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Mineral Rights - Damages for Failure to Drill - Lease Interpretation

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years the force and logic of their arguments have received increasing recognition, possibly because of the change in present-day attitude towards the matrimonial relation.[39] There has been a slow but definite trend throughout the common law jurisdictions towards the abolition of the privilege altogether.[40] The Legislature, in drafting Act 157 of 1916, did not clearly indicate the extent to which it intended the policy behind the privilege to be carried out.[41] Therefore, in cases presenting aspects of the privilege not covered specifically by the statute, the court has been obliged to rely largely on its own discretion as to whether the protection afforded by the privilege should be limited or extended. It is submitted that the position taken by the court is completely justified.

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MINERAL RIGHTS—DAMAGES FOR FAILURE TO DRILL—LEASE INTERPRETATION

Plaintiff, lessor, sought damages from defendant, lessee, for alleged breach of contract to drill on her land. A rider attached to a form lease provided:

> "Notwithstanding any other provisions contained herein it is understood and agreed that this lease shall be forfeited and rendered null and void *unless* on or before sixty days from the date lessee commences the actual drilling of a well at some point within one mile of the above described property and prosecutes such drilling with due diligence to a depth of 3,300 feet unless oil or gas is discovered in paying quantities at a lesser depth, and if said well is completed as well capable of producing oil or gas in paying quantities, then, in the event, lessee shall commence the actual drilling of a

39. Hutchins and Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675 (1929).

40. Report by the American Bar Association's Committee on the Improvement of the Law of Evidence as quoted in 8 Wigmore, Evidence § 2228 (3d ed. 1940): "The privilege has been abolished in only a few States; but a tendency to extend the abolition has recently been apparent, not only in civil litigation but in criminal prosecutions. . . . It is recommended that the privilege protecting from being called one against the other be abolished (1) in civil cases, and (2) in criminal cases."

41. Statutes which include a specific provision protecting the accused from adverse inference created by the exercise of the husband-wife privilege are by no means rare. For a full list of such enactments, see 3 Wigmore, Evidence § 2272 (3d ed. 1940).

> well on some part of the land covered by this lease within 90 days after the completion of said first well and drill the same with due diligence to at least the depth where the oil or gas is found in paying quantities in the said first well. A well capable of producing 25 barrels of oil in 24 hours shall be considered as capable of producing in paying quantities." (Italics supplied.)

The lessee drilled a "producing well" outside the leased premises, but did not begin drilling a well on plaintiff's premises within ninety days after completion of the first well. Plaintiff contended that by the terms of the rider defendant became unconditionally obligated to drill on her land when the producing well was drilled adjacent to her premises. *Held*, defendant was not unconditionally obligated to drill on plaintiff's land, hence, plaintiff was not entitled to damages. Failure to drill merely terminated the lease. *Godfrey v. Lowery*, 223 La. 163, 65 So.2d 124 (1953).

The lease without the rider in the instant case[1] provided that the lease would terminate at the end of a stated time unless the lessee drilled a well or paid delay rental, but did not bind the lessee either to drill or to pay. This type is sometimes designated as an "option" lease. A lease with similar provisions is often designated in other jurisdictions as the "unless" type lease.[2]

The absence of a duty upon the lessee in the so-called "option" type lease does not, however, render it null as containing a potestative condition since the cash consideration, usually considered as a bonus, supports the lease for the primary term specified in the contract.[3] Since the lessee is not bound to continue the lease beyond the initial term, the extension, or renewal is therefore in the nature of an option.[4]

The option lease has been subject to strict construction by the courts, and if the lessee has not exercised his "option" to extend the lease, by either drilling or paying delay rental, the lease automatically terminates.[5] There is no necessity for the

1. This type of lease was first approved in Saunders v. Busch-Everett Co., 138 La. 1049, 71 So. 153 (1916). See Comment, 16 Tulane L. Rev. 80 (1941). See also Daggett, Louisiana Mineral Rights 181 (1945).

2. Joyce v. Wyant, 202 F.2d 863, 864 (6th Cir. 1953); LeRosen v. North Central Texas Oil Co., 169 La. 973, 126 So. 442 (1930).

3. See note 1 supra.

4. Ibid.

5. Talley v. Lawhorn, 150 La. 251, 90 So. 427 (1922); Smith v. Sun Oil Co., 172 La. 655, 135 So. 15 (1931); Logan v. Tholl Oil Co., Inc., 189 La. 645, 180 So. 473 (1938).

lessor to put the lessee in default, since the lease is said to terminate by its own terms.[6]

Since the decision finds its basis in the interpretation of the lease, and more particularly in the interpretation of the quoted rider, brief mention of basic canons of construction should prove helpful.

When the terms of the instrument are free from ambiguity, and the intent of the parties is clear, the courts are bound to give effect to the contract as written.[7] If the written instrument does not clearly express the intent of the parties, but the parties themselves have executed the contract in a certain manner, or where one of the parties executed it and the other expressly or impliedly gave his assent, the court will use the construction placed upon the agreement by the parties as a rule for its interpretation.[8]

It is also a rule of construction that the interpretation of one part of an instrument shall be made with due regard for the other parts, reflecting the intention of the act as a whole, so that one part will not negate other parts of the instrument.[9] It appears that the court used only the latter rule to determine the intentions of the parties with respect to the rider attached to the form lease.

