cases indicates that there is little judicial antipathy to these clauses in the absence of bad faith on the part of the lessee.<sup>82</sup> Thus, while equity's dislike of forfeitures may be said to be a basis for enforcing the notice and demand or judicial ascertainment clause,<sup>83</sup> the same enforcement is given when the remedy sought is damages,<sup>84</sup> although no forfeiture is involved. Similarly, application of the clause does not seem to depend on the reason for the breach of covenant, assuming the lessee's good faith. Thus notice and demand or judicial ascertainment, as the case may be, are required whether the breach is due to the negligence of the lessee<sup>85</sup> or arose out of a bona fide dispute between the lessor and lessee.<sup>86</sup> Lastly, no distinction is made between notice and demand clauses and judicial ascertainment clauses. Whatever circumstances warrant application of one seem to warrant application of the other.

#### NOTICE PROBLEMS

Several notice problems give rise to difficulty or dispute in connection with these clauses, *viz.*, (1) whether the giving of notice and demand may be excused by reason of the fact that the lessor did not have knowledge of breach or default by the lessee, (2) whether the notice given to the lessee by the lessor is adequate, and (3) what person or persons may give notice and make demand.

As to the first of these matters, it has been urged that the lessor's lack of

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not change their agreement without the consent of each." 230 La. at 631, 89 So.2d at 148, 6 O. & G.R. at 638.

81. *Billeaud Planters v. Union Oil Co.*, 144 F.Supp. 564, 6 O. & G.R. 803 (W. D. La. 1956), *aff'd*, 245 F.2d 14, 7 O. & G.R. 798 (5th Cir. 1957).

82. Compare Professor Merrill's statement that:

"Particular applications of the judicial ascertainment clauses may be invalid. For instance, they ought not to apply where the lessee has been guilty of such fraudulent or oppressive conduct as to destroy confidence which must be the basis of a proper relationship between the lessor and the lessee. Likewise, they should be invalid in so far as they attempt to relieve the lessee from liability for damages where the alternative decree will not afford the lessor full recompense for the lessee's wrongful conduct." Merrill, *Lease Clauses Affecting Implied Covenants*, Southwestern Legal Foundation, Second Annual Institute on Oil and Gas Law and Taxation 141, 187 (1951).

83. See *e.g.*, *Lawrence Oil Corp. v. Metcalfe*, 266 Ky. 819, 100 S.W.2d 217 (1936).

84. See *Billeaud Planters v. Union Oil Co.*, *supra* note 81.

85. *Cf. Woolley v. Standard Oil Co.*, 230 F.2d 97, 5 O. & G.R. 1394 (5th Cir. 1956). The notice and demand clause was applicable to the situation where the lessee "shall in good faith and with reasonable diligence, attempt to pay any rental, but shall fail to pay or incorrectly pay some portion thereof." It was urged that the clause was inapplicable because the lessee was negligent, but the court declared that "Whether or not Standard was negligent is beside the point as we are concerned here only with the question of whether Standard acted in good faith. The words 'good faith' and the word 'negligent' are not mutually exclusive. Good faith denotes honesty of purpose and as that expression is used in the law simply means 'honestly without fraud, collusion or deceit; really, actually and without pretense.'" *Id.* at 104, 5 O. & G.R. at 1401.

86. See *e.g.*, *Kirker v. Shell Oil Co.*, 104 Cal. App. 2d 497, 231 P.2d 905 (1951).

knowledge of breach or default by the lessee should excuse his failure to give notice and demand.<sup>87</sup> The limited case authority on this matter is to the contrary,<sup>88</sup> absent concealment of the facts by the lessee.

The sufficiency of the notice of breach given the lessee by the lessor has been the subject of considerable litigation.<sup>89</sup> In some instances the courts have been satisfied with notice which did not comply in all particulars with the notice required by the lease clause<sup>90</sup> but usually the courts have been fairly strict in this regard. If the lease provides for the period of time which must elapse after notice and demand before suit may be filed, the lessor must permit that full period of time to pass before instituting action.<sup>91</sup> The notice should not be phrased in terms of a declaration of forfeiture but in terms of notice of breach and a demand for performance on penalty of forfeiture.<sup>92</sup>

Still another notice problem may occasionally give rise to difficulty, *viz.*, who is entitled to give the notice. Thus where either at the time of the lease or sub-

87. Daggett, Discussion Notes, 6 O. & G.R. 813 and 7 O. & G.R. 804.

88. *Billeaud Planters Inc. v. Union Oil Co.*, 144 F. Supp. 564, 6 O. & G.R. 803 (W.D.La. 1956), *aff'd*, 245 F.2d 14, 7 O. & G.R. 798 (5th Cir. 1957). The district court declared that "the mere fact that plaintiffs were ignorant of the drainage did not relieve them from the necessity of giving notice in the absence of actual concealment on the part of defendant, or some act on the part of defendant which hindered, prevented or impeded plaintiffs from ascertaining knowledge of facts." 144 F. Supp. at 573, 6 O. & G.R. at 812. The Court of Appeals declared that lessors "were not relieved of the duty of making inquiry and of notifying appellee in writing, setting out specifically in what respects appellee had breached the contract, as was required by paragraph 12 of the agreement." 245 F.2d at 19, 7 O. & G.R. at 803.

