



Volume 46 | Issue 2

Article 8

February 1940

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Recommended Citation

C. C. Williams Jr. & Robert B. Goodwin, *Oil and Gas in the Federal Court--Hutchinson v. McCue*, 46 W. Va. L. Rev. (1940).

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OIL AND GAS LAW IN THE FEDERAL COURT—

HUTCHINSON V. McCUE

“The forms of action we have buried, but they rule us from their graves”, Maitland used to say,¹ when explaining present-day causes of action.² Perhaps a similar remark may someday be ventured regarding the disposition of federal courts in equity cases³ to exercise an independent judgment as to matters of oil and gas law, despite recent liquidation of *Swift v. Tyson*.⁴ Prior to *Eric Railroad v. Tompkins*⁵ and *Ruhlin v. New York Life Insurance Co.*,⁶ important incidents of mineral servitudes had frequently been in litigation before federal judges, and, — on one theory or another,⁷ — the state decisions were fairly often disregarded. Hence,

citation (1938) 63 A. B. A. Rep. 522;
(1939) 23 Journal of American Judicature Society 15;
(1938) 24 American Bar Association Journal 795;
(1937) 23 *id.* at 969;
(1938) 21 Journal of American Judicature Society 160;
Pre-Trial Practice Succeeds in One-Judge County (1937) 20 *id.* at 247;
Sunderland, Theory and Practice of Pre-Trial Procedure (1937) 21 *id.* at 125;
Pre-Trial Procedure in Wayne Circuit (1933) 16 *id.* at 136;
Pre-Trial Procedure — A Collection of Articles from the Journal of the American Judicature Society.

¹ MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW (1913) 296.

² Note (1910) 8 MICH. L. REV. 315, 318: “The inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be.”

See also Note (1918) 32 HARV. L. REV. 166, discussing “the theory of the pleadings.”

³ Guffey v. Smith, 237 U. S. 101, 114, 35 S. Ct. 526, 59 L. Ed. 856 (1915), per Van Devanter, J.: “By the legislation of Congress and repeated decisions of this court, it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting.”

⁴ 16 Pet. 3, 19, 10 L. Ed. 865 (U. S. 1842), — to the effect that federal courts were not bound by state decisions “in the general principles and doctrines of commercial jurisprudence.” In *B. & O. R. Co. v. Baugh*, 149 U. S. 368, 403, 13 S. Ct. 914, 37 L. Ed. 772 (1893), Field, J., correctly prophesied eventual fate of the doctrine: “I have an abiding faith that this, like other errors, will, in the end, ‘die among its worshippers.’”

⁵ 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938), squarely overruling *Swift v. Tyson*.

⁶ 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290 (1938), holding that the state court construction of a contract was binding not only on the federal courts of law, but as to suits in equity as well. See Schmidt, *Substantive Law Applied by the Federal Courts* (1939) 16 TEX. L. REV. 512, 524.

⁷ Note (1934) 40 W. VA. L. Q. 258. Even when the federal court did follow state law, it often refused to concede the necessity of doing so. *E. g.*, Upde-

if equity discretion as to cancellation of oil and gas leases⁸ must still remain with the trial chancellor, then, "for as moch as conscience is a thing of great uncertaintie",⁹ the practical result of a separate federal jurisprudence is quite likely to survive on, long after its abolishment in constitutional theory.¹⁰

Speculation along these lines has been prompted by an important decision of the circuit court of appeals, for the fourth circuit, defining the habendum clause in an instance where there was failure to market gas continuously from a producing leasehold. In *Hutchinson v. McCue*,¹¹ a lease was granted of West Virginia land for a term of ten years, and so long thereafter as oil or gas should be produced and (royalty and) rentals paid.¹² In addition to oil royalty, the lessee agreed to pay a quarterly gas well rental of fifty dollars, but only *from the time and while the gas was marketed*,¹³ and the lessor's free gas covenant expressly extended to three dwelling houses on the leasehold.¹⁴ Following the instrument's execution in April, 1924, delay rentals were fully paid the lessor until,

graff v. United Fuel Gas Co., 67 F. (2d) 431 (C. C. A. 6th, 1933): "Without deciding whether the interpretation of the contract involves the application of a rule of property so as to constitute a holding of the court of last resort in West Virginia, a rule of decision binding on us, we yet find these cases highly persuasive."

⁸ Cancellation is the generic term used to describe an equity proceeding brought to establish abandonment, expiration or forfeiture of a lease.

⁹ HARGRAVE, LAW TRACTS (1787) 326.

¹⁰ *Erie R. Co. v. Tompkins* held *Swift v. Tyson*, in its ninety-six years of legal history, an unconstitutional course of conduct on the part of the federal courts, (perhaps within Amendment X to the Constitution).

¹¹ 101 F. (2d) 111 (C. C. A. 4th, 1939). It is to be observed the majority opinion expressly admits the applicability of local decisions (at p. 116): "These questions must be decided upon the facts hereinbefore set forth in conformity with the controlling law of West Virginia."

