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OIL AND GAS LEASES AND THE RULE AGAINST PERPETUITIES

By JAMES W. SIMONTON¹

THE validity of a certain type of oil and gas lease has recently been questioned on the ground that it violates the rule against perpetuities.² Under the existing law in many of the states which are large producers of these minerals, it seems that there is merit in such an objection. The point raised is sufficiently interesting and important to justify a brief discussion of the application of the rule against perpetuities to oil and gas leases, in view of the fact that there are a large number of leases in force to which the objection, stated above, may be made, and that such forms are still being used by many oil and gas companies.

The rule against perpetuities is stated by Professor Gray as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."³ If by any possibility an interest might vest beyond the prescribed limit of time, such interest is void. The rule against perpetuities has to do with property interests only, and does not apply to mere contract rights.⁴ A future interest which is not limited on a life or lives in being at its creation, must vest, if at all, within a gross term of twenty-one years.⁵ Within the latter limit of time future interests, arising under oil and gas leases, must vest, since such leases are seldom, if ever, made for the term of any life or lives in being.⁶

The forms of oil and gas leases to which the objection can be reasonably made that they may possibly give rise to future interests which may vest more than twenty-one years after the execution of said leases, are: (1) leases for no definite term, which, by their provisions, give the lessee the option to drill a well or pay a certain sum periodically as delay rental in lieu of drilling, until a

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² *Wilson v. Reserve Gas Co.*, 88 N. E. 1075 (W. Va. 1916).

³ GRAY, *RULE AGAINST PERPETUITIES*, 3 ed., § 201.

⁴ GRAY, *RULE AGAINST PERPETUITIES*, 3 ed., § 329.

⁵ GRAY, *RULE AGAINST PERPETUITIES*, 3 ed., §§ 223, 224.

⁶ See *Wagner v. Mallory*, 169 N. Y. 501, 62 N. E. 584 (lease for 40 years).

well is completed; (2) leases for a fixed term of more than twenty-one years with no power in the lessor to terminate during such fixed period. Either form, of course, may have the usual provision that upon discovery of oil or gas the lease is to continue as long thereafter as oil or gas is produced, a clause of such character being immaterial so far as the rule against perpetuities is concerned.

Leases of the first type, which apparently may be continued indefinitely at the option of the lessee, are frequently called "no-term" leases. They are well known in the oil and gas producing sections of the country. There are few, if any, oil and gas leases of the second type but if any such be found they will be just as objectionable to the rule against perpetuities as leases for an indefinite term.

It is now settled by the great weight of authority that the owner of land does not have title to the oil or gas that may be beneath the surface of his land, and that he can acquire title to such oil and gas only by severing them from the land or reducing them to his possession.⁷ It has been decided that the property in the oil and gas in the pools beneath the land is not in any individual owner of the overlying soil, but is in all the owners of the soil above said pools in common.⁸ While the individual landowner has no title to the oil and gas in place, he does have the exclusive right to sink wells on his land, tap the pool beneath and take as much of the oil and gas therefrom as he can secure, even though he exhausts the supply so that the surrounding land is completely drained of the minerals;⁹ though probably a deliberate waste of the minerals may be enjoined.¹⁰ This right to take oil and gas

⁷ *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Osborn v. Arkansas Oil Co.*, 103 Ark. 175, 146 S. W. 122; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53; *Richmond Natural Gas Co. v. Davenport*, 37 Ind. App. 25, 76 N. E. 525; *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71, 77 S. W. 368; *Wagner v. Mallory*, 169 N. Y. 501, 62 N. E. 584; *Kolachny v. Galbreath*, 26 Okla. 772, 110 Pac. 902; *Kelly v. Keys*, 213 Pa. St. 295, 62 Atl. 911; *Westmoreland, etc., Natural Gas Co. v. DeWitt*, 130 Pa. St. 233, 18 Atl. 724. See also an excellent article by Mr. John Stokes Adams on *The Right of a Landowner to Oil and Gas in his Land*, in 63 U. Pa. L. Rev. 471.

