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## THE CESSATION OF PRODUCTION CLAUSE AND LESS THAN PAYING PRODUCTION IN THE SECONDARY TERM: *HOYT V.* *CONTINENTAL OIL CO.*

### I. INTRODUCTION

The Oklahoma Supreme Court recently considered, in *Hoyt v. Continental Oil Co.*,<sup>1</sup> whether an oil and gas lease in its secondary term<sup>2</sup> terminated by the terms of a cessation of production clause<sup>3</sup> where there was less than production in paying quantities<sup>4</sup> and when the habendum clause<sup>5</sup> required such production. Only three cases<sup>6</sup> have previously addressed this issue. Of these cases, only one<sup>7</sup> constituted legal precedent. In *Hoyt*, the supreme court held that, after the expiration of the primary term,<sup>8</sup> where a cessation of production clause modified a habendum clause requiring production in paying quantities, the oil and gas lease terminated if cessation of production in paying quantities had been established and if there was less than production in paying quantities for more than the stipulated time period of the cessation of production clause.<sup>9</sup> Significantly, Texas and Oklahoma, the first states to apply this rule,<sup>10</sup> have previously interpreted the habendum clause of an oil and gas lease to require production in paying quantities in the secondary term even where the express language in the habendum

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1. 606 P.2d 560 (Okla. 1980).

2. See note 14 *infra* and accompanying text.

3. See notes 20 & 21 *infra* and accompanying text.

4. See notes 47 & 49 *infra* for two definitions of production in paying quantities.

5. See notes 12 & 14 *infra* and accompanying text.

6. All of these cases are from Texas. *Clifton v. Koontz*, 325 S.W.2d 684 (Tex. 1959); *Wainright v. Wainright*, 359 S.W.2d 628 (Tex. Civ. App. 1962), *writ ref. n.r.e.*; *Sullivan & Garnett v. James*, 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*

7. *Sullivan & Garnett v. James*, 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*

8. See note 14 *infra* and accompanying text.

9. *Hoyt v. Continental Oil Co.*, 606 P.2d at 563. The Oklahoma Supreme Court also disposed of three other issues. The court held that contract negotiations and internal corporate authorization to rework did not constitute operations for drilling as required by the cessation of production clause in the Hoyt lease. *Id.* at 564. See note 74 *infra*. The court held that the shut-in gas well doctrine had no application where there had not been completion and testing of a gas well capable of production in paying quantities. *Id.* at 565. See note 67 *infra*. The court held that the time after the filing of the petition in this action did not constitute non-productive time for the purpose of this action. *Id.* at 562. See note 66 *infra*.

10. The rule was first applied in *Sullivan & Garnett v. James*, 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*

dum clause referred only to the term "production."<sup>11</sup>

## II. CESSATION OF PRODUCTION PRIOR TO *HOYT V. CONTINENTAL OIL CO.*

### A. Characterizing the Habendum Clause

The habendum clause of an oil and gas lease defines the duration of the leasehold interest<sup>12</sup> but may be subject to other provisions.<sup>13</sup> Under the typical oil and gas lease, the habendum clause provides for a fixed primary term and also includes a provision known as the thereafter clause, which provides that the lease shall continue after the expiration of the primary term so long thereafter as oil or gas is produced.<sup>14</sup> The estate created is a determinable fee.<sup>15</sup> Consequently, where the primary term has expired, the lease will remain in effect only by the terms of the thereafter clause.<sup>16</sup> In Oklahoma and other states,<sup>17</sup> if the terms of the thereafter clause are not satisfied then the lease will terminate. No element of forfeiture exists, however, since policy interests suggest that a lease terminates by its own terms.<sup>18</sup> In addition, the

11. *Henry v. Clay*, 274 P.2d 545 (Okla. 1954); *Garcia v. King*, 164 S.W.2d 509 (Tex. 1942).

12. E. KUNTZ, 2 A TREATISE ON THE LAW OF OIL AND GAS § 26.1 (12th rev. ed. 1964); H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 601.4 (abr. ed. 1975).

13. H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 602 (abr. ed. 1975). Though the habendum clause may be subject to the provisions of other oil and gas lease clauses, we are here concerned only with the effect of a cessation of production clause upon a habendum clause.

14. E. KUNTZ, 2 A TREATISE ON THE LAW OF OIL AND GAS § 26.4 (12th rev. ed. 1964); H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 601.4 (abr. ed. 1975). The thereafter clause provides for a secondary term after the expiration of the primary term for so long thereafter as oil or gas is produced.

15. In those instances in which the courts [California, Mississippi, Pennsylvania, Texas, and Oklahoma] have had occasion to identify by name the estate created by such an oil and gas lease, the interest created has been identified as a determinable fee where the lease provided for a fixed term and for so long thereafter as oil or gas is produced.

E. KUNTZ, 2 A TREATISE ON THE LAW OF OIL AND GAS § 26.2, at 246-47 (12th rev. ed. 1964).

16. *Henry v. Clay*, 274 P.2d 545 (Okla. 1954); *Woodruff v. Brady*, 72 P.2d 709 (Okla. 1937); *Gypsy Oil Co. v. Marsh*, 248 P. 329 (Okla. 1926).

17. Arkansas, California, Louisiana, Montana, Tennessee, Texas. For case authority in these states see note 29 *infra* and accompanying text.

18. *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298 (5th Cir. 1954); *McQueen v. Sun Oil Co.*, 213 F.2d 889 (6th Cir. 1954). In *Haby v. Stanolind Oil Co.*, the United States Court of Appeals, Fifth Circuit, stated: "There is no principal [*sic*] of forfeiture involved when a lease is terminated by its own provisions for cessation of production." 228 F.2d at 307 (quoting *Woodson v. Pruett*, 281 S.W.2d 159 at 164 (Tex. Civ. App. 1955), *writ ref. n.r.e.*). Among other cases, this particular quote from *Woodson* was supported by the United States Court of Appeals, Fifth Circuit, in *Empire Gas & Fuel Co. v. Saunders*, 22 F.2d 733 (5th Cir. 1927). *Haby v. Stanolind Oil Co.* quoted *Empire Gas* to this effect: "[The] equitable rule as to relieving against forfeiture has no application to the facts of this case, for there was no forfeiture; there was nothing to be forfeited, because the lease by its very terms had ceased to exist." 228 F.2d at 305 (quoting *Empire Gas & Fuel Co. v. Saunders*, 22 F.2d at 735).

same result is warranted by policy interests which construe an oil and gas lease liberally in favor of the lessor and strictly against the lessee.<sup>19</sup>

### B. *Characterizing the Cessation of Production Clause*

The cessation of production clause in an oil and gas lease provides a lessee with certain rights for maintaining the lease should production cease.<sup>20</sup> A typical cessation of production clause may read in part: "(If after discovery of oil or gas the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter . . . ." <sup>21</sup> Where such a clause is absent, and there is temporary cessation of production, a lessee may be allowed a reasonable time in which to reinstate production under the common law doctrine of temporary cessation.<sup>22</sup> But where a cessation of production clause is present, the stipulated time period of a cessation of production clause generally defeats the doctrine of temporary cessation.<sup>23</sup> Cessation of production then, which exceeds the period stipulated in a cessation of production clause, cannot be considered temporary under the doctrine of temporary cessation since it is superseded by the terms of the cessation of production clause.<sup>24</sup>