¹² The testing provision was that of a drill "or" pay lease, with a surrender clause. If there were no drilling within six months, the lessee agreed to pay in advance the usual delay rentals of a dollar an acre per year, in quarterly settlements, — until a well were drilled or the lease surrendered.

¹³ *Leslie v. Chase National Bank*, 83 F. (2d) 1013 (C. C. A. 6th, 1936), *Printed Record therein*, p. 53, 55, lower court opinion *per Cochran*, District Judge (1933): "This calls for a construction of the provision of the lease as to the payment of royalties. Payments thereof are to be made 'from the time and while the gas is marketed.' This expression can be expanded so as to read 'from the time the gas begins to be marketed and while it continues to be marketed' without enlarging its meaning. . . . It was only in case it (the lessee) was unable to market it (the gas) that its (the lessee's) obligation to pay ceased. In that contingency it (the rental) was to cease because there is no other stipulation to pay than while the gas is marketed."

¹⁴ In 1937, five of the seven subdivision interests were receiving free gas from the leasehold, — two of whom were petitioners in the case. True, on April 9, 1934, only three dwelling houses were supplied; yet one of the dissentients in fact "hooked on to the line" as late as March, 1937. *RECORD*, pp. 99-100.

five years later, producing gas wells were drilled.¹⁵ When the first two wells had been completed, the operator marketed the gas and met the gas well rentals as these accrued. Unfortunately, by the time the third producer was drilled in 1930, the marketing ceased, so all were accordingly shut in. There was thus no revenue out of the leasehold for either lessor or lessee, from the fall of 1930 until December, 1934.¹⁶ Meantime, after the lessor's death in 1931, the tract subject to the lease had been partitioned among the heirs; and there were now seven claimants to the rentals.¹⁷ In January, 1934, the receivers¹⁸ of the operator company effected an arrange-

¹⁵ Looking at the RECORD, (p. 35, *Finding of Fact*, No. 2), — "All delay rental called for by the lease, in the total amount of \$1244.50, was fully paid to the original lessor by the Hamilton Gas Company, as it accrued."

¹⁶ Rental was paid on the first well up to October 15, 1930, — and on the second, up to September 4, 1930. The third had never been turned into production lines, so no rentals were paid during the fixed term with respect to that well. The ten-year period was up, April 9, 1934. In December, 1934, marketing was resumed: on January 23, 1935, tender was made as to rentals earned after December 20, 1934, — the date on which the wells were cut into the pipe lines of the purchaser. Rentals were regularly offered the petitioners, down to October 1, 1936. Meantime, November 19, 1935, cancellation proceedings were begun. Thereafter, on May 18, 1937, when the cause came on for trial, a final tender was made in open court of the maximum amounts the three dissenters might claim, — assuming there were liability for rentals during the cessation of operations, 1930-1934.

¹⁷ Each of the seven partition deeds contained the following provision:

"And it is further understood and agreed . . . that the land hereby conveyed is subject to an oil and gas lease . . . dated on April 9, 1924; and that any royalties or incomes arising from said lease shall be divided equally among the direct heirs of . . . deceased."

¹⁸ Officials of the lessee, Hamilton Gas Company, began negotiations for sale of the gas with the United Fuel Gas Company during the summer of 1930, immediately after the wells had been shut in. After considerable delay, the contract, dated November 18, 1931, was finally executed in July, 1932, — about six months after the institution of receivership proceedings against the lessee in the federal court for the southern district of West Virginia. No doubt these financial difficulties impeded the operator's chances for a lengthy marketing arrangement.

Scarcely a year later, before the purchaser had taken any gas, 77B litigation developed over the question of venue for the corporate reorganization proceeding. Eastern creditors preferred to take it elsewhere, but the circuit court of appeals for the second circuit eventually decided that, with the company's principal assets in this region, venue should be laid in West Virginia. *In re Hamilton Gas Co.*, 79 F. (2d) 97 (C. C. A. 2d, 1935); *cert. denied*, 296 U. S. 647, 56 S. Ct. 307, 309, 80 L. Ed. 460 (1935). Parallel litigation here resulted in a decision favoring the district chosen by the debtor, having regard to the provisions of the Act. *Hamilton Gas Co. v. Watters*, 75 F. (2d) 176 (C. C. A. 4th, 1935); *cert. denied* 296 U. S. 647, 56 S. Ct. 307, 309, 80 L. Ed. 460 (1935); Note (1936) 22 VA. L. REV. 464. These various struggles have done much to settle the whole issue of venue for reorganizations in bankruptcy.