⁸ *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 545 (C. C. Okla.); *Lindsay v. Raydure*, 239 Fed. 928 (D. C. Ky.); *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490.

⁹ *Kelly v. Ohio Oil Co.*, 57 O. St. 317, 49 N. E. 399; *Hague v. Wheeler*, 157 Pa. St. 324, 27 Atl. 714; *Jones v. Forest City Oil Co.*, 194 Pa. St. 379, 44 Atl. 1074; *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. St. 362, 65 Atl. 801.

¹⁰ *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71, 77 S. W. 368; *Hague v. Wheeler*, 157 Pa. St. 324, 27 Atl. 714.

found beneath the surface of the land is therefore an incorporeal property right. As was recently said:

“This right [of the landowner to the oil and gas in place] may be resolved into two successive rights: i. e., to explore therefor by drilling wells, and then, if discovered, to produce them [oil and gas]. Having such right, he can transfer it, and immediately upon the execution of the transfer an estate in the land vests in the person to whom it is made, at least so far as the right to explore is concerned.”¹¹

Certainly the landowner may convey to a third party either the whole of his right or a limited interest therein, though he cannot transfer any title to the oil and gas in place, because he can transfer no more than he has. A transferee of such an interest acquires a right to enter on the land and search for oil and gas and take the minerals if he finds them. Such briefly is the nature of the landowner's property interest in oil and gas beneath his land in most of the states where the question has been decided.¹² In West Virginia and Kansas oil and gas in place is held to belong to the landowner just as a vein of coal belongs to him, and he may sever by conveyance the ownership of the oil and gas from that of the surface, just as he can sever the ownership of a vein of coal from that of the rest of the land.¹³

Oil and gas are usually mined under leases by which the landowner grants for a limited time the privilege of exercising his right to take oil and gas which may be found beneath the surface. The lessor usually secures a share in the profits, if oil or gas is discovered, by reserving a royalty on the mineral produced. The development of the land for oil and gas so that the lessor can secure royalties is quite generally regarded as the chief consid-

¹¹ *Lindlay v. Raydure*, 239 Fed. 928, 933 (D. C., Ky.).

¹² It is believed that statements sometimes found to the effect that a landowner has title to the oil and gas beneath his land but loses such title when said minerals escape across his boundary do not represent the law in any state. The idea comes from the analogy to animals *ferae naturae* drawn by Justice Mitchell in *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. St. 235, 18 Atl. 724. As pointed out by the Supreme Court of Indiana in *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, the public has a paramount right in animals *ferae naturae*, but the public has no such right in oil and gas in place. Hence the analogy to wild animals tends to confusion.

¹³ *Moore v. Griffin*, 72 Kan. 164, 83 Pac. 395; *Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co.*, 83 Kan. 136, 109 Pac. 1002; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781; *Preston v. White*, 57 W. Va. 278, 50 S. E. 236. See also *Texas Co. v. Daugherty*, 176 S. W. 717 (Tex.); *Pierce Fordyce Oil Ass'n. v. Woodrum*, 188 S. W. 245 (Tex. Civ. App.).

eration for the lease.¹⁴ There is much confusion among the authorities dealing with the rights of a lessee under an oil and gas lease. This is to be expected when we remember that the courts are here dealing with peculiar minerals which are vagrant in character, like percolating waters, yet do not underlie the whole surface of the earth, but are confined in comparatively localized pools or reservoirs. The courts of some states have construed oil and gas leases, where the sole purpose of the demise is the exploration for, and production of, oil and gas, as giving the lessee no immediate vested interest in the land, but only a right or license to enter on the land and search for oil and gas until he makes an actual discovery.¹⁵ The courts of other states hold that the lessee under a similar lease gets an immediate vested right in the lands, but that a new and different estate vests in him upon the discovery of oil or gas.¹⁶ At all events the lessee gets at least an exclusive right¹⁷ to explore for oil and gas, together with a right to take oil and gas from the land, contingent upon discovery of the same. It might be suggested that if the right of the lessor consists of a right to explore and a right to take, then the right to explore passes at once to the lessee, but the right to take is contingent upon actual discovery of oil or gas.