### C. *Interpreting the Term Production*

To determine whether a lease terminates by the terms of its cessation of production clause, it has been necessary to define the term production with respect to both the habendum and the cessation of

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19. *Greer v. Salmon*, 479 P.2d 294 (N.M. 1970) which said: "A lessee cannot be permitted to fail in development and hold the lease for speculative purposes unless in strict compliance with his contract. . . ." *Id.* at 296. Furthermore, *Greer v. Salmon* stated: "Frequently this court has construed oil and gas mining leases strictissimi juris as against the lessee and liberally in favor of the lessor. But this has always been to the end of promoting development as contemplated by the parties." *Id.* at 299 (quoting *Simons v. McDaniel*, 7 P.2d 419, 421 (Okla. 1932)).

*Lima Oil & Gas Co. v. Pritchard*, 218 P. 863 (Okla. 1923); *New State Oil & Gas Co. v. Dunn*, 182 P. 514 (Okla. 1919).

20. E. KUNTZ, 4 A TREATISE ON THE LAW OF OIL AND GAS § 47.3(a) (13th rev. ed. 1972).

21. Hazlett, *Effect of Temporary Cessation of Production on Leases and Term Royalties*, TENTH ANN. INST. ON OIL & GAS L. & TAX., 201, 248 (1959).

22. *Cotner v. Warren*, 330 P.2d 217 (Okla. 1958); E. KUNTZ, 2 A TREATISE ON THE LAW OF OIL AND GAS § 26.8 (12th rev. ed. 1964).

23. *Woodson v. Pruett*, 281 S.W.2d 159 (Tex. Civ. App. 1955), *writ ref. n.r.e.* (involved an oil and gas lease that terminated by reason of cessation of production for more than the sixty days allowed in a cessation of production clause).

24. *But cf. Wilson v. Talbert*, 535 S.W.2d 807 (Ark. 1976) (*force majeure* clause allowed applicability of doctrine of temporary cessation where a cessation of production clause would have precluded such an application).

production clauses since this term appears in each clause.<sup>25</sup> After the expiration of the primary term, production has generally been defined as production in paying quantities<sup>26</sup> because policy suggests that a lessee should not be allowed to maintain a lease in the secondary term for purely speculative reasons.<sup>27</sup> As such, production in less than paying quantities will generally terminate a lease in its secondary term. Specifically, in Oklahoma<sup>28</sup> and other states,<sup>29</sup> the term production, as contained in a habendum clause, is interpreted to mean production in paying quantities because that word is typically contained within a habendum clause only by virtue of the thereafter clause, which has application only to the secondary term.

Before the expiration of the primary term, production has generally been defined as any production,<sup>30</sup> and not just production in paying quantities. This definition affords the lessee with an opportunity to explore and develop the leasehold during the primary term.<sup>31</sup> As such, complete cessation of production has been required to terminate a lease in its primary term. Consequently, a cessation of production clause containing the term production will have no effect on a primary term lease until there is complete cessation of production.<sup>32</sup> There is no au-

25. See notes 14 & 21 *supra* and accompanying text.

26. See notes 47 & 49 *infra* for two definitions of production in paying quantities.

27. See note 18 *supra*.

28. State v. Carter Oil Co., 336 P.2d 1086 (Okla. 1959); Henry v. Clay, 274 P.2d 545 (Okla. 1954); Gypsy Oil Co. v. Marsh, 248 P. 329 (Okla. 1926).

29. McLeon v. Wells, 180 S.W.2d 325 (Ark. 1944); Barnard v. Gibson, 100 Cal. App. 2d 527, 224 P.2d 90 (1950); Caldwell v. Alton Oil Co., 108 So. 314 (La. 1926); Steven v. Potlatch Oil & Ref. Co., 260 P. 119 (Mont. 1927); Waddle v. Lucky Strike Oil Co. Inc., 551 S.W.2d 323 (Tenn. 1977); Garcia v. King, 164 S.W.2d 509 (Tex. 1942). *Accord*, Atlantic Ref. Co. v. Moxely, 211 F.2d 916 (5th Cir. 1954).

30. For an oil or gas well to be defined as producing, there must be some quantity of oil or gas coming from the well. *E.g.*, Roberts v. Corum, 112 So.2d 550 (Miss. 1959); Long v. Magnolia Petroleum Co., 89 N.W.2d 245 (Neb. 1958); Murphy v. Garfield Oil Co., 225 P. 676 (Okla. 1923).

31. Garcia v. King, 164 S.W.2d 509 (Tex. 1942) stated:

In order to understand and properly interpret the language used by the parties, we must consider the objects and purposes intended to be accomplished by them in entering into the contract. The object of the contract was to secure development of the property for the mutual benefit of the parties. It was contemplated that this would be done during the primary period of the contract. So far as the lessees were concerned, the object in providing for a continuation of the lease for an indefinite time after the expiration of the primary period was to allow the lessees to reap the full fruits of the investments made by them in developing the property. Obviously, if the lease could no longer be operated at a profit, there were no fruits for them to reap. The lessors should not be required to suffer a continuation of the lease after the expiration of the primary period merely for speculation purposes on the part of the lessees. Since the lease was no longer yielding a profit to the lessees at the termination of the primary period, the object sought to be accomplished by the continuation thereof had ceased, and the lease had terminated.

*Id.* at 512.

32. Roberts v. Corum, 112 So.2d 550 (Miss. 1959); Long v. Magnolia Petroleum Co., 89

thority indicating a secondary term cessation of production clause to be activated only by a complete cessation of production. One authority<sup>33</sup> though, has held that cessation of paying production will activate the cessation of production clause in the secondary term. Generally, the cessation of production clause modifies the thereafter clause in a secondary term lease.<sup>34</sup> Consequently, where the term production in a cessation of production clause is construed to require complete cessation of production in the secondary term before a lease may terminate, an important issue arises where production in the thereafter clause is construed to mean paying production.

Where a secondary term oil and gas lease contains a cessation of production clause, and it modifies the habendum clause, there is cessation of paying production under the cessation of production clause if the habendum clause requires paying production but such requirement is not met.<sup>35</sup> Cessation of production in paying quantities, not necessarily complete cessation, is required for termination. Professor Eugene Kuntz has stated it this way:

If production should not cease entirely but should cease to be in paying quantities, there may or may not be a cessation of production for purposes of the cessation of production clause, depending upon whether the effect is to modify the habendum clause or the drilling clause. Thus, if the primary term has expired and the effect of the cessation of production clause is to modify the habendum clause, there is a cessation of production if the habendum clause requires production in paying quantities and production has ceased to be in paying quantities.<sup>36</sup>

*Sullivan & Garnett v. James*<sup>37</sup> is the only legal precedent supporting this

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N.W.2d 245 (Neb. 1958). *Contra*, *Mitchell v. Brockenbush*, 363 S.W.2d 166 (Tex. Civ. App. 1962), *writ ref. n.r.e.*

33. *Sullivan & Garnett v. James*, 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*

34. *McQueen v. Sun Oil Co.*, 213 F.2d 889 (6th Cir. 1954).