No gas was sold under the 1932 contract, because of the depression and consequent delay in completing the pipe line to the eastern seaboard. Venue litigation was not conducive to further negotiations with the purchaser during 1933 and early 1934. However, in October, 1934, a modification of the 1932

ment for reduced payments with four of the seven interests,¹⁹ the other three refusing any such compromise tender. When marketing of the gas had been resumed at the end of that year, the receivers formally offered the three dissentients their respective shares of the maximum amount of well rental²⁰ that could possibly have accrued during the period the wells were shut in. After rejecting the offer, the three subdivision owners in due course filed a petition, in the lessee's bankruptcy proceeding, for cancellation²¹ of this fully developed lease as to their lots, — on two of which, as it happened, the three wells were located.

There could be no dispute as to the fact that the fixed term had expired on April 9, 1934, and, further, that neither marketing nor gas well rental then existed. On the other hand, the three producing wells represented substantial investment by the operator;²² and the free gas was in fact being utilized on the leased land.²³ Moreover, only three of the seven interests objected to continued operation, the others being wholly satisfied with the settlement reached. It was uncontroverted that, during the period while the wells were shut in, the lessee made periodic tests of pressures, kept the equipment in order and paid the proper taxes.²⁴ Indeed, the

contract was effected, so that two months later, the Hutchinson leasehold was connected up with the United Fuel lines, and marketing resumed once more. It is thus essential to realize that all this time receivers and trustees were in charge of the lessee company, with their tenure hardly an undisturbed one.

¹⁹ "In order to effect an amicable settlement of the controversy with the lessor's heirs over well rentals while the gas was not being marketed, the receivers in January, 1934, agreed with the four respondent heirs to pay to each \$100.00 in cash, and his proportionate share of 50c per acre per annum until the gas could be marketed, at which time well rentals were to be resumed at the rate provided for in the lease." *Finding of Fact*, No. 8.

²⁰ RECORD, pp. 50-51. The formal tender to each petitioner was in the amount of \$586.90, as being the maximum sum of his respective share, — just as if marketing had continuously been in progress, 1930-1934. The operator's amended answer in this proceeding, filed May 24, 1937, set forth a willingness also to pay to each of the four assenting interests the amount of \$273.45, being the difference between the above maximum and the compromise payments already accepted by them.

²¹ The theory of the bill, (according to the amended petition, filed July 8, 1937), seems to have been (1) abandonment, as of July 1, 1930, or (2) termination on April 9, 1934, at the end of the ten-year period. In correspondence prior to suit, it was suggested too that the lease "had been forfeited".

²² Total cost of wells, \$37,232.04; erecting lines to wells, \$8,542.90. RECORD, p. 96.

²³ The use of the free gas for three dwelling houses, prior to April 9, 1934, did not of course serve in and of itself to extend the lease beyond the fixed term. *Anderson v. Schaffner*, 90 W. Va. 225, 229, 110 S. E. 566 (1922). See, however, *Ketchum v. Chartiers Oil Co.*, 5 S. E. (2d) 414 (W. Va. 1939).

²⁴ RECORD, p. 36. *Finding of Fact* No. 7.

only factual issue before the bankruptcy judge had to do with the "equities" of the case. The lessee contended that in July, 1930, when the wells were closed, there was no buyer for the gas except possibly on a temporary and unsatisfactory sufferance basis. Owing to the depression, it was claimed, no adequate market then became available until December, 1934.²⁵ The three petitioners insisted that there had always been a market at hand, — for the wells were already connected with the lines of the prospective purchaser, who had utilized the production since completion of the wells in 1929.²⁶ In other words, the controversy on the facts really became a question as to whether the operator had used due diligence in marketing.

The federal judge²⁷ found in favor of the operator and dismissed the petition for cancellation, holding there had been no expiration, abandonment nor forfeiture of the vested estate in the leasehold. On appeal by the petitioners, the circuit court of appeals²⁸ reversed the decree of the district court, and held, in effect, the lease had terminated at the end of the fixed term, — the senior circuit judge dissenting.²⁹ Curiously enough, the appellate opinion continued the arrangement as to the four assenting interests and permitted the lessee to operate the wells, the petitioners receiving merely three-sevenths of the net proceeds of gas sold.³⁰

²⁵ This the lower court found as the fact. RECORD, p. 35. The lessee's argument was to the effect that (1) the purchaser prior to July, 1930, never offered to buy on the basis of a long-term arrangement; (2) that the most that purchaser ever offered was to take the lessee's gas on sufferance until a larger line could be built to the field of an affiliate producer; (3) that the lessee immediately undertook protracted negotiations with United Fuel Gas Company, who eventually did purchase the output of the wells; and (4) that there was no other market available. Naturally, part of the foregoing was controverted by petitioners' witnesses.

²⁶ The contention of the petitioners was simply that the real facts were otherwise than the lessee claimed. In brief, it was asserted that (1) the lessee refused an existing market at hand in order to speculate on the chance of a good long-term contract for all the company's other leaseholds; (2) that the prior purchaser definitely needed the gas and would have bought it; (3) that even a temporary basis of marketing, as regards the lessee's obligation to the lessor, was better than simply shutting in the wells; and (4) that suddenly breaking off existing contacts with an existing market, in July, 1930, was wholly unwarranted.