Some courts treat many oil and gas leases as vesting an im-

¹⁴ *Higgins v. Daley*, 99 Fed. 606 (C. C. A., 4th Cir.); *Brown v. Wilson*, 160 Pac. 94 (Okla.); *Steelsmith v. Gartlin*, 45 W. Va. 27, 33, 29 S. E. 978.

¹⁵ "The title is inchoate, and for the purpose of exploration only, 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." *Venture Oil Co. v. Fretts*, 152 Pa. St. 451, 460, 25 Atl. 732, 735. See also *Higgins v. Daley*, 99 Fed. 606 (C. C. A., 4th Cir.), 48 L. R. A. 320; *Brookshire Oil Co. v. Casmalia Ranch Oil & Development Co.*, 156 Cal. 211, 103 Pac. 927; *Rawlings v. Armel*, 70 Kan. 778, 79 Pac. 683; *Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971; *Wagner v. Mallory*, 169 N. Y. 501, 62 N. E. 584; *Kelley v. Keys*, 213 Pa. St. 295, 62 Atl. 911; *Richlands Oil Co. v. Morriss*, 108 Va. 288, 61 S. E. 762; *Steelsmith v. Gartlin*, *supra*; *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688; *Kilcoyne v. Southern Oil Co.*, 61 W. Va. 538, 56 S. E. 888; *The Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836. Though the courts of West Virginia and Kansas hold that oil and gas in place is capable of separate ownership apart from the land just like coal (see note 13) yet these states hold an oil and gas lessee gets no vested interest in the oil and gas until discovery. In West Virginia if the purpose of a grant of oil and gas is to explore for and mine them, the instrument seems to be treated as a lease regardless of the language of the granting clause. See *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915.

¹⁶ *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801 (C. C. A. 8th Cir.); *Watford Oil Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Heal v. Niagara Oil Co.*, 150 Ind. 483, 50 N. E. 482.

¹⁷ *Westmoreland, etc., Gas Co. v. DeWitt*, 130 Pa. St. 235, 18 Atl. 724; *Lynch v. Burford*, 201 Pa. St. 52, 50 Atl. 228; THORNTON, *THE LAW RELATING TO OIL AND GAS*, 2 ed., § 90.

mediate estate in the land in the lessees, especially if such leases purport to demise the land for the purpose of searching for and mining oil and gas.¹⁸ But in some of these jurisdictions, if the lease does not purport to grant the land to the lessee, but merely grants the oil and gas with the right to enter and explore for and produce them, it is construed, like the leases mentioned in the preceding paragraph, as giving merely a right to explore for the mineral until oil or gas is actually found, so that in such case an estate vests when oil or gas is actually discovered.¹⁹

There may be other views differing somewhat from any of the above, but the idea that some sort of a new and greater estate in the land vests in the lessee when he actually discovers oil or gas is becoming rather well established in most of the oil and gas producing states. The doctrine is particularly well established in West Virginia and Pennsylvania, though in the latter state it does not apply to all leases.²⁰ It is this new estate which may possibly vest too remotely under some oil and gas leases.

