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To what extent should equity considerations enter into the determination of whether or not a mining lease should be forfeited or terminated? Should the courts pay more attention to the freedom of contract and less attention to the fairness of the lease, where, after the passage of time the lease becomes highly favorable to one party? These and other questions are critically examined by Mr. Cardine in this thought provoking article.

FORFEITURE AND TERMINATION OF MINING LEASES

*G. Joseph Cardine**

I. Purpose of The Mining Lease

When and how a mining lease may be forfeited or terminated is a matter of critical concern to all connected with the mining industry. Each new court decision which bears upon the subject is closely scrutinized for any change or clarification of the law on this subject in a particular jurisdiction. Too many decisions have mistakenly been based upon equity or upon a personal reaction to the fairness or unfairness of the lease, rather than the written terms of the contract between the parties. The uncertainty which results is unfair to both parties to the lease.

The mining lease is the most generally accepted means employed to obtain exploration and production of hard rock minerals. These mining leases result from negotiations, offers, and counter offers, between mining companies, corporate executives and representatives, attorneys, landowners,

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claim owners, and miners, who generally are knowledgeable in the subject of their negotiations. The objective of both the lessor and lessee is to obtain the most favorable lease possible, and the result is the best bargain which each of the parties can make at the time. It is the very essence of business that a seller should attempt to obtain the greatest price possible in selling, and the buyer attempt to purchase on terms most favorable to him. With the passage of time, the bargain may prove to be more favorable to one party than to the other, but this is no basis for a court's refusal to enforce the lease according to its terms.

A lessor seeking a mining lease most favorable to himself may demand:

(a) a cash consideration or bonus to be paid upon execution for the granting of the lease;

(b) a yearly cash rental for the privilege of retaining the lease;

(c) monthly or yearly advance royalties chargeable back against production at a later date;

(d) a retained royalty interest;

(e) a covenant providing for specific work to be accomplished within a specific time;

(f) a covenant requiring that exploration, development and mining operations be carried on with reasonable diligence;

(g) a covenant requiring continuous development and mining operations;

(h) a covenant giving a right of access to the property for purposes of inspection;

(i) a covenant giving a right to examine books and records relating to the property and production, and a right to copies of such records.

A lessee seeking the most favorable lease for himself wants to hold the encumbrances, restrictions or mandatory requirements and covenants to a minimum, if possible. The lessee prefers the sole consideration to the lessor to be a royalty payable out of production, if and when production is had. In negotiations over payment of a cash consideration,

bonus, yearly rental, or advance royalty, the lessee would much prefer to put such cash into a development program, thus spending the money on the mining property. The lessee prefers a lease which will permit him to determine if, when, how and where, to explore, mine, or produce, the property, without interference from lessor.

These divergent purposes are reconciled in the written lease.

The extent to which a lessor succeeds in obtaining, and a lessee is willing to grant, the objectives listed, depends upon the potential and value of the mining property involved and the ability of the negotiating parties.

II. DEFAULT CLAUSE

Having agreed upon the lease, there remains the necessity of setting forth in clear and precise terms, the result of a failure to comply with the terms, conditions, provisions and covenants of the same by either of the parties. This is often accomplished by a provision providing for forfeiture and termination for failure to perform specified terms, conditions or requirements of the lease. This clause should be drafted carefully and precisely. It is important to both the lessor and lessee to know exactly what is required of him in the way of performance under the lease and the effect of not complying therewith.

III. FAILURE TO MAKE EXPRESS PROVISIONS FOR FORFEITURE AND TERMINATION

There are many clauses involving mining leases which contain no express provision or covenant requiring diligence in the conduct of exploration, development or mining operations, which place no mandatory requirements for performance upon the lessee, and which contain no express provision for forfeiture or termination. A failure by the lessee to explore, develop or mine would not be a violation of breach of the terms of this lease. A lessor therefore, seeking relief in court for such failure, has no adequate remedy at law. However, equity, while expressing its abhorrence of forfeitures, will grant relief by forfeiture and cancellation.[1] It

1. George v. Jones, 168 Neb. 149, 95 N.W.2d 609 (1959).

is generally held that the discovery, development, and mining, of minerals is in the public interest,[2] and although there is no express covenant, where the only remuneration to the lessor is a royalty to be paid out of production, a covenant will be implied requiring the lessee to exercise reasonable diligence in prospecting for, developing and mining the leased mineral lands.[3]