²⁷ The opinion of McClintic, District Judge, (dated May 14, 1938), is contained in the printed RECORD, pp. 34-43.

²⁸ 101 F. (2d) 111 (C. C. A. 4th, 1938), — opinion of the court by Soper, Circ. J., with Northcott, Circ. J., concurring.

²⁹ Parker, Circ. J., dissenting, 101 F. (2d) 111, 123.

³⁰ Since the production of the petitioners' gas was thus wholly proper, the lessee was entitled to deduct production costs. Cf. Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411 (1897).

Each side then sought unsuccessfully a writ of certiorari³¹ from the United States Supreme Court, on differing contentions that the decision was in direct conflict with applicable West Virginia law.³² It is pertinent therefore to ascertain whether the circuit court actually has disposed of the litigation by employing a *Swift v. Tyson* technique.

In part, the task of the court was to interpret the habendum clause,—the fixed term *plus* the “so long as production and rentals paid” extension,—in the light of the royalty provision that promised rentals only during marketing. The difficulty lies in the separate historical significance of each important paragraph of the modern oil and gas lease. One cannot construe such a deed as the ordinary bilateral agreement between two parties bargaining at arm’s length, and ignore the slow evolution by which these various quasi-independent provisions were gradually formulated.³³ They have all been skilfully contrived for the purpose of facilitating a great industry, while yet concealing vital implications as to necessary development of the leased minerals. The habendum, for example, has grown out of unsatisfactory experiments with no-term³⁴ and long term leases into its present fixed exploratory period coupled with a production term for the life of the field. Similarly, its very language in the *Hutchinson* case recalls an early stage of West Virginia oil and gas jurisprudence.³⁵

³¹ *McCue v. Hutchinson*, 60 S. Ct. 75, 84 L. Ed. 78 (U. S. 1939).

³² The three petitioners contended that West Virginia law required complete relinquishment of the wells by the operator, since they now owned the gas in fee, as the result of the appellate court’s decision on the termination point. Moreover, it was also argued that according to local decisions, the reservation of rentals in favor of the four assenting heirs died with expiration of the lease itself.

The lessee stressed an alleged misconstruction of the habendum clause, and pointed out that no such inequitable forfeiture of a vested estate, (as it was said resulted here), was possible in West Virginia practice.

³³ Compare the opinion in *J. J. Fagan & Co. v. Burns*, 247 Mich. 674, 226 N. W. 653 (1929), with the attempt of a federal court to construe a lease within its four corners as though it were a simple exchange of promises, — in *Lester v. Mid-South Oil Co.*, 296 Fed. 661 (C. C. A. 6th, 1924).

³⁴ For example, *Wilson v. Reserve Gas Co.*, 78 W. Va. 329, 88 S. E. 1075 (1916), indicated disadvantages in a no-term lease. See *Simonton, The Nature of the Interest of the Grantee Under an Oil and Gas Lease* (1917) 25 W. VA. L. Q. 295, 312.

³⁵ The *Hutchinson* lease habendum contained an extension clause, “so long as production *and* rentals paid.” Originally, a few decades ago, this provision read, “production *or* rentals paid.” In *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271 (1896), the court held that “or” should be construed to mean “and”: thus it became impossible for a lessee to extend the fixed period merely by paying *delay* rentals indefinitely, in no-term lease fashion. Since that time, the extension clause here has usually contemplated a lease for the life of the field, assuming the lessee has diligently developed and fairly met his royalty obligations.

The essential rule involved here is that completion of a paying well in and of itself creates a vested estate.³⁶ Older West Virginia decisions even stressed mere discovery, (provided diligent development followed), in contrasting the lessee's right prior thereto as being something inchoate or executory.³⁷ No doubt these court utterances mean simply that the successful operator will be protected in equity against every hazard, excepting that of his own serious misconduct.³⁸ In any event, local law has founded the polity that the vested interest in a fully developed lease can be lost only through a course of action or inaction amounting to abandonment³⁹ or justifying a decree of forfeiture.⁴⁰ With the fixed term defining only the maximum exploratory period, its expiration becomes wholly immaterial in determining the extent of the vested estate created by the *so long as* clause.⁴¹

³⁶ *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836 (1909), syl. par. 4: "The discovery of oil or gas under a lease giving right of exploration and production, unless there is something in the lease manifesting a contrary intention, is sufficient to create a vested estate in the lessee in the exclusive right to produce oil or gas provided for therein — a right, however, which may be lost by abandonment, by failure to produce oil or gas, or pursue the work of production, or development of the property."

³⁷ The doctrine originated in a dictum of *Venture Oil Co. v. Fretts*, 152 Pa. 451, 460, 25 Atl. 732 (1893): "The title is inchoate, and for purposes of exploration, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned." In *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688 (1896), and *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128 (1903), it was held that discovery vested in the lessee the title to the oil and gas.