As a practical illustration, it may be well to note in two forms of oil and gas leases the express provisions which are construed as vesting in the lessee an estate in the land when he actually discovers oil or gas. The first excerpt is taken from the lease involved in the case of *Lowther Oil Co. v. Guffey*.²¹

"In consideration of the sum of one dollar the receipt of which is hereby acknowledged, Ella Yoak and Agnew Yoak, . . . hereby grant unto James M. Guffey, . . . second party, their heirs and assigns, all the oil and gas in and under the following described premises, together with the right of ingress and egress at all times, for the purpose of drilling and operating for oil, gas and water,

"To have and to hold the above premises unto the parties of the second part, their heirs and assigns, on the following conditions: in case no well is completed within two years from this date then this grant shall immediately become null and void as to both parties, provided that the

¹⁸ *Coalinga Pacific Oil & Gas Co. v. Associated Oil Co.*, 16 Cal. App. 361, 116 Pac. 1107; *Brown v. Fowler*, 65 O. St. 507, 63 N. E. 76; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 80 O. St. 127, 71 N. E. 281; *Barnsdall v. Bradford Gas Co.*, 225 Pa. St. 338, 74 Atl. 207; *Williams v. Fowler*, 201 Pa. St. 336, 50 Atl. 969.

¹⁹ *Brookshire Oil Co. v. Casmalla Ranch Oil & Development Co.*, 156 Cal. 211, 103 Pac. 927; *Ramage v. Wilson*, 45 Ind. App. 599, 88 N. E. 862; *Venture Oil Co. v. Fretts*, 152 Pa. St. 451, 25 Atl. 732; *Kelly v. Keys*, 213 Pa. St. 295, 62 Atl. 911; *Burgan v. South Penn Oil Co.*, 243 Pa. St. 128, 89 Atl. 823.

²⁰ See cases cited in notes 15 and 19, *supra*.

²¹ 52 W. Va. 88, 43 S. E. 101.

second party may prevent such forfeiture from year to year by paying to the first party annually in advance eighteen & 75/100 dollars at her residence until such well is completed”

This lease was held valid. The court said it gave to the lessee an option to continue the lease from year to year by payment annually of the non-forfeiture sum. There are a considerable number of decisions in accord.²²

Sometimes provisions similar to the following are found:

“Agreement, made and entered into the.....
by and between.....party of the first part, and
.....party of the second part.

“Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar and of the covenants and agreements hereinafter contained on the part of the party of the second part, has granted, demised, leased and let and by these presents does grant, demise, lease and let unto the said party of the second part, his heirs and assigns, for the sole and only purpose of mining and operating for oil and gas,

“It is agreed that this lease shall remain in force for the term of ten years from this date and so long thereafter as the said land is operated by the lessee in the search for or production of oil or gas, with the extension of term by payment of rentals as hereinafter set forth.

“The said lessee covenants and agrees to pay a rental at the rate of.....dollars quarterly in advance, beginning in.....months from this date, until a well yielding royalty to the lessor is drilled on the leased premises; upon the drilling of a dry well yielding no royalty to the lessor, the lessee may continue to hold the leased premises for such further term as the lessee may desire upon the payment of said rental, not exceeding the term of five

²² Venedocia Oil & Gas Co. v. Robinson, 71 O. St. 392, 73 N. E. 222; Woodland Oil Co. v. Crawford, 55 O. St. 161, 44 N. E. 1093; Central Ohio Natural Gas & Fuel Co. v. Eckert, 70 O. St. 127, 71 N. E. 281; Smith v. South Penn Oil Co., 59 W. Va. 204, 53 S. E. 152; Weaver v. Akin, 48 W. Va. 456, 37 S. E. 600; Snodgrass v. South Penn Oil Co., 47 W. Va. 509, 35 S. E. 820. Such leases were apparently assumed to be valid in the following cases: Ohio Oil Co. v. Detamore, 165 Ind. 243, 73 N. E. 606; Union Petroleum Co. v. Bilven Petroleum Co., 72 Pa. St. 173; Richards Oil Co. v. Morriss, 108 Va. 288, 61 S. E. 762. Where the option of the lessee was limited to a term of years the lease has been held valid in many cases. If valid where the term is ten or fifteen years such option lease should be valid where the term is over twenty-one years or where there is no time limit. See Guffey v. Smith, 237 U. S. 101; Brewster v. Lanyon Zinc Co., 140 Fed. 801 (C. C. A., 8th Cir.); Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53; Pittsburg, etc., Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803; Brown v. Fowler, 65 O. St. 507, 63 N. E. 76; Leatherman v. Oliver, 151 Pa. St. 646, 25 Atl. 309.

years after the expiration of the term above mentioned and as long thereafter as oil and gas are produced. . . .”