*Wainright v. Wainright*, 359 S.W.2d 628 (Tex. Civ. App. 1962), *writ ref. n.r.e.*; *Sullivan & Garnett v. James*, 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*

35. *Sullivan & Garnett v. James*, 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*; *cf. McQueen v. Sun Oil Co.*, 213 F.2d 889 (6th Cir. 1954) (where neither the sixty-day cessation of production clause nor the habendum clause were satisfied in the secondary term when there were no operations designed to restore production within sixty days of total cessation of production); *Wainright v. Wainright*, 359 S.W.2d 628 (Tex. Civ. App. 1962), *writ ref. n.r.e.* (where the court, without referring to the terms of the habendum clause, declared the lease to be terminated by the express terms of the cessation of production clause pursuant to total cessation of production).

36. E. KUNTZ, 4 A TREATISE ON THE LAW OF OIL AND GAS § 47.3, at 105 (13th rev. ed. 1972).

37. 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*

proposition.<sup>38</sup> *Sullivan & Garnett* involved a lease which produced oil, but not in paying quantities. The habendum clause was interpreted to require production in paying quantities.<sup>39</sup> However, the language of the cessation of production clause contained only the term production.<sup>40</sup> The jury determined that production in paying quantities had ceased at the end of June by taking the difference between the receipts and expenditures for the first six months of 1952.<sup>41</sup> The court of appeals in *Sullivan & Garnett* upheld the trial court's finding that cessation in paying quantities continued for a period exceeding the sixty day allowance in the cessation of production clause.<sup>42</sup> The principles applicable to defining production in a habendum clause were applied to a cessation of production clause. It must be mentioned, however, that the lessees failed to argue that complete cessation was required in the secondary term to terminate the lease.

There are only two other cases,<sup>43</sup> also from Texas, which have addressed a question similar to the one discussed in *Sullivan & Garnett*. Without citing *Sullivan & Garnett*, the Supreme Court of Texas addressed a similar issue in *Clifton v. Koontz*.<sup>44</sup> The question in *Clifton* was whether a marginal well<sup>45</sup> produced quantities sufficient to satisfy

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38. See notes 32 & 33 *supra* and accompanying text. *Sullivan & Garnett* has been distinguished from *Roberts* and *Long* in H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 616.1 (abr. ed. 1975), where it was said: "The latter case [*Sullivan & Garnett*] is distinguishable from the former two cases [*Roberts* and *Long*], however, in that the question arose in the latter cases with reference to the secondary term of the lease and in the former cases with reference to the primary term of the lease." *Id.* at 331.

39. 308 S.W.2d at 892.

40. *Id.* at 891. The cessation of production clause stated:

If, after the expiration of the primary term of this lease, *production* on the leased premises shall cease from any cause, Lessee shall have a period of sixty (60) days from the stopping of production within which at his election, to commence operations for the drilling of another well, deepen an existing well, or wells, or otherwise to attempt to restore the production of such existing well or wells, and if such work is so commenced and prosecuted with reasonable diligence and production results therefrom, this lease shall remain in force so long as production continues.

*Id.* at 894 (emphasis added).

41. *Id.* at 893. Though the lessees testified that operating and administrative expenses should have been allocated on an income basis, the jury determined cessation of paying quantities on a per well basis. *Id.*

42. *Id.* at 893-94.

43. *Clifton v. Koontz*, 325 S.W.2d 684 (Tex. 1959); *Wainright v. Wainright*, 359 S.W.2d 628 (Tex. Civ. App. 1962), *writ ref. n.r.e.*

44. 325 S.W.2d 684 (Tex. 1959).

45. From June, 1955, through September, 1956, there was a net loss of \$216.16. For the months of July, August, and September, 1956, there was a net profit of \$111.25, though there was a loss for the consecutive months of April and May, 1956. 325 S.W.2d at 689. Because the well produced in paying quantities and failed to produce in paying quantities, depending upon which period of time was considered, the supreme court called the well a marginal well. *Id.*

the cessation of production clause<sup>46</sup> in the secondary term. This question was narrower than the issue in *Sullivan & Garnett*. The supreme court in *Clifton* not only defined production in the habendum clause to mean paying production but defined paying production as well. *Clifton* deviated from its earlier definition of production in paying quantities pronounced in *Garcia v. King*.<sup>47</sup> This departure was predicated on the fact that the lessors in *Clifton*, by application of the sixty-day cessation of production clause, sought to compel the lessees to drill immediately upon sustaining a slight loss for one month regardless of whether the succeeding month's production might be profitable. Responding to the lessor's contention, the court in *Clifton* said that by the terms of the cessation of production clause, paying production could not be determined by applying an arbitrary sixty-day period, implemented before cessation of production in paying quantities had actually been established.<sup>48</sup> The supreme court also said that where a marginal well was involved the *Garcia* definition of paying quantities was too harsh on lessees, and instead, production in paying quantities should be determined by how a reasonably prudent lessee would operate the well under similar circumstances.<sup>49</sup> The supreme court found that produc-

46. *Id.* at 690. The cessation of production clause stated in part: "If after discovery of oil, gas or other mineral the *production* thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter. . . ." *Id.* (emphasis added).

47. *Id.* at 691. The definition of production in paying quantities in *Garcia v. King* stated: "If a well pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the enterprise as a whole may prove unprofitable." *Id.* (quoting *Garcia v. King*, 164 S.W.2d 509, 511 (Tex. 1942)).

48. 325 S.W.2d 684. The supreme court said:

After cessation of production in paying quantities, the lessee has 60 days of "grace" in which to save his leasehold, however, if production never ceased, as is the case here, the 60-day clause is not definitive of the period over which the trier of the facts must determine whether a lease is producing in paying quantities. There can be no arbitrary period for determining the question of whether or not a lease has terminated for the additional reason that there are various causes for slowing up of production, or temporary cessation of production, which the courts have held to be justifiable. We again emphasize that there can be no limit as to time, whether it be days, weeks, or months, to be taken into consideration in determining the question of whether paying production from the lease has ceased. To apply the 60-day clause as contended by petitioners would mean that respondents would have been required to immediately commence drilling operations, upon sustaining a slight loss for one month, without regard to whether they believed the next month's production might be profitable for the reason that if they were in error and suffered another slight loss, the lease would terminate.

*Id.* at 690 (citations omitted).