³⁸ The theory "does not signify much when the relation between the lessor and lessee is examined", — *per Poffenbarger, J.*, dissenting in *Musgrave v. Musgrave*, 86 W. Va. 119, 124, 139, 103 S. E. 302 (1920). Perhaps it amounts only to this, — that the courts will aid the lessee who is engaged in producing, to the extent of construing the "so long as" clause to denote merely a condition subsequent by which the operator's investment may be lost. And, for such a condition subsequent to come into play, the wrong committed must have been of a very grave nature.

³⁹ "As a matter of actual decision, the doctrine of implied covenants in mineral leases has thus far been limited to those cases in which it has been invoked to . . . make effective the principle of surrender by operation of law, when the premises have been abandoned after discovery of mineral and delay rentals have ceased. . . ." *per Poffenbarger, J.*, in *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 438, 89 S. E. 12 (1916).

⁴⁰ In order for the trial chancellor to decree forfeiture, an implied condition must be found for violation of which the lessee's vested interest will be cancelled, — a sort of equitable right of re-entry for condition broken invented by the court. The condition of adequate development so implied may in the particular litigation have to do with the omission to drill protection wells to prevent drainage of the minerals, — as in the *Carper* case, *ibid.*; or, with the neglect to offset additional wells against fraudulent drainage, — as in *Adkins v. Huntington Development & Gas Co.*, 113 W. Va. 490, 168 S. E. 366 (1933); or, "with a totally inexcusable failure to produce and sell the gas", [101 F. (2d) 111, 120], — as in the present instance.

⁴¹ "There is no holding anywhere, so far as I can find, that such rights are

As an original question, it may be conceded that the habendum is susceptible of an interpretation more favorable to lessors. Granted the lease should be construed against the lessee,⁴² its language would exclude implications promoting the industry. A keen, severe and even malevolent scrutiny could do away with the vested estate theory: surely, one might insist, a *proffit a prendre*⁴³ once conveyed is no more or no less executory whether or not the act of severance is incomplete. And, after all, the habendum limitations have to do with termination, not forfeiture. The ordinary tenant's term for years is not held to be forfeited, because that period has expired. Nor, analogously, does equity shrink from holding in a proper proceeding that a fee simple determinable has run out,—or that the life estate *durante viduitate* ended through remarriage. As a matter of fact, a very fair argument might be put up for enforcing literally the habendum: certainly, there is nothing against public policy in so construing it,—if one were only able to ignore innumerable authorities to the contrary. The trouble is that fertile judicial minds, with extraordinary talent for devising expedients in the early chaos of oil and gas law, have long ago settled an important doctrine,—that the habendum clause does not mean exactly what it says.

The circuit court of appeals held in the *Hutchinson* case that

terminated other than by abandonment or by forfeiture for breach of condition", *per* Parker, Circ. J., dissenting, 101 F. (2d) 111, 123, 127. "If oil or gas was produced within the five years given for exploration the full term thereof was as surely for as much longer as oil or gas should be produced, as it was for the term of five years in which to explore": *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 533, 541, 64 S. E. 836 (1909). "We can see very little strength in the claim that the lease has expired by its own terms at the end of the ten-year period. If there had been no development, and a vested interest had not accrued, then the payment of delayed land rental would not extend the right to drill after the ten years given for that purpose": *McCutcheon v. Enon Oil & Gas Co.*, 102 W. Va. 345, 353, 354, 135 S. E. 238 (1926).

⁴² *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271 (1896); *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978 (1898). The principle of construction does not hold, however, where the lease was prepared by the lessor: *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. 748 (1899).

⁴³ *Simonton*, *supra* n. 34. In other words, a profit to hunt and fish, — to cut timber, to mine coal or to exploit oil and gas, — is a completely vested incorporeal legal interest, right from the moment of delivery of the deed of grant. Whether it will ever be successfully exercised in the future, is wholly immaterial from the angle of real property law: possibly on some basis of essential error, or mutual mistake of fact, the conveyance might be set aside in equity if there never had been any game, — or timber, or coal or fugacious minerals, — on or under the grantor's land. Of course, there is no title to the personal property, where the profit is actually developed, until discovery and reduction of the substance to possession. The alleged "vested estate" of the West Virginia courts is somewhere midway in between the concepts of realty and personalty.

the fully developed lease, with its three producing wells, had "expired under the terms of the contract for failure" to pay rentals and to market "with due diligence".⁴⁴ So the fixed period of the habendum became a termination provision, when the ten years had finally elapsed: the extension clause never came into operation, since its condition precedent was not satisfied. For this drastic result, reliance was placed on the leading West Virginia abandonment case,⁴⁵ although the federal court refrained in mild fashion from definitely characterizing the lessee's conduct as "a technical abandonment." It would be difficult to find a decision more at variance with West Virginia practice, in advancing the theory that the fixed term controls the duration of a productive leasehold where the lessee has temporarily suspended marketing. No dexterity can uphold that interpretation as representing local law.