The above is also a “no-term” lease, the essential element of such a lease being that the lessee is given the option to extend his rights indefinitely by payment of the delay rentals from time to time.

Why is an oil and gas lease, under which an estate vests in the lessee when he discovers oil or gas, or under which a new estate vests upon such discovery, objectionable to the rule against perpetuities where the term is for more than twenty-one years, or where the term is indefinite but the lease may be kept alive by the lessee for more than twenty-one years without the discovery of oil or gas? There are now a number of cases which have followed the decision of *London & South-Western Railway Co. v. Gomm*,²³ to the effect that an option to purchase land, or an interest therein, which may be exercised after the expiration of a life or lives in being and twenty-one years, is void, because it violates the rule against perpetuities.²⁴ This may perhaps, be taken as the prevailing law as to options. On the other hand, it is settled that a covenant for the perpetual renewal of a lease is valid and not within the rule against perpetuities. This has been said to constitute an exception to the rule against perpetuities.²⁵ The “no-term” oil and gas lease has provisions analogous to a covenant for the perpetual renewal of a lease, and also to an option to purchase which may continue unexercised for more than twenty-one years.

The lessee has a right to renew from period to period by merely paying the delay rental in accordance with the terms of the lease. The lessee thus has the power to keep said lease alive from term to term, and the situation is analogous to a case where there is a covenant for the perpetual renewal of a lease. No plausible argument can be made that these leases are objectionable because the lessee may renew from year to year for more than twenty-one years, except in California where a covenant for the perpetual renewal of a lease has been held invalid.²⁶

²³ 20 Ch. D. 562.

²⁴ *Woodall v. Clifton*, (1905) 2 Ch. 257; *Worthing Corporation v. Heather*, (1906) 2 Ch. 532; *Windsor v. Mills*, 157 Mass. 362, 32 N. E. 352; *Barton v. Thaw*, 246 Pa. St. 348, 92 Atl. 312; *Starcher Bros. v. Duty*, 61 W. Va. 371, 56 S. E. 527; *Woodall v. Buren*, 76 W. Va. 193, 85 S. E. 170; *contra*, *Hollander v. Central Metal, etc., Co.*, 109 Md. 131, 71 Atl. 442.

²⁵ GRAY, *RULE AGAINST PERPETUITIES*, 3 ed., §§ 230, 230a, 230aa.

²⁶ See *Morrison v. Rossignol*, 5 Cal. 64.

If a different estate in the land vests in the lessee under an oil and gas lease when he discovers oil or gas, or if an estate in the land for the first time vests in him when oil or gas is discovered, then, under a "no-term" lease, or under a lease for a fixed term exceeding twenty-one years, he may not succeed in finding the mineral until twenty-one years have elapsed. If he should then discover oil or gas, there vests in him a new or a different estate in the land.²⁷ Here we have a situation very similar to the option cases previously cited.²⁸ The new estate in the land vests in the lessee because of his act in discovering oil or gas, just as in the case of the option, the optionee vests the new estate in himself by exercising the option; hence if an option which the optionee can exercise after twenty-one years is void, then an oil and gas lease under which oil or gas might be discovered by the lessee after twenty-one years, should also be void. This situation is somewhat analogous also to a collateral power of appointment which is exercisable beyond the limits of the rule against perpetuities.

The rule against perpetuities does not apply to mere contract rights, but in the case of the oil and gas lease the lessee has more than a mere contract right. He has a right which may be specifically enforced in equity.²⁹ It is at least an exclusive right to enter on the land and search for oil and gas, irrevocable during the continuance of the lease, and, therefore, more than a mere contract right. It is certainly as substantial a property right as that of the optionee or of the donee of a power of appointment.