49. *Id.* at 690-91. The definition of production in paying quantities in *Clifton v. Koontz* stated:

In the case of a marginal well, such as we have here, the standard by which paying quantities is determined is whether or not after all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for



tion in paying quantities had not ceased and did not need to interpret the term production in the cessation of production clause. In dictum, though, the court agreed with the lessor that the sixty-day cessation of production clause applied where production in paying quantities had ceased.<sup>50</sup> The opinion in *Clifton* provides support, in dictum, for the appellate court case of *Sullivan & Garnett*.

In *Wainwright v. Wainwright*,<sup>51</sup> the Civil Appeals Court of Texas declared a lease to be terminated by the express terms of the cessation of production clause.<sup>52</sup> The court in *Wainwright* distinguished *Clifton v. Koontz*<sup>53</sup> by pointing out that the facts in *Wainwright* involved a question of complete and voluntary cessation, whereas the *Clifton* case involved a question of production in paying quantities. As such, it was only necessary for the court to define production in the cessation of production clause to mean production, not paying production. *Wainwright* questioned the appellee's interpretation of *Clifton* which urged that if a lessee shut down a well capable of paying production, it could not be said that production had ceased as long as a reasonably prudent lessee would have continued production. The court in *Wainwright* reasoned that such an interpretation would allow an imprudent lessee to cease production of a well which had been producing in paying quantities for an indefinite period without termination of the lease. *Wainwright* rejected this interpretation of *Clifton* but agreed with the dictum acknowledgement in *Clifton* that the sixty-day clause would apply where paying production had ceased.<sup>54</sup> Therefore, the civil appeals court in *Wainwright*, like the supreme court in *Clifton*, provided support, in dictum, to the rule established in the civil appeals court deci-

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speculation, continue to operate a well in the manner in which the well in question was operated.

*Id.*

50. The supreme court said: "We agree with petitioners that if production in paying quantities ceased, the 60-day clause applies. However, the facts in the instant case compel a different result than that contended for by petitioners." *Id.* at 690.

51. 359 S.W.2d 628 (Tex. Civ. App. 1962), writ ref. n.r.e.

52. The cessation of production clause stated in part:

It is specially agreed that in the event that oil or gas is being *produced* or is obtained from said premises after the expiration of the primary term hereof and said *production* shall for any reason cease or terminate, lessee shall have the right at any time within ninety (90) days from the cessation of such *production* to resume drilling operations in the effort to make said leased premises again *produce* oil or gas, in which event this lease shall remain in force so long as such operations are continuously prosecuted . . . , and if they result in production of oil or gas, so long thereafter as oil or gas is produced from the premises.

*Id.* at 628-29 (emphasis added).

53. 325 S.W.2d 684 (Tex. 1959).

54. 359 S.W.2d at 630.

sion of *Sullivan & Garnett v. James*.<sup>55</sup>

### III. THE CASE OF *HOYT v. CONTINENTAL OIL CO.*

#### A. *The Facts of the Case*

With the oil and gas lease in its secondary term, the controversy in *Hoyt v. Continental Oil Co.*<sup>56</sup> began when Hoyt, the lessor, made a demand for a release of the leasehold interest<sup>57</sup> by the lessee, Continental Oil Company. The lessee failed to comply with this demand. The lease's thereafter clause specified that the lease would remain in force for as long thereafter as oil or gas was or could be produced.<sup>58</sup> The lease also contained a sixty-day cessation of production clause which provided in part: "If after expiration of the primary term . . . production shall cease from any cause . . . this lease shall not terminate provided . . . lessee resumes operations for drilling . . . within sixty days from such cessation . . . ." <sup>59</sup> The lease involved only one well, the Hoyt well, which, during the twelve months<sup>60</sup> under consideration, produced gas in non-paying quantities.<sup>61</sup>

Hoyt brought an action for the cancellation of the lease and for damages resulting from the failure of the lessee to release the lease.<sup>62</sup>

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55. 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*

56. 606 P.2d 560 (Okla. 1980). Though there were two lessees other than *Continental Oil Co.*, the lessees will hereinafter be referred to as the lessee, *Continental Oil Co.*

57. Hoyt also made an alternative demand for the further development and completion of an offsetting well. *Id.* at 562.

58. In its entirety the habendum clause stated: "This lease shall remain in force for a term of ten years from April 25, 1956, and as long thereafter as oil, gas, casinghead gas, casinghead gasoline, or any of the products covered by this lease is or can be produced." Brief-In-Chief at 4, Answer Brief at 4, *Hoyt v. Continental Oil Co.*, 606 P.2d 560 (Okla. 1980).

The thereafter clause contains the phrase "or can be produced." *Id.* Though this phrase did not effect the question as to the interpretation of the term "produce" in the cessation of production clause, the lessees did use it in their argument concerning the application of the shut-in gas well doctrine to the Hoyt well. *See* note 67 *infra*.

59. In its entirety the cessation of production clause stated:

If after the expiration of the primary term of this lease, *production* on the leased premises shall cease from any cause, this lease shall not terminate provided lessee resumes operations for drilling a well within sixty days from such cessation and this lease shall remain in force during the prosecution of such operations and, if *production* results therefrom, then as long as *production* continues.

Brief-In-Chief at 4, Answer Brief at 5, *Hoyt v. Continental Oil Co.*, 606 P.2d 560 (Okla. 1980) (emphasis added).

60. Actually, production in paying quantities was not obtained for a period of fourteen months but the last two of these months were not considered by the supreme court. *See* note 66 *infra*.

61. 606 P.2d at 562.

62. Hoyt sought damages for lessees' failure to release the leasehold interest that prevented Hoyt from re-leasing the leasehold interest in addition to acquiring a commercial oil and gas well on the property. *Id.*

The district court<sup>63</sup> granted partial summary judgment on the cancellation issue.<sup>64</sup> The Oklahoma Supreme Court affirmed the partial summary judgment and remanded the case.<sup>65</sup>

### B. *The Issues and Holdings in Hoyt*

After dispensing with a minor issue,<sup>66</sup> the supreme court in *Hoyt* turned to answer the question whether the Hoyt well ceased production for a period sufficient to actuate the sixty-day cessation of production clause.<sup>67</sup> The lessee contended that the term production in the cessation of production clause did not mean production in paying quantities as is true in the habendum clause.<sup>68</sup> Hoyt, however, asserted that the lease expired after the primary term under both the cessation of production clause and the habendum clause because of the lessee's inabil-

63. The District Court for Dewey County, Oklahoma, Joe Young, J., presiding. *Id.* at 560.

64. The lessee, Continental Oil Co., perfected an interlocutory appeal on the cancellation issue, but the damages issue was never appealed. *Id.* at 562.

65. Petition for rehearing before the Oklahoma Supreme Court was denied on March 3, 1980. The judgment of the supreme court was mandated on March 6, 1980. The controversy was pursued no further; the parties settled out-of-court on the damages issue.