The implied covenant is founded upon the theory that the lessor granted the lease to secure for himself rents and royalties out of production; that the parties therefore intended that the lessee prospect, develop and mine the lease granted; that to permit lessee to hold the land without working it is to permit its holding for speculative purposes; that while a landowner may do with his land what he likes, a tenant or lessee who holds land for a specific purpose has no such discretion; and finally, to deny the existence of the covenant would be to utterly defeat the purpose of a mining lease, and make such lease a snare for the entrapment of unwary owners.[4]

The lessee upon discovery, must determine if the ore exists in commercial quantities, and thereafter reasonably develop the same.[5] The lessee's duty is one of complete development, although the rapidity with which development should proceed may depend upon the circumstances of the particular case.[6]

Whether the lessee has exercised reasonable diligence in prospecting, developing and mining the leased premises is a fact question.[7] The test to be used in determining what is required of lessee to satisfy a covenant requiring reasonable diligence in the exploration, development and operation of a mining property is: "Whatever in the circumstances would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."[8]

2. Annot., 76 A.L.R.2d 721, 724 (1961).
3. George v. Jones, *supra* note 1; 36 AM. JUR. *Mines and Minerals* § 58 (1941).
4. Annot., 60 A.L.R. 901 (1929).
5. 58 C.J.S. *Mines and Minerals* § 183 (1948).
6. Morley v. Berg, 218 Ark. 195, 235 S.W.2d 873 (1951).
7. Owens v. Waggoner, 115 Ind. App. 43, 55 N.E.2d 335 (1944).
8. Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W.2d 1039, 60 A.L.R. 890, 898 (1928); Phillips v. Hamilton, 17 Wyo. 41, 52, 95 Pac. 846, 849 (1908).

A failure to exercise reasonable diligence in operations for periods of one year, one and one-half years, nine years,[9] two years,[10] six years,[11] has resulted in a declaration of forfeiture and cancellation of the lease. Forfeiture in these cases were decreed by courts of equity, and based upon an implied covenant for the development and operation of the property, there being no express covenant in the lease.

IV. FORFEITURE AND TERMINATION IN ACCORDANCE WITH EXPRESS PROVISIONS IN LEASE

Some examples of forfeiture provisions appearing in mineral leases are the following:

(a) If for any reason there shall be default on the part of lessee, and lessee shall fail or refuse to comply with any of the terms or provisions hereof, then at the option of lessor, lessor may give notice in writing to lessee of such default, specifying the nature and character thereof, and unless the default shall be corrected within ..... days after receipt by the lessee of such notice, then at the option of lessor, this lease and all rights thereunder of lessee shall be terminated and lessee shall quietly and peaceably surrender the said premises unto lessor.[12]

(b) The lessee, with all reasonable dispatch, and as soon as practicable hereafter, and in any event not later than the ..... day of ....., 19....., shall enter upon the leased premises and begin and continue operations thereon and take such steps as may be necessary for the act of mining and marketing said coal, it being the purpose and spirit of this lease to secure the prompt development and continuous operation, mining, and removing of said coal, and to secure as full, complete, and speedy operation thereof as can be done practicably and economically; and the judgment of lessee as to whether said coal is practicably and economically mineable as aforesaid, exercised in good faith, shall be binding and conclusive upon the parties hereto.[13]

9. Annot., 60 A.L.R. 901 (1929).
10. George v. Jones, *supra* note 1.
11. Owens v. Waggoner, *supra* note 7.
12. 5 AMERICAN LAW OF MINING 1228.11 (12) (1964).
13. *Id.* at 1232, 1233 (21).

(c) [I]n the event . . . minimum royalty is not paid when due, then the lease shall terminate as of that date.

[I]n the event of default by either party in the performance of any of the covenants, if such default shall continue for a period of 60 days after written notice of such default is given by one to the other (such notice setting out the particulars of such default and making demand upon the other to make good the alleged default), then it shall be lawful for the party giving the notice to terminate and end this agreement.[14]

(d) If lessees fail or refuse to mine or work said coal from said premises for a period of 6 months . . . then and in that event, said lease shall become null and void.[15]

(e) [Lessee] shall exercise diligence in the conduct of prospecting and mining operations; shall carry on development and operations in a workmanlike manner and to the fullest possible extent, shall commit and permit no waste . . . .
[Lessor] shall have the right to terminate . . . in the event that . . . [lessee] fails for a period of six consecutive months to carry on operations . . . .[16]