It may be suggested, nevertheless, that the present case is right in its result, but wrong only in its reasoning. Such an approach to the problem would have to assume the lessee enjoyed a vested estate by reason of his developed leasehold, as already discussed, and that his estate could be lost in this jurisdiction only through cancellation based on abandonment or forfeiture. The first of these two grounds would have to be discarded at once: the lessee's care of the wells, along with the compromise settlement of January, 1934, conclusively negatives any argument for abandonment. The only conceivable theory in support of the decision would then have to be forfeiture for violation of an implied condition, — if the rule of *Carper v. United Fuel Gas Co.*⁴⁶ can be borrowed over

⁴⁴ 101 F. (2d) 111, 121.

⁴⁵ *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655 (1902), — where a cessation of operations for eighteen months after the drilling of a dry hole, together with other conduct by the lessee evincing an intention to relinquish the leasehold, was held to constitute an "abandonment". Obviously, abandonment is used by the courts in the layman's use of the word, — just as a tenant is said popularly to "abandon" the house he has rented from the landlord; it is not the technical abandonment of a chattel personal, where the owner deliberately casts it away and thereby divests himself of title. One cannot in theory abandon realty, except possibly in Spanish-settled states of the South West. What these cases really mean, (as was observed in the *Carper* opinion), is that a type of *surrender by operation of law* may result from a course of conduct on the part of the oil and gas lessee, provided there has later been action taken by the lessor in reliance thereon.

⁴⁶ 78 W. Va. 433, 442, 89 S. E. 12 (1916), — holding "an implied obligation on the part of the lessee to drill a well for protection against drainage, upon necessity therefor and the lessor's demand for such action, within any rental period for which rent has been paid, with notice of intention to refuse to accept further rentals, and right in the lessor to declare a forfeiture of the lease for non-compliance with such demand," would afford full and ample protection to the lessee under a fixed term lease, (who complained against non-development where there was drainage).

into this type of litigation. The implied condition here would have to be invented for the occasion, yet obviously a court of equity need not hesitate on that account. Presumably it would infer the necessity of due diligence in marketing from producing wells, with forfeiture of the lease as the sanction for failure to meet the requisite standard. In view of *McGraw Oil Co. v. Kennedy*,⁴⁷ the implied condition would also take into consideration the omission to tender full gas well rental over a seriously-long four year period.

If the *Hutchinson* decision is to be classed as forfeiture, many obstacles must be surmounted. Foremost among these is an equity principle denying forfeiture for mere failure to pay money:⁴⁸ the remedy at law is ordinarily so adequate as even to preclude jurisdiction over such an equity bill.⁴⁹ Here, too, the omission to pay gas rentals was backed up by a ruling from the circuit court of appeals, for the sixth circuit, denying money judgment against this very operator on a similar set of facts.⁵⁰ It was not unreasonable to infer that the course of conduct was legitimate, which had been pronounced legitimate by the sages of the law elsewhere. Equity could not presume any wanton disregard of the lessee's financial obligation: the forfeiture would have to be on some theory that it was gravely improper under existing conditions to shut in the wells and thereby to cut off the flow of rentals.⁵¹ The next obstacle in

⁴⁷ 65 W. Va. 595, 64 S. E. 1027 (1909). In that case, under a "so long as production" habendum, a profitable gas well had been drilled but capped, so that there was no marketing of the gas. On the other hand, the lessor used the free gas covenant and for seven years accepted payment of the annual \$200. gas well rental. Suit was then brought to cancel the lease for a forfeiture based on failure to market the gas. The court held squarely the lease was not forfeited because of non-marketing, provided the lessee paid or tendered gas well rental. In effect, such payment extended the lease beyond its fixed term.

⁴⁸ *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744 (1906); *Castle Brook Carbon Black Co. v. Ferrell*, 76 W. Va. 300, 85 S. E. 544 (1915); *Engel v. Eastern Oil Co.*, 100 W. Va. 301, 303-4, 130 S. E. 491 (1925).

⁴⁹ There would, of course, be equity jurisdiction in the event an accounting were sought. Moreover, on a possible theory that royalty represented purchase price for the sale of the profit, it might be argued that specific performance should be available against the lessee to compel such payment. Without some such basis for equity jurisdiction, ordinarily the lessor's bill could not be retained and other relief given.

⁵⁰ *Leslie v. Chase National Bank*, 83 F. (2d) 1013 (C. C. A. 6th, 1936), *supra* n. 13.

⁵¹ The present *Editorial Note* expresses no opinion whatsoever on the specific issue as to whether, in a proper proceeding with all other legal and equitable requirements fully satisfied, there should be cancellation of a gas lease for forfeiture based on failure diligently to market or to pay well rentals over a four-year period. So far as is known, the present litigation offers the first instance of involuntary termination for such a reason of a lessee's vested estate in a producing gas leasehold, by a West Virginia state or federal court, — where the question of "abandonment" is not fairly raised on the facts.