66. By affidavit, Hoyt alleged that production in paying quantities had not been obtained for fourteen consecutive months and claimed monetary losses for each month. Citing *Jones v. Moore*, 338 P.2d 872 (Okla. 1959) (oil and gas lessee could not be charged with the time between the institution of a court injunction and the disposal of that injunction) the supreme court pointed out that the last two of these months were after the filing date of the petition in this action and did not constitute non-productive time for the purpose of this action since the filing of the proceeding until the lessee's title at issue and relieved them of the covenant to produce in paying quantities until determination could be made that title to the lease did indeed rest with Hoyt. 606 P.2d at 562.

67. The lessee also raised another factual issue—whether the Hoyt well was capable of a quantity of production which could satisfy the habendum clause. Although the Hoyt well was neither completed nor tested to the Cottage Grove formation (i.e., it was only completed to the Morrow formation), lessee contended that cessation of production under the habendum clause did not occur because the Cottage Grove formation was indeed capable of production. Additionally, the lessee contended that its efforts in negotiating a gas purchase contract for the Cottage Grove formation preserved the lease because it satisfied the requirement of diligence to obtain a market for gas once discovered. 606 P.2d at 562-63. In short, the lessee contended that the shut-in gas well doctrine had application to the Hoyt well. See generally H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 631 (abr. ed. 1975).

The lessor, Hoyt, denied that the shut-in gas well doctrine extended the lease because the Cottage Grove formation was neither completed nor tested. The supreme court, without finding it necessary to decide whether there had been diligence to obtain a market, merely agreed with the lessor that the shut-in gas well doctrine had no application where there had not been completion of a gas well capable of paying production. 606 P.2d at 564 (citing *State v. Carter Oil Co.*, 336 P.2d 1086 (Okla. 1959); *McVicker v. Horn, Robinson, & Nathan*, 322 P.2d 410 (Okla. 1958)). The supreme court noted that the lessee's authorities, *Gard v. Kaiser*, 582 P.2d 1311 (Okla. 1978), *Flag Oil Co. v. King Resources Co.*, 494 P.2d 322 (Okla. 1972), and *Cox v. Gulf Oil Corp.*, 301 F.2d 122 (10th Cir. 1962), concerned wells which had been completed and tested and thus capable of paying production. Moreover, the court was unable to find a single instance wherein a shut-in gas well had not been completed and tested to be a commercial producer. 606 P.2d at 564-65.

68. 606 P.2d at 563. In other words, the lessee contended that the cessation of production clause became actuated only where there was complete cessation of production.

ity to produce in paying quantities. The supreme court found that in Oklahoma, production had substantially the same meaning as production in paying quantities in the habendum clause of an oil and gas lease.<sup>69</sup>

The supreme court looked to the effect of the Hoyt lease's cessation of production clause upon the lease. The court found that in the primary term, where the effect of the cessation of production clause was to modify a clause other than the habendum clause, there was cessation of production only if production totally ceased.<sup>70</sup> *Hoyt* also examined the effect of the cessation of production clause on a habendum clause in a secondary term lease. In an instance of complete cessation of production, the court found that a lease could be terminated by the express terms of the cessation of production clause, without considering the question of paying quantities.<sup>71</sup> Where there was production, however, the court found and emphasized that there was cessation of production by the terms of the cessation of production clause if the habendum clause required production in paying quantities and the lessee failed to comply with that requirement.<sup>72</sup> Furthermore, because the parties had bargained for the sixty-day period, such a stipulated time period would defeat the doctrine of temporary cessation allowing a reasonable time for the lessee to restore paying production or, at least resume drilling operations.<sup>73</sup> Consequently, the lease terminated if paying production,

69. *Id.* State v. Carter Oil Co., 336 P.2d 1086 (Okla. 1958).

70. Roberts v. Corum, 112 So.2d 550 (Miss. 1959); Long v. Magnolia Petroleum Co., 89 N.W.2d 245 (Neb. 1958). The specific language of the supreme court which these cases are cited as supporting is as follows:

If, as in the situation before us, production does not cease entirely but does cease to be in paying quantities, there may or may not be such a cessation of production for purposes of the cessation of production clause, depending upon whether or not the effect is to modify the habendum or drilling clause. If the primary term has not expired so that the effect of the cessation of production clause is to modify the drilling clause there is no cessation of production unless that production ceases entirely.

606 P.2d at 563. *Contra*, Mitchell v. Brockenbush, 363 S.W.2d 166 (Tex. Civ. App. 1962), *writ ref. n.r.e.*

71. McQueen v. Sun Oil Co., 213 F.2d 889 (6th Cir. 1954); 606 P.2d at 563.

72. Wilson v. Talbert, 535 S.W.2d 807 (Ark. 1976); Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959); Wainright v. Wainright, 359 S.W.2d 628 (Tex. Civ. App. 1962), *writ ref. n.r.e.*; Sullivan & Garnett v. James, 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.* The specific language of the supreme court that these cases are cited as supporting is as follows: "The result is contrary where, as here, the primary term has expired and the effect of the provision is to modify the habendum clause. In such a situation there is a cessation of production if the habendum clause requires production in paying quantities and such requirement is not met." 606 P.2d at 563.

*See* note 36 *supra* and accompanying text.

73. Haby v. Stanolind Oil Co., 228 F.2d 298 (5th Cir. 1955); Wilson v. Talbert, 535 S.W.2d 807 (Ark. 1976); Greer v. Salmon, 479 P.2d 294 (N.M. 1970); Lynch v. Southern Coast Drilling Co., 442 S.W.2d 804 (Tex. Civ. App. 1969), *writ ref. n.r.e.*; Sunray DX Oil Co. v. Texaco, 417

or an operation designed to restore paying production, was not resumed within the sixty-day period.<sup>74</sup> *Hoyt* held that, after the expiration of the primary term, where a cessation of production clause modified a habendum clause which required production in paying quantities, then the oil and gas lease terminated if, once cessation of production in paying quantities had been established, there was less than production in paying quantities for more than the stipulated time period of the cessation of production clause.<sup>75</sup>

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S.W.2d 424 (Tex. Civ. App. 1967), *writ ref. n.r.e.*; *Hall v. McWilliams*, 404 S.W.2d 606 (Tex. Civ. App. 1966), *writ ref. n.r.e.* 606 P.2d at 563. Of these authorities, *Haby v. Stanolind*, *Greer v. Salmon*, and *Wainright v. Wainright* directly quote *Woodson v. Pruett*, 281 S.W.2d 159 (Tex. Civ. App. 1955), *writ ref. n.r.e.* where it was said:

Appellants next contend that the cessation of production on the lease was sudden and only temporary, and that under such circumstances they were entitled to a reasonable time in which to remedy the defect and resume production. This might be true under the terms of some leases, but under the lease here the parties agreed and stipulated what would constitute temporary cessation. The lease provides, in effect, that if production should cease the lessee must commence re-working or additional operations within sixty days or the lease would terminate. If the cessation of production is for more than sixty consecutive days it is not to be regarded as temporary under the terms of this lease. If re-working or additional operations are not begun within the sixty-day period the lease terminates by its own provisions.