Since courts of equity have readily created an implied covenant permitting forfeiture and termination of a lease for failure to develop the same, it would seem that a written lease, with express provisions for development, mining, operations, and enforcement of the obligations by termination and forfeiture, would present little difficulty. Unfortunately, text-writers[17] and many courts[18] have dealt with cases with express covenants and without express covenants as though the same legal principles applied in each case. One notes repeated use of the phrase, "the lease was granted upon the condition, either express or implied, that the land would be

14. May v. Shields, 393 P.2d 319, 321 (Wyo. 1964).
15. Marcum v. Brock, 257 S.W.2d 55 (Ky. 1953).
16. Vitro Minerals Corp. v. Shoni Uranium Corp., 386 P.2d 938, 940, 941-42 (Wyo. 1963).
17. 36 AM. JUR. *Mines and Minerals* § 59 (1941); 58 C.J.S. *Mines and Minerals* § 184 (1948).
18. Annot., 60 A.L.R. 901 (1929).

developed, etc.'"[19] Obviously it makes a great deal of difference whether the covenant or condition was express or implied.[20]

If the covenant is one which is created by the court out of necessity and arises by implication, it is important to consider: (a) the consideration passing from lessee to lessor, (b) the purpose for which the lease was granted, (c) the good faith exhibited by lessee in his operations on the property, (d) the expenditures and investment of the lessee, (e) the relative justice of the case.

These matters ought to be considered by a court of equity in determining whether it should grant relief to a party where no remedy is provided by the lease itself.

Quite a different situation is presented when the lease contains express provisions for exploration, development, mining, continuous operation, for consequences for failure to operate for six months, for forfeiture or termination, or that the lease shall never be forfeited or work required beyond assessment work. Inquiry into the consideration paid, the purpose of the lease, or whether a failure to perform was in good or bad faith, is irrelevant where the clear and plain meaning of the express provisions are apparent on their face. It is, in this case, the duty of the court to enforce the solemn agreement of the parties according to its terms.[21]

It is lawful and proper for parties to make a lease containing express covenants for the exercise of reasonable diligence in operations and for the forfeiture and termination of the lease upon a failure to satisfy such obligations, and it is the duty of the court to interpret the language used by the parties and enforce their contract according to established legal principles.[22] These express provisions have been held to have been accepted by the lessee as part of the business risk, and to be reasonable, equitable and enforceable.[23] Furthermore, in considering a forfeiture of rights under a lease for the breach of some covenant, it is unimportant whether the

19. See cases, Annot., 60 A.L.R. 901 (1929).
20. Home Creek Smokeless Coal Co. v. Combs, 204 Va. 561, 132 S.E.2d 399 (1963).
21. Chauvenet v. Person, 217 Pa. 464, 66 Atl. 855 (1907).
22. Phillips v. Hamilton, *supra* note 8, at 50-51, 95 Pac. at 848.
23. Goldberg v. Ford, 188 Md. 658, 53 A.2d 665 (1947).

breach occurred intentionally or unintentionally, or through neglect or inability on the part of the lessee to keep or perform the same.[24]

The law relating to written mining leases is derived from the general law of contracts and landlord/tenant.[25] The general rule is that where a lease has been fairly entered into and there is no mistake, accident, fraud or duress in the making of the lease, a court will give full force and effect to the agreement.[26] It is not the function of a court to make a lease agreement for the parties different from the one they entered into.[27] The fact that the lease agreement for one of the parties was unwise, improvident, or even harsh, does not furnish a ground for refusal to enforce the same; and, where the written lease of the parties does not require a showing of fraud or intentional default, such requirement should not be imposed upon either of the parties.

In conclusion, although forfeitures are not favored, either in law or equity, still the courts will enforce the fairly entered into, solemn written agreements of parties, where the plain meaning of its terms are clear, giving to the parties the benefits of the agreement and requiring of them the performance of their obligations.[28] It is important, both for the lessor and lessee, that their lease agreement be clearly and precisely drawn setting forth the obligations and rights of the parties. It is also important that their agreement, as drawn, be enforced.

24. Phillips v. Hamilton, *supra* note 8, at 51-52, 95 Pac. at 848.
25. 36 AM. JUR. *Mines and Minerals* § 58 (1941) refers to 32 AM. JUR. *Landlord and Tenant* § 847, 848 (1941).
26. 17A C.J.S. *Contracts* § 294 (1963).
27. Phillips v. Hamilton, *supra* note 8, at 50-51, 95 Pac. at 848; 17A C.J.S. *Contracts* §296(4) (1963).
28. Alexander v. Grove Stone & Sand Co., 237 N.C. 251, 74 S.E.2d 538 (1953).