The statement that oil and gas leases are construed strongly against the lessee has been made frequently by the courts of many jurisdictions, including Louisiana.[10] The Supreme Court in *Hunt Trust v. Crowell Land & Mineral Corporation*[11] however refused to accept this proposition without reservation. This refusal is pointed up in cases where damages were sought against the lessee. If there is ambiguity, the lease is generally construed against the one who prepares it, and oil and gas leases are usually prepared by the lessee.[12]

6. Ibid.

7. Art. 1945, La. Civil Code of 1870; Sartor v. United Carbon Co., 183 La. 287, 163 So. 103 (1935); Ker v. Evershed, 41 La. Ann. 15, 6 So. 566 (1889).

8. Art. 1956, La. Civil Code of 1870; Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623 (1913); Pendleton v. McFarlane, 222 La. 569, 63 So.2d 1 (1953).

9. Art. 1955, La. Civil Code of 1870; Knight v. Blackwell Oil & Gas Co., 197 La. 237, 1 So.2d 89 (1941); Gautreaux v. Harang, 190 La. 1060, 183 So. 349 (1938); Lozes v. Segura Sugar Co., Ltd., 52 La. Ann. 1844, 28 So. 249 (1900); Glassell v. Richardson Oil Co., 150 La. 999, 91 So. 431 (1922).

10. Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623 (1913). Cf. Murrell v. Lion, 30 La. Ann. 255 (1878).

11. 210 La. 945, 28 So.2d 669 (1946).

12. Art. 1958, La. Civil Code of 1870; Murrell v. Lion, 30 La. Ann. 255 (1878).

In the instant case the rider did not provide for the renewal of the lease by the payment of delay rental, and it contained the provision that the lease "shall be forfeited and rendered null and void *unless*" certain wells were drilled, which did not obligate the lessee. The plaintiff was of the opinion that the lessee had exercised its only option by drilling the well outside the leased premises, and that failure to drill on the plaintiff's land rendered the lessee liable to damages similar to those granted in *Fite v. Miller*.[13]

That case presented a similar factual situation. The lessee had entered into a contract with the lessor to drill a well on land owned by the former which joined that of the latter, and upon completion of that well to commence a second well within ten days on the leased premises which were owned by the parties jointly. The court awarded damages equal to the amount it would have cost to drill the well.

In a later case, *Fogle v. Feazel*,[14] damages were sought by the lessor because the lessee failed to drill a well on property outside the leased premises. The court said the lessor did not have an interest in the well and therefore could not claim damages. It appears that if, in the instant case, the court had found that the provision in the nature of an option applied only to the first well, the lessor would have had the requisite "interest" since the second well was to be drilled on land owned and leased by him.

The printed lease form in the instant case would have made performance by the lessee optional. Under its terms he would not have been obligated to drill or pay delay rental. The parties at the instance of the lessor replaced this provision with the rider. According to the court's interpretation of the meaning of the rider, the lessor merely eliminated one means by which the lease could be extended or renewed—payment of delay rental—and provided the lessee with two options to drill instead of one, the second option to become effective if the lessee exercised the first one.

The ultimate result of the case seems sound. It appears likely that the value of lessor's mineral rights, and hence the value of his land, was enhanced by the producing well within a mile of his land. On the other hand, it is possible that the well was not

13. 196 La. 876, 200 So. 285 (1940).
14. 201 La. 899, 10 So.2d 695 (1942).

producing according to the hopes of the lessee, and that it would not be any more enticing to another lessee than to the defendant.

It would seem that the court intends to restrict the ruling of *Fite v. Miller*[15] to the particular factual situation there presented. The court seems to make it clear that the unconditional obligation, necessary to come within the facts of that case, must be explicit in the agreement, and that the lease will not be arbitrarily construed against the lessee. This is a plausible position. The costs of drilling have increased considerably since the decision in the *Fite* case, and similar damages would be very heavy, indeed.

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MINERAL RIGHTS—EFFECT OF SPACING ORDERS ON SERVITUDE

Holt owned forty acres of land. In 1939 he sold the east half to A. J. Pitts and the west half to J. C. Pitts, subject to a reservation in himself of the minerals underlying both tracts. In 1944 Holt had granted an oil and gas lease covering the whole forty and subsequently conveyed undivided interests in his reserved minerals. In 1945 the Department of Conservation issued an order setting up a forty acre spacing pattern for the Holt Zone and May Sand in the Delhi Field of which this tract formed a part. In 1946 the lessees obtained a permit to drill on the tract and a well was completed on the west half which has produced oil in allowable quantities since that time. In 1947 plaintiff Smith acquired the east half of the forty on which no well had been drilled. Plaintiff brought suit against Holt and his assignees to be declared the owner of the minerals on that part of the tract alleging the extinguishment of the servitude on that part of the tract by non-user for a period of ten years. *Held*, that since a single lessee held the entire tract, he was the "owner" of the entire tract within the meaning of the Conservation Act. In such a situation a pooling order could serve no useful purpose, the effect of a conventional pooling agreement being achieved by single ownership. *Smith v. Holt*, 67 So. 2d 93 (La. 1953).

The Louisiana Conservation Act[1] provides that the Commissioner of Conservation may establish drilling units upon

15. 196 La. 876, 200 So. 285 (1940).
1. La. Act 157 of 1940, now La. R.S. 1950, 30:1 et seq.