*Id.* at 164-65. *Sunray DX Oil Co. v. Texaco*, *Hall v. McWilliams*, and *Lynch v. Southern Coast Drilling Co.* directly cite the civil appeals court case of *Woodson v. Pruett*, but *Wilson v. Talbert* only indirectly cites that case by way of *Haby v. Stanolind*.

To emphasize the law in *Woodson v. Pruett*, the supreme court in *Hoyt* favorably quoted George Hazlett who said:

The courts have been unanimous in construing this clause as meaning that cessation of production for longer than the stipulated period cannot be considered "temporary." In effect, the provision is construed as giving the lessee a fixed period of time within which to resume production or commence additional drilling or reworking operations in order to avoid termination of the lease; the period of grace having been fixed by agreement of the parties, it cannot be extended by the courts, no matter what the circumstances or cause of the cessation.

606 F.2d at 564 (quoting Hazlett, *Effect of Temporary Cessation of Production on Leases and Term Royalties*, TENTH ANN. INST. ON OIL & GAS L. & TAX., 201, 248 (1959)). This comment by Hazlett was made about a typical cessation of production clause which he constructed. See note 21 *supra* and accompanying text.

74. The lessee also contended that the negotiations in obtaining a new gas purchase contract, and the internal corporate authorization to re-work the Hoyt well, constituted resumption of drilling operations. On this point, the supreme court favorably quoted Professor Eugene Kuntz who said:

The literal provisions of the clause in question will govern what type of operation must be commenced or resumed. It may be limited in application to a resumption or commencement of drilling, or it may be less restrictive and apply to reworking and other operations. If the clause specifically provides for the resumption or commencement of drilling, no other operation will satisfy the clause.

606 P.2d at 564 (quoting E. KUNTZ, 4 A TREATISE ON THE LAW OF OIL AND GAS § 47.5, at 134 (13th rev. ed. 1972)). To this effect, Professor Kuntz cited and quoted only *Francis v. Pritchett*, 278 S.W.2d 288 (Tex. Civ. App. 1955), *writ ref.*

75. See note 9 *supra*.

#### IV. AN ANALYSIS OF *HOYT v. CONTINENTAL OIL CO.*

##### A. *Interpreting Production in the Cessation of Production Clause*

In *Hoyt*, the Oklahoma Supreme Court determined for the first time that production in a cessation of production clause meant production in paying quantities. The lessee argued against such an interpretation on the ground that it would rewrite the Hoyt lease to the benefit of the lessor. But construing an oil and gas lease liberally in favor of a lessor and strictly against a lessee is encouraged as a matter of policy, and this may especially be true where the question is whether an oil and gas lease is in force. The fact that the lessor is a landowner and the lessee is several corporations may only enhance this policy. The lessee's basic argument, however, cogently advocated the policy of encouraging the termination of an oil and gas lease by its terms.

The important distinction to be made in applying a policy which encourages the termination of an oil and gas lease by its terms is the difference between defining production before the expiration of the primary term and defining it after the expiration of that term. Interpreting production in a cessation of production clause to mean any production is appropriate in the primary term where a total cessation of production rule provides a lessee with plenty of opportunity to explore and develop the leasehold interest. In the secondary term, however, the cessation of production clause modified the thereafter clause. Nevertheless, the lessees would have had the express wording of the cessation of production clause control over the interpretation of production in the thereafter clause. Consequently, as in the primary term, only total cessation of production would have activated the cessation of production clause. Such a rule would conceivably allow an imprudent lessee to lower production to less than production in paying quantities for speculative reasons. Preventing such speculation was a major reason for requiring production in paying quantities in a secondary term lease which had no cessation of production clause. The lessee, however, cited no authority involving a secondary term lease to support such a construction of the lease.<sup>76</sup> The supreme court in *Hoyt* countered this argument by practically quoting Professor Eugene Kuntz who, unlike the supreme court, cited only *Sullivan & Garnett v. James*<sup>77</sup> in support of that language.<sup>78</sup>

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76. But the lessee did cite *Cities Service Oil Co. v. Geograph Co.*, 254 P.2d 775 (Okla. 1953) (where a royalty clause was strictly construed). Brief-In-Chief at 12, *Hoyt v. Continental Oil Co.*, 606 P.2d 560 (Okla. 1980).

77. 308 S.W.2d 891 (Tex. Civ. App. 1957), *writ ref. n.r.e.*

It is not surprising that *Sullivan & Garnett* is the only case cited by Professor Kuntz addressing the meaning of cessation of production in the secondary term of an oil and gas lease containing a cessation of production clause. The only support *Clifton v. Koontz*<sup>79</sup> provides for the result in *Hoyt* is derived from its speculative statement that a sixty-day cessation of production clause has application where production in paying quantities has ceased. Unlike *Sullivan & Garnett*, cessation of paying production was not established in *Clifton*. The holding in *Wainright v. Wainright*<sup>80</sup> supports *Hoyt* only to the extent that it agrees, in dictum, with the supreme court's dictum in *Clifton*.<sup>81</sup> The Supreme Court of Arkansas, in the case of *Wilson v. Talbert*,<sup>82</sup> provides no sup-

78. See notes 36, 70 & 72 *supra* and accompanying text.

79. 325 S.W.2d 684 (Tex. 1959).

80. 359 S.W.2d 628 (Tex. Civ. App. 1962), *writ ref. n.r.e.*

81. See note 54 *supra* and accompanying text.

82. 535 S.W.2d 807 (Ark. 1976).

In *Wilson v. Talbert*, the decision involved two leases in their secondary terms concerning the same well: the Haltom lease and the Talbert lease. The Haltom lease was to continue as long thereafter as oil or gas was produced, but contained no cessation of production clause. The Talbert lease was to continue as long thereafter as oil or gas was produced or drilling operations were continuously prosecuted, and contained a sixty-day cessation of production clause and a *force majeure* clause, see, E. KUNTZ, 2 A TREATISE ON THE LAW OF OIL AND GAS § 26.13(f) (12th rev. ed. 1964) (discussion of the *force majeure* clause). The controversy began in March, 1974, when a leak developed in the bottom of one of the lessee's storage tanks and production for the well was discontinued. 535 S.W.2d 807-08.

The lessees of the Haltom lease sought entry into the premises in July, 1974, to attempt to repair the tank but Talbert refused them permission to enter. The trial court chancellor reached the decision that the Haltom lease had not terminated due to the lessees' attempt within a reasonable time to reinstate paying production upon temporary cessation of production. The chancellor's decision was not appealed. 535 S.W.2d 808-09.

The Supreme Court of Arkansas affirmed the chancellor's decision that the Talbert lease had terminated. In reaching a decision, the chancellor cited authorities to the effect that the Talbert lease terminated by the terms of its cessation of production clause. The supreme court pointed out that the cessation of production clause referred only to permanent cessation situations. Continuing, the court established that the *force majeure* clause was applicable because it applied to instances of temporary cessation of production and provided no stipulated time period regarding reinstatement of production or drilling operations. But the supreme court found that effort to repair the rupture in the tank bottom had not been commenced by Talbert until approximately four months after cessation, and that another storage tank had stood adjacent to the ruptured tank and could quite easily have been used for storage of oil. Under the circumstances the supreme court did not consider four months to be a reasonable time period under the doctrine of temporary cessation. As such, the supreme court affirmed the trial court's decision though noting that the chancellor had used the wrong reason in reaching the same conclusion. 535 S.W.2d 809-10.