Naturally, the factual controversy between lower court judge and the major-

the way of the petitioners would then be a probable requirement that, prior to cancellation for violation of such an implied condition, notice be served on the lessee to use proper diligence in marketing,⁵² — with a reasonable time allowed within which to comply.⁵³ West Virginia doctrine, as declared in the *Carper* case, would hardly dispense with this substantive condition precedent, unless possibly the four-year default were deemed serious enough to render formal demand unnecessary.⁵⁴ Suppose these difficulties are averted; there is still the problem of the operator's insolvency. Keeping in mind the notion of forfeiture, — of course if it were termination, there would be no issue,⁵⁵ — applicable local law insists on protection of other creditors.⁵⁶ The lessor cannot re-enter

ity opinion, as to the lessee's conduct in 1930, is wholly beyond the scope of this *Note*.

⁵² *Howerton v. Kansas Nat. Gas Co.*, 82 Kan. 367, 108 Pac. 813 (1910); *American Wholesale Corp. v. F. & S. Oil & Gas Co.*, 242 Ky. 356, 46 S. W. (2d) 498 (1932); *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 P. (2d) 187 (1934).

⁵³ The *locus poenitentiae* is always available in such an equitable proceeding: there is a true analogy here to the flexible discretion of early English chancery. As a matter of fact, the present case offers an interesting side light on such a requirement. The order of events runs as follows:

1. In the latter part of 1933, the Hutchinson heirs made demand on the lessee for payment of rentals, (Appellants' Brief, p. 16). Relying on *Leslie v. Chase National Bank*, liability for such payment was denied.

2. Prior to 1934, the lessee's receivers were engaging in securing reductions in the delay rental rate for the various leaseholds throughout the region. On January 29, 1934, the compromise arrangement was effected with four of the seven Hutchinson interests.

3. On April 9, 1934, the "ten year period" expired. Three weeks later, counsel for petitioners notified lessee that "abandonment" of the lease was claimed by his clients.

4. In October, 1934, the original 1932 agreement with United Fuel Gas was modified; and, during the following December, the gas was once more marketed. Counsel again notified the lessee that its lease had been "forfeited". In January, 1935, gas rental payments were tendered for the period of the marketing.

5. Suit was begun November, 1935. When trial opened in May, 1937, tender was made to petitioners of the maximum amounts which could possibly have been claimed.

It will be observed that formal notice to market diligently was never actually served on lessee.

⁵⁴ *Gadbury v. Ohio etc. Gas Co.*, 162 Ind. 9, 67 N. E. 259 (1903); *Soaper v. King*, 167 Ky. 121, 180 S. W. 46 (1915); *Hitt v. Henderson*, 112 Okla. 194, 240 Pac. 745 (1925).

⁵⁵ *Soper*, Circ. J., carefully notes this distinction, [101 F. (2d) 111, 121]: "Forfeiture for such a reason is not favored in West Virginia, as we have shown above. But we know of no decision in which the courts have assumed to extend the period of a lease which has expired under the terms of the contract for failure to prosecute the work with due diligence."

⁵⁶ *Pelzel v. Pen-Mar Coal Co.*, 101 W. Va. 247, 250-1, 132 S. E. 310 (1926): "We see no equity in turning over to the lessors property worth many times

and, by so doing, secure an inequitable preference.⁵⁷ Unquestionably, the very considerable investment in the wells would merit comparison with maximum rental shares of the three claimants, particularly having regard to the tender made. In short, equitable relief through cancellation will seldom meet with approval in the supreme court of appeals, when so many hazards confront the litigation.

The foregoing discussion has viewed the proceeding as though it were the original lessor of the entire leasehold who procured cancellation. In the *Hutchinson* case, however, only three out of seven partial assignees were complaining. Divisibility of express covenants,⁵⁸ and probably of implied ones as well,⁵⁹ occurs by operation of law once the appurtenant tract has been subdivided. But in order to forfeit in this jurisdiction, it is a condition and not a covenant that is implied. The common law has for centuries adhered to a policy of refusing to divide conditions, violation of which would enable legal forfeiture.⁶⁰ Implied equitable conditions are usually treated similarly in mineral development suits,—though not without criticism.⁶¹ Beyond doubt, divisibility should never be permitted in equity, where a thoroughly unfair result would follow:⁶² irrespective of the petitioners' motives, the wells on their lands must inevitably drain the gas from the other four lots. Partial forfeiture ought always to be denied, in the absence of complete protection for others. Be this as it may, the appellate court escaped the dilemma by its holding that the lease expired. The relief granted was partial termination,—which would seem

their claim, when, by so doing, other creditors may be prevented from or hindered and delayed in the collection of their demands."

⁵⁷ "Equity will not permit the enforcement of a forfeiture in an inequitable . . . manner," *Wheeling etc. Ry. v. Triadelphia*, 58 W. Va. 487 (syl. par. 5), 52 S. E. 499 (1905).