89. See e.g., *Sun Oil Co. v. Oswell*, 258 Ala. 326, 62 So.2d 783, 2 O. & G.R. 145 (1953) (finding that notice was inadequate); *Danker v. Lee*, 137 Cal.App.2d 797, 291 P.2d 73, 5 O. & G.R. 313 (1955) (finding that notice under the circumstances was sufficient); *Sohio Petroleum Co. v. Miller*, 229 La. 581, 86 So.2d 201, 7 O. & G.R. 262 (1956) (finding notice and demand were adequate although containing an erroneous statement of fact); *Eota Realty Co. v. Carter Oil Co.*, 225 La. 790, 74 So.2d 30, 3 O. & G.R. 1876 (1954) (finding that notice and demand were adequate); *Brown v. Shafer*, 325 P.2d 743, 9 O. & G.R. 202 (Okla. 1958); *Lyons v. Robson*, 330 P.2d 593, 9 O. & G.R. 927 (Okla. 1958) (finding that notice and demand were adequate under the circumstances of the case); *Burnett v. R. Lacy, Inc.*, 293 S.W.2d 674, 6 O. & G.R. 846 (Tex. Civ. App. 1956), error *ref'd* (inadequate notice an alternative ground for holding the lessee was not liable for alleged breach of covenant).

90. *General Crude Oil Co. v. Harris*, 101 S.W.2d 1098 (Tex. Civ. App.), error *dism'd* (1937). Lease required written notice and demand. Court said oral notice given to lessee upon lessor's request for further development "may be said to be a substantial compliance with the provisions in the lease for notice, except that it was not in writing." The court further declared that in any event the notice was adequate by reason of waiver and estoppel. "Lessees having accepted the verbal notice and promised to comply with it, we do not think that they can now, in the circumstances, be held to complain that it was not in writing." *Id.* at 1101.

91. *Deace v. Stribling*, 142 S.W.2d 564 (Tex. Civ. App. 1940), error dismissed, (only 25 days notice given before suit to cancel for breach of covenants and conditions; held that 30 days notice as required by notice and demand clause was prerequisite to action).

92. *Storm v. Barbara Oil Co.*, 177 Kan. 589, 282 P.2d 417, 4 O. & G.R. 962 (1955) (absolute cancellation for breach of further exploration covenant denied, one ground being that lessor gave notice of forfeiture rather than notice and demand for additional drilling); *Kunc v. Harper-Turner Oil Co.*, 297 P.2d 371, 5 O. & G.R. 1028 (Okla. 1956) (declaring that the notice given by lessor "simply notified the defendant that it had

sequent thereto there is a division of ownership of the landowner or mineral interest, must all of the owners join in the notice and demand? Some clauses deal explicitly with this matter<sup>93</sup> but most are silent on the subject. In the latter instance notice given and demand made by less than all cotenants may be inadequate.<sup>94</sup> It seems likely that the answer to the question of who must give notice will be supplied not by an interpretation of the lease clause but by the state law governing the rights of partial owners to maintain actions severally.<sup>95</sup>

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forfeited and allowed to lapse and abandoned the lease and demanded that it be released of record and that any entry or operation upon the land would constitute a trespass and that plaintiffs would seek recovery of damages arising therefrom.

"This notice certainly does not constitute notice to further develop, but in fact forbids any further effort in that direction." *Id.* at 377, 5 O. & G.R. at 1034-35.

93. E.g. "In case of default in performance by Lessee of any of its obligations under this lease, and the failure to commence to remedy the same within 60 (sixty) days after receipt of written notice so to do signed by parties owning a majority of Lessor's interest or in the event the lease land is pooled with other lands as provided in paragraph—hereof by parties owning a majority of the landowners' interest in all the lands so pooled, specifying the particulars in which it is claimed Lessee is in default. . . ." A California lease form.

94. Cf. *Hawkins v. Klein*, 124 Okla. 161, 255 Pac. 570 (1927) (holding that forfeiture notice issued by one concurrent owner was not sufficient; all the concurrent owners must concur in the election to enforce the forfeiture and no one of them may, by virtue of his relationship as a cotenant, act as agent for his concurrent owners. The notice of one concurrent owner alone was a nullity and did not effectuate a forfeiture). *Contra*, *Coal Oil and Gas Co. v. Styron*, 303 P.2d 965, 6 O. & G.R. 827 (Okla. 1956). See also Okla. Stat. tit. 12, § 230 (1951) allowing a cotenant to maintain an action without the joinder of other cotenants.

95. Compare *Magnolia Petroleum Co. v. Storm*, 239 S.W.2d 437 (Tex. Civ. App. 1951), error ref'd, n.r.e., (non-participating royalty owner not an indispensable party in a suit to cancel the lease), with *Hunt v. McWilliams*, 218 Ark. 922, 240 S.W.2d 865 (1950) (*contra*).