The validity of a "no-term" oil and gas lease has apparently been attacked but once, on the ground that it violates the rule against perpetuities. This was in the case of *Wilson v. Reserve Gas Company*.³⁰

The court held that the lease in that case did not violate the rule against perpetuities, but the reasons for this conclusion are not clearly given, nor, with due deference to the learned court, can they be said to be satisfactory. Whether the objection to the validity of this lease was urged on the ground of the analogy to an option for more than twenty-one years, or whether it was on

²⁷ See cases cited in note 15 *supra*.

²⁸ See cases in note 24, *supra*. This analogy is suggested in *THE BAR*, Vol. 23, 431 (November, 1916).

²⁹ *Logan Natural Gas Co. v. Great Southern Gas & Oil Co.*, 126 Fed. 623; *Duffield v. Hue*, 136 Pa. St. 502, 20 Atl. 526; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S. E. 961; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762.

³⁰ 88 S. E. 1075.

the ground that the lessee could by paying the delay rental, renew the lease perpetually, does not appear from the opinion of the court, but it is quite probable that only the latter ground was urged, and that the other ground of objection was not suggested. In fact, the court expressly compared the case to *Thaw v. Gaffney*,³¹ which is a case holding that an option for the perpetual renewal of a lease of a building, by the payment of fifty dollars annually in advance, is valid. The court in its opinion said:

“To similar contracts the same objections have been urged, [that they violate the rule against perpetuities] and, upon careful examination, held unfounded. *Oil Company v. Snodgrass*, 71 W. Va. 438, 43 L. R. A. (N. S.) 848, and cases cited. The lessee cannot hold the leased land indefinitely without exploring the land and producing oil and gas. There is nothing in the contract to deny the lessors the right to terminate the lease upon reasonable notice. They have not shorn themselves of that power. Equity will grant them relief upon equitable principles. It will cancel for failure or refusal to develop, upon timely application after due and reasonable notice.”

Oil Company v. Snodgrass and the cases therein cited do not show that the application of the rule against perpetuities to the leases involved was considered. Furthermore, as the lease under consideration in *Oil Company v. Snodgrass* was for ten years and as long thereafter as oil or gas should be produced, it could not be objectionable to the rule against perpetuities because the new estate must vest, if at all, within ten years. After discovery of oil or gas the lease would continue as long as either oil or gas was produced, but this would be only a vested estate for an indefinite period and, of course, no more objectionable than the ordinary life estate. Since the lease under consideration in *Wilson v. Reserve Gas Company* expressly provided that said lease should be null and void unless the gas company should elect to pay a quarterly sum in advance or should elect to drill a well on said land, it would seem the lessee had the option to continue the lease indefinitely. If the lessor, under such a lease, has a right to terminate the lease “for failure to develop upon timely application after due and reasonable notice,” as was stated by the court, it must be because the court implies a condition that the lessee must explore for oil and gas within a reasonable time after execution of the

³¹ 75 W. Va. 229, 83 S. E. 983.

lease, and that on breach of such condition the lessor may forfeit the lease after due notice. Where a lessee expressly covenants to drill a well within three months or to pay a quarterly sum in advance for each three months' delay in drilling a well until a well is completed, it would seem that an implied condition that the lessee must drill a well within a reasonable time, would be inconsistent with the express covenants of the lease. So the West Virginia Supreme Court of Appeals has recently held in *Carper v. United Fuel Co.*³² Is there a distinction where the lease, as in *Wilson v. Reserve Gas Co.*, provides that it shall be null and void unless the lessee drills a well within three months or pays a quarterly sum in advance for each three months' delay in drilling a well? It is difficult to see why there should be any distinction because of this difference in the stating of the lessee's option, for if the option is supported by a good consideration it should be valid only *if exercisable* within the limit allowed by the rule against perpetuities. According to the doctrine in the *Carper case*, there would be no right in the lessor to terminate the lease as long as delay rental was paid and no drainage was occurring, and if this were applied to the lease in *Wilson v. Reserve Gas Co.*, the lease should be held void as violating the rule against perpetuities.