The Arkansas Supreme Court's decision in *Wilson v. Talbert* is not authority for the rule in the Oklahoma Supreme Court decision of *Hoyt v. Continental Oil Co.* regarding termination of a lease by the terms of a cessation of production clause where there is less than production in paying quantities. The decision in *Talbert* was decided by the terms of a *force majeure* clause, not a cessation of production clause. Furthermore, even if the Arkansas Supreme Court had affirmed the chancellor's reason for terminating of the Talbert lease by the terms of the cessation of production clause, there is no mention of paying quantities in the chancellor's decision regarding the Talbert lease. Such a decision would not have been unlike the decision in *Wainright v. Wainright*,

port on this point although it was cited to that effect in the *Hoyt* opinion.<sup>83</sup> Authorities other than *Sullivan & Garnett* which were cited in *Hoyt* as support on this point only provide, at best, dictum support.

Though *Sullivan & Garnett's* interpretation supports *Hoyt's* ruling, and though the two cases are factually similar, *Sullivan & Garnett* does have analytical faults. Unlike the court in *Hoyt*, *Sullivan & Garnett* did not consider arguments advocating total cessation of production in the secondary term. Furthermore, the court in *Sullivan & Garnett* failed to substantively analyze the issue of paying production in the secondary term. Perhaps because of *Sullivan & Garnett's* deficiencies, or perhaps because facts did not provide the opportunities, the supreme court in *Hoyt* failed to conclusively resolve important subsidiary issues.

#### B. *Before the Activation of the Cessation of Production Clause in the Secondary Term*

With cessation of production in paying quantities an uncontroverted fact in *Hoyt*, the court substituted the terms of the cessation of production clause for the doctrine of temporary cessation. As such, the sixty-day period of the cessation of production clause controlled over the reasonable time period allowed by the doctrine. Nevertheless, since the question of paying quantities was not examined, the court did not consider when the cessation of production clause would be activated by cessation of production in paying quantities even though production continued. In *Sullivan & Garnett*, the trial court found cessation of production in paying quantities by defining production in paying quantities very much like it was defined in *Garcia v. King*.<sup>84</sup> But such a definition may allow a cessation of production clause to be triggered six months after cessation of production in paying quantities, as it was in *Sullivan & Garnett*, or immediately after cessation of production in paying quantities, as the lessor contended it should in *Clifton*. Application of the sixty-day cessation of production clause would have required the lessees to immediately drill upon sustaining a slight loss for

359 S.W.2d 688 (Tex. Civ. App. 1962), *writ ref. n.r.e.*, where a secondary term lease terminated by the express provisions of a cessation of production clause. But, unlike the civil appeals case of *Wainright v. Wainright*, the supreme court case of *Wilson v. Talbert* does not even provide dictum support for the rule in *Hoyt v. Continental Oil Co.* At best, the supreme court decision in *Wilson v. Talbert* provides support for the rule in *Woodson v. Pruett*, 281 S.W.2d 159 (Tex. Civ. App. 1955), *writ ref. n.r.e.*, where it was held that a lease terminated by the express terms of a cessation of production clause.

83. See note 72 *supra* and accompanying text.

84. 164 S.W.2d 509 (Tex. 1942).



one month, without regard to whether the next month's production might be profitable. The Supreme Court of Texas in *Clifton* attempted to remedy this problem by substituting the general definition of production in paying quantities with a definition intended to be less imposing on the lessees. But neither *Clifton's* special facts, nor the rejection of a liberal interpretation of *Clifton's* reasonable operator rule by the court in *Wainright*, should be forgotten. *Clifton's* rule may merely be considered a remedy for the acrimonious nature of the definition of production in paying quantities found in *Garcia v. King*. In *Hoyt*, though the supreme court did not have to determine when production in paying quantities ceased as was true in *Clifton* and *Sullivan & Garnett*, the language of the opinion explicitly indicates that the sixty-day time period of the cessation of production clause tolled immediately when cessation of paying production was established.

C. *After the Activation of the Cessation of Production Clause in the Secondary Term*

The issue of paying quantities in *Hoyt* also raised the subsequent question of what measure of time should prevail after cessation of paying production is established, before a lease may be terminated by the cessation of production clause. With cessation of production in paying quantities uncontroverted, *Hoyt* concluded, pursuant to the progeny of *Woodson v. Pruett*,<sup>85</sup> that, instead of the reasonable time period allowed by the doctrine of temporary cessation, the period stipulated in the cessation of production clause would control the period over which paying production would have to be re-established, or drilling operations resumed. Though cessation of production was established by a jury in *Sullivan & Garnett*, the appeals court in that case reached the same conclusion as the supreme court in *Hoyt*. But the practicality of utilizing the period stipulated in a cessation of production clause as time required to reinstate paying production, or resume drilling operations, were considered neither by the appeals court in *Sullivan & Garnett*, nor the supreme court in *Hoyt*. The lessee's brief in support of a petition for rehearing in *Hoyt* pointed out that by the time the profits and losses for any particular month have been calculated, it is practically impossible to preserve a lease in the little time remaining under a

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85. 281 S.W.2d 159 (Tex. Civ. App. 1955), writ ref. n.r.e.; See note 23 *supra* and accompanying text.

sixty-day period.<sup>86</sup> In *Clifton*, a pro-lessor decision, the Supreme Court of Texas indirectly dealt with this problem.<sup>87</sup> It held that by the terms of a cessation of production clause, paying could not be determined under an arbitrary sixty-day period instituted before cessation of paying production had actually been established. But the supreme court in *Clifton* stated only what measure of time could *not* be used before cessation of production in paying quantities had been established. It failed to specify what measure *could* be used before or after such cessation. Any question of the time period to be applied before a lease could terminate under a cessation of production clause after cessation of production is established was, at best, answered only partially by the supreme court's opinion in *Hoyt*.

## V. CONCLUSION

The holding in *Hoyt* concerning paying production in the secondary term has reinforced the foundation upon which the rule in *Sullivan & Garnett* stands, and it has increased the sphere of this rule to include both Texas and Oklahoma. The effect of the supreme court's ruling is to extend the holding in *Sullivan & Garnett* to the extent that an argument favoring a total cessation of production rule in the secondary term has been considered and rejected. If not for the inevitable fact that an imprudent lessee would take advantage of a total cessation rule in the secondary term, a holding for the lessee in *Hoyt* would have provided an easily ascertainable point from which the stipulated period of time of a cessation of production clause would begin to run. It also would have provided support against a rule requiring paying production under a cessation of production clause in the secondary term and it would have precluded uncertainties involved in determining when cessation of paying production occurs. The court in *Wainright* echoed this uncertainty when it rejected, in dictum, the lessee's interpretation of the reasonable operator rule in *Clifton* which was used to define production in paying quantities. Nevertheless, the total cessation of production rule in the secondary term will be acceptable only when a secondary term lessee producing less than paying quantities without completely ceasing production is perceived as fair and prudent.