⁵⁸ *Dickinson v. Hoomes' Adm'r*, 8 Gratt. 353 (Va. 1852).

⁵⁹ There should be no problem as to division of the lessor's benefits. But as to division of the lessee's burdens, see *Standard Oil Co. of La. v. Giller*, 183 Ark. 776, 779, 38 S. W. (2d) 766 (1931); *Cosden Oil Co. v. Scarborough*, 55 F. (2d) 634, 638 (C. C. A. 5th, 1932). The law on this point is unsettled, and there is ample authority to the contrary, as to divisibility of implied covenants of the lessee.

⁶⁰ *Twynam v. Pickard*, 2 Barn. & Ald. 105, 106 Eng. Rep. R. 305 (1818); *Leiter v. Pike*, 127 Ill. 287, 326, 20 N. E. 23 (1889).

⁶¹ *North Central Texas Oil Co. v. Gulf Refining Co.*, 159 La. 403, 105 So. 411 (1925); *Howard v. Manning*, 79 Okla. 165, 192 Pac. 358 (1920); *Vaughn v. Littlefield*, 4 S. W. (2d) 153 (Tex. Civ. App. 1928). *Contra*: concurring opinion of Busby, J., in *Gypsy Oil Co. v. Champlin*, 163 Okla. 226, 22 P. (2d) 102 (1933).

⁶² *Jones v. Pier*, 124 Cal. App. 444, 12 P. (2d) 646 (1932), is an excellent example of this.

somewhat anomalous. If expiration of the fixed term ended the servitude, all interests appear to be affected alike. Certainly, on principle, the assenting heirs cannot by any receipt of money waive termination; a new lease might be necessary, satisfying the deed requirement of the 1931 Code,⁶³ though conserving rental shares recognized by the present decision.

Having thus terminated the lease as to the three petitioners, the circuit court of appeals decided that their interest "would best be served by the continued operation of the property by the lessee", (— reserving to them the right to show future hardship in such an arrangement). In construction of the partition deeds, it was held that the reservation of income from the 1924 lease included the privilege of extending its term and waiving requirements of production and rentals;⁶⁴ thus the four others became entitled to one-seventh shares in the agreed rentals during the life of the lease. While the result of equitable apportionment by judicial fiat seems thoroughly fair in this unusual situation, one wonders how to reconcile it with existing case-law. The petitioners recovered title to their minerals, yet they have no present control over the marketing. Whether or not to continue production, or which purchaser will offer the most desirable contract: these are questions that cannot concern the owners of the gas. The producing leasehold that expired through lapse of time as to the three continues on, by curious logic,⁶⁵ in full force and effect as to the rest. With a finding here in favor of partial cancellation, a resort to methods of seventeenth-century chancellors has much to be said for it.

Hutchinson v. McCue can scarcely be described as conforming to West Virginia law, either in reasoning or in result. In its important aspects, there is striking resemblance to the former habit of a separate federal jurisprudence.⁶⁶ As a precedent, the decision

⁶³ W. VA. REV. CODE (1931) c. 36, art. 1, § 1. — Otherwise, it might be argued that a tenancy from year to year is created. Cf. *Drake v. O'Brien*, 83 W. Va. 678, 99 S. E. 230 (1919).

⁶⁴ Judge Parker's observation [101 F. (2d) 111, 131], that neither *Gay Coal & Coke Co. v. Chafin*, 116 W. Va. 262, 180 S. E. 95 (1935), nor *Updegraff v. Blue Creek Coal & Land Co.*, 74 W. Va. 316, 81 S. E. 1050 (1914), is in point for construction of the reservation in the partition deeds seems thoroughly sound. As to the former case, see Comment (1935) 42 W. VA. L. Q. 73. In any event, the decision here seems doubtful.

⁶⁵ Professor Simonton's comment, elsewhere, seems pertinent at this point: "One cannot help feeling that the case was decided more on what has sometimes been termed 'fireside equities' than on sound principles." Simonton, *Extension of Term of Oil Lease Through Discovery of Oil in Less than Paying Quantities* (1918) 26 W. VA. L. Q. 79, 82.

⁶⁶ Cf. *Hoffer Oil Corp. v. Carpenter*, 34 F. (2d) 589 (C. C. A. 10th, 1929).

may invite unhappy lessors to seek federal court relief, if bankruptcy or diversity jurisdiction afford opportunity. According to Francis Bacon, "things are to be determined not by arguing, but by trying." The present experiment has not served to discredit *Swift v. Tyson*⁶⁷ practice.

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⁶⁷ It is curious that Judge Parker should in this case have filed the dissent, urging closer adherence to West Virginia case-law. Perhaps the best recent justification of the principle of *Swift v. Tyson* was written by him in *Hewlett v. Schadel*, 68 F. (2d) 502, 504 (C. C. A. 4th, 1934). His view then was that the federal rule would "preserve a uniform body of law upon which those who do business in other states" could depend, and which would "inevitably have a unifying influence on the decisions of the state courts themselves."