It is clear, that if the lessor does have a right to terminate an oil and gas lease within twenty-one years, then the lease does not violate the rule against perpetuities. But is it not possible that, admitting there is an implied condition that the lessee explore for oil and gas, the lessor might not under all circumstances have the right to forfeit the lease within twenty-one years even though the lessee does not find oil or gas within that period? Will the court say as a matter of law that a failure by the lessee to find oil or gas within twenty-one years is in every case a breach of the implied condition? Is it not possible for the lessee to put down dry holes in his effort to find oil or gas and ultimately succeed in finding the mineral after twenty-one years have elapsed? If so, there would still be a possibility that the estate might vest in the lessee beyond the period allowed by the rule against perpetuities. Hence, if there should be a condition implied, it would be necessary to hold such condition must be performed within twenty-one years or the lease would still be invalid.

³² 89 S. E. 12 (W. Va. 1916).

The courts of one or two jurisdictions now imply a condition that the lessee must proceed to explore diligently for oil and gas in spite of express language of the lease giving him a right either to drill a well or pay delay rentals.³³ These courts hold that taking the lease as a whole it appears that the real consideration for the same is the exploration and development for oil or gas so that royalties may be produced for the lessor. This is not always true. Frequently the lessor makes the lease largely for the sake of delay rentals. As the Supreme Court of Appeals of West Virginia has said:³⁴ "In territory remote from actual and profitable operation, leases are often taken, without reasonable expectation of any immediate advantage to the lessor other than the rental in the form of delay money, and with the expectation of delay in drilling until the neighboring lands are shown to contain minerals, and the subsequent establishment of probability of the existence thereof in the leased premises." The lessee's business is, at best, an extremely speculative one, and it would seem there can be no good reason why he should not be allowed to pay delay rental according to the agreement, provided there is no drainage from the leased premises. Such delay rentals are usually substantial sums to pay for the privilege of holding the lease when we consider the risks of the lessee. Probably a great majority of the oil and gas leases prove to be of no value. However, under such a rule of law applying to oil and gas leases, whether right or wrong, there would be no violation of the rule against perpetuities, because such leases would in all cases be terminable by the lessor within a comparatively short time.

The courts of most of the states have not yet reached a point where they are willing to disregard the express language of the lease and imply such condition to develop the land for oil and gas under a lease giving the lessee an option to drill a well or pay delay rentals. In such jurisdictions if it is held that an estate vests in the lessee when oil or gas is found, it would seem that "no-term" leases should be held void as violating the rule against perpetuities.

Perhaps when courts come to consider the question they may

³³ *Brown v. Wilson*, 160 Pac. 94 (Okla.); *Hill Oil & Gas Co. v. White*, 157 Pac. 710 (Okla.); *Monarch Oil, Gas & Coal Co. v. Richardson*, 124 Ky. 602, 99 S. W. 668 (*semble*); see also *Witherspoon v. Staley*, 156 S. W. 557; *National Oil & Pipe Line Co. v. Teel*, 67 S. W. 545 (Tex. Civ. App.), affirmed 95 Tex. 586, 68 S. W. 979.

³⁴ *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 452, 76 S. E. 961.

refuse to declare "no-term" leases void as violating the rule against perpetuities, because such leases have been so long considered valid that they should not be disturbed at this late date.³⁵ One might argue that there are already so many cases holding such leases valid without considering the rule against perpetuities that, like rights of entry for condition broken,³⁶ such leases should be upheld as another exception to the rule, but as most courts are not inclined to favor "no-term" oil and gas leases this might be regarded as a good opportunity finally to dispose of them.

³⁵ See cases in note 22 *supra*.

³⁶ See cases collected in GRAY, *RULE AGAINST PERPETUITIES*, 3 ed., §§ 293, 294.