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86. Brief of Appellants in Support of a Petition for Rehearing at 15, *Hoyt v. Continental Oil Co.*, 606 P.2d 560 (Okla. 1980).

87. Note 50 *supra* and accompanying text. It was indirectly dealt with for the reason that, unlike *Hoyt v. Continental Oil Co.* and *Sullivan & Garnett v. James*, cessation of production in paying quantities was not established in *Clifton v. Koontz*.

The language of the *Hoyt* opinion explicitly substitutes the sixty-day period of the cessation of production clause for the reasonable time period allowed at common law by the temporary cessation of production doctrine.<sup>88</sup> At first glance, this language appears to favor the lessor whether or not paying production is a factual issue. There are, however, at least three arguments which expose the pro-lessor facade of *Hoyt*. First, in *Sullivan & Garnett* a definition of paying quantities was arguably applied for a reasonable period of time. Specifically, this was the first six months of the year in which the lease terminated and before cessation of production in paying quantities was actually established. *Hoyt* and *Sullivan & Garnett* are factually similar and stand for the same rule. Consequently, it may be further argued that if the lessee in *Hoyt*, like the lessees in *Sullivan & Garnett*, had not conceded that paying production had ceased, then the court in *Hoyt* could also have allowed a reasonable period of time over which a definition of paying quantities would have been applied to determine if paying production had ceased.

Second, consistent with *Clifton*, it may be argued that paying production should be defined by how a reasonably prudent operator would operate the well under similar circumstances.<sup>89</sup> Logically, everything a reasonably prudent operator does is done within a reasonable time. Consequently, if *Hoyt* had involved the factual question of when production ceased to be in paying quantities, then applying *Clifton's* definition of paying quantities would have necessitated that a reasonable period of time be allowed over which cessation of production in paying quantities would be determined. Obviously, both the argument derived from *Sullivan & Garnett*, and the argument derived from *Clifton*, are for the purpose of allowing a reasonable time over which a definition of paying quantities may be applied to determine if cessation of paying production has occurred.<sup>90</sup>

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88. The supreme court stated:

On this point the record clearly demonstrates production in paying quantities was not obtained for an uninterrupted period far in excess of the 60-day provision in the lease executed by the parties. Where the parties have bargained for and agreed on a time period for a temporary cessation clause that provision will control over the common law doctrine of temporary cessation allowing a "reasonable time" for resumption of drilling operations.

606 P.2d at 563 (citations omitted).

89. It must not be forgotten that *Clifton* is factually distinguishable from *Sullivan & Garnett*. See note 45 *supra* and accompanying text.

90. But in order for the effect of each argument to be consistent with the *Hoyt* opinion, it would be necessary that a reasonable time period for determining cessation of paying production precede the common law doctrine of temporary cessation. The common law doctrine, which be-

The third argument which exposes the pro-lessor facade of *Hoyt* concerns the measure of time to be used once cessation of production in paying quantities has been established. It may be argued that the arbitrary time period of a cessation of production clause does not allow enough time for the lessee to preserve the lease and, therefore, such a time period should be judicially replaced by a longer time period, if not a reasonable time period. The difficulty in making such an argument would be the counter-argument, based upon the rule in *Woodson v. Pruett*,<sup>91</sup> that the expressed intent of the parties to the lease must not be re-written by the courts. This argument was basically accepted by the *Hoyt* court; the court rejected the lessee's argument that the sixty-day time period of the cessation of production clause did not allow enough time to preserve the lease after cessation of paying production had been established.<sup>92</sup> Moreover, it must not be forgotten that both *Clifton* and *Wainright* stated, in dictum, that once cessation of production is established, the stipulated period of time of the cessation of production clause is the measure of time to be applied before the lease terminates pursuant to the cessation of production clause. Consequently, this third argument probably has less chance of success than the first two arguments, which are derived from *Clifton* and *Sullivan & Garnett*.<sup>93</sup>

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gins with the establishment of cessation of paying production, also allows for a reasonable time period for the operator to restore any production in less than paying quantities to paying production. Consequently, it would be possible for a lessee to have two consecutive reasonable time periods in which to preserve an oil and gas lease. The first reasonable time period would be the time over which a definition of paying quantities would be applied to determine if there is paying production; the second reasonable time period would allow the lessee time to restore any cessation of paying production, or resume drilling operations.

91. 281 S.W.2d 159 (Tex. Civ. App. 1955), *writ ref. n.r.e.*

92. This seems contradictory since, on the one hand, the terms of the cessation of production clause are said to control over the common law doctrine of temporary cessation. On the other hand, however, the court interprets production in the cessation clause to mean production in paying quantities, not just production.

93. Note that an argument concerning the application of a reasonable time period over which cessation of production in paying quantities may be determined is not an argument for substituting the arbitrary time period of a cessation of production clause with a longer period of time, if not a reasonable time period. If one of these two arguments is successful, it may be difficult to effectively assert the other because the two consecutive reasonable time periods might appear to be too favorable to a lessee where policy interests suggest that the needs of the lessor should be looked after first.

A fourth argument might be that the terms of the cessation of production clause are controlled by other provisions of the lease under certain conditions. Thus, a *force majeure* clause of an oil and gas lease controlled over a cessation of production clause, similar to the cessation of production clause in *Hoyt*, in instances of temporary cessation even though the cessation of production clause had application to cessation of production resulting from either temporary or permanent cessation. *Wilson v. Talbert*, 535 S.W.2d 807 (Ark. 1976). The effect of the *force majeure* clause was to restore the common law doctrine of temporary cessation to allow a reasonable time period over which production could be restored.

The rule in *Hoyt* will probably be followed in other jurisdictions which define the term "production" in a habendum clause to mean production in paying quantities.<sup>94</sup> But because cessation of paying production was an uncontroverted fact in *Hoyt*, successful arguments favoring the application of a reasonable period of time over which a definition of paying quantities may be applied will, at least, soften the pro-lessor rule in *Hoyt* to the benefit of a lessee in future litigation. Obviously, such arguments cannot be made if cessation of production in paying quantities is conceded by a lessee. Furthermore, a successful argument favoring the substitution of the arbitrary time period of a cessation of production clause with a longer time period, if not a reasonable time period, will have the same effect upon the rule in *Hoyt*. Consequently, because the *Hoyt* opinion thoroughly rejected an argument favoring a total cessation of production rule in the secondary term, these arguments should not be ignored by a lessee who finds himself in the same predicament as the lessee in *Hoyt*.

*Steven L. Holcombe*

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94. See notes 28 & 29 *supra* and accompanying text.