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WYOMING DECISIONS RELATIVE TO THE LAW OF OIL AND GAS AND COMMENTS WITH RESPECT TO FORM "88' LEASES[1]

W. H. EVERETT[2]

Prior to discussing decisions of the state and federal courts with respect to oil and gas law in Wyoming, it is of interest to note briefly some of the historical background concerning the production of oil in Wyoming.

In 1878, John W. Hoyt, Territorial Governor, reported to the Secretary of the Interior that ". . . at the railroad crossing of Bear River in Uinta County along the railroad near Green River station . . . in the valley of Popo Agie . . . and doubtless at many other points in Wyoming there are indications of very large deposits of crude petroleum and kindred carbonaceous substances. At (Bear River) crossing borings have been made with a view to practical operations. Oil bearing shales lie upon the surface . . . and at a depth of 175 feet the underlying sand rock was struck with an increase of oil."[3]

By 1888, fourteen shallow wells were producing oil in Wyoming; for that year, Territorial Governor Thomas Moonlight reported that ". . . the oil fields of Wyoming present today perhaps the greatest field for speculation of any industry hidden or developed. Racy advertisements have been broadcast over the land and large bodies of men are now prospecting, locating and working out assessments in various parts of the territory. It is no fiction for the oil is there to be seen by anyone who will take the trouble to look."[4]

Honorable Francis E. Warren, in his report to the Secretary of the Interior in 1890, said: "Thus it will be observed that Wyoming is soon to become a great oil field of the world in variety, quantity and quality."

The great landmark of oil development in Wyoming—the Salt Creek field—had its beginning largely between 1890 and 1910. The first serious discoveries in the field occurred during the years 1905 through 1910. The federal government had not entirely forgotten reports of its territorial governors, and their successors, for in 1909 all government land in the field was withdrawn from entry. By 1920, other great producing fields had been developed, including Grass Creek and Elk Basin, to be followed shortly by discovery and development in Oregon Basin, Byron, Garland, and others.

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1. Delivered at Semi-annual Meeting of the Big Horn Basin Bar Association, Cody, Wyoming, December 1, 1951.
2. Division Attorney, The Ohio Oil Company, Casper, Wyoming.
3. Ann. Rep. Ter. Gov. Wyo. to Sec. Int. (1878).
4. Ann. Rep. Ter. Gov. Wyo. to Sec. Int. (1888).

For many years, inescapable economic factors caused these and other great fields to lay fallow. The local demands for petroleum and its products were negligible. The disparaging transportation costs and facilities, practically eliminated Wyoming's oil from competition with mid-continent, eastern, and California oil in vying for the markets of populous areas. In 1933, crude oil was selling for as little as ten cents a barrel in many parts of the country and the outlook for the industry in Wyoming was not bright. These economic factors, of course, always enter into the matter of litigation and no doubt explain to some extent the paucity of cases in the Wyoming courts dealing directly with oil and gas leases and the rights of parties thereto and thereunder.

Changes in market demand and other economic factors are directly reflected in the tempo and volume of oil and gas matters we are called upon to handle in the practice of law. In 1935, there were 45 drilling wells in Wyoming and oil and gas production that year amounted to 3.61% of the total taxable valuation of all property in the state. The latest report of the Commissioner of Public Lands covering the year 1949 states that 799 wells were drilled that year, including 257 dry holes. For the first ten months of 1950, the State Mineral Supervisor reported 794 drilling wells, including 172 dry holes, and in 1950, the total valuation of oil and gas, and items directly related thereto, amounted to more than 25% of the total taxable valuation of all property in the state. My guess is that the ratio of oil and gas practice in your respective offices is directly comparable to the number of wells drilled during the years mentioned.

In considering the law with respect to an oil and gas lease, several basic concepts must be kept in mind. First, a lease is a contract between the parties thereto and is subject to the same basic rules of construction as contracts generally.[5] Second, to determine the meaning of a contract, the intention is of primary importance. If the lease is not ambiguous, the wording thereof is the only legitimate evidence of intent; parol evidence not being admissible to vary, explain, modify or contradict the express wording thereof. The lease must be construed as a whole and the intention collected from the entire instrument and not from a detached portion.[6] Third, the relationship between a lessor and a lessee does not satisfy the test as to the existence of a trust and should not be classified as a joint adventure, lacking such elements as the sharing of profits and losses, cooperation in carrying on the enterprise or a voice in the control of operations.[7] Fourth, the nature of the estate created by an oil and gas lease or by a conveyance of oil and gas or minerals will determine largely whether the lease, contract or conveyance is governed by the laws affecting real property or personal property. Fifth, the leasehold estate may be lost by abandonment. Sixth, we should consider the obligations of the lessor

5. Hammett Oil Co. v. Gypsy Oil Co., 95 Okl. 235, 218 Pac. 501, 34 A.L.R. 275 (1921).
6. Cooper v. Ohio Oil Co., 25 F. Supp. 304, 309 (D. Wyo. 1938) and cases cited.
7. Cooper v. Ohio Oil Co., Ibid; Chisholm v. Gilmer 81 F.(2d) 120 (4th Cir. 1936).

and lessee, each to the other, in the absence of express provisions in the contract.

In reviewing the cases decided by the Supreme Court of Wyoming and the decisions affecting oil and gas matters in Wyoming arising through the United States courts, no attempt will be made to discuss cases primarily affecting state lands, Indian lands or public domain lands. I will, therefore, with an exception of two, limit this discussion to cases affecting fee lands only.

NATURE OF ESTATE

A. GENERALLY. In the case of *State v. Snyder,*[8] the Supreme Court of Wyoming was called upon to determine whether the royalty income from a state school section under an oil and gas lease was real or personal property, and held that: "Oil and gas, while in situ, are part of the realty; part of the corpus of the land." After reviewing the authorities under an analagous situation as to the rights of a life tenant and a remainderman to proceeds, the Court quoted with approval from an old Illinois case holding that "Oil is a mineral and part of the realty. Owing to its fugitive nature, a grant of oil under the ground is a grant, not of the oil in place in the earth, but of such oil as the grantee may find there and save." The Court held that the royalty in question became part of the permanent school fund of the state in that the oil and gas belonged to and was a part of the corpus of the land and to permit same to be included in the income fund would constitute waste, holding that the leases themselves, and by themselves, without more, did not accomplish the sale of the lands as such, stating:

> "The final disposition of the oil or gas, or sale, if we please to call it so, does not take place—is not in any event consummated—until after the oil is taken from the earth, has become severed from the realty, and has become personal property."

B. ROYALTY. In *Boatman v. Andre,*[9] the Supreme Court held that the right created by an oil and gas lease appeared to make it a *profit à prendre*; but the Court did not, prior to 1942, have occasion to consider and determine whether a royalty or mineral interest as distinguished from a leasehold estate was real or personal property. In the case of *Denver Joint Stock Land Bank of Denver v. Dixon et al.,*[10] the question arose in a contest between the Land Bank, which had foreclosed under a mortgage containing general words of conveyance with no reservation or exception, and a grantee of the mineral interests under an assignment made subsequent to the mortgage. Defendant contended that when the oil and gas is severed from the land, it is personal property, and is no part of the realty; that, as a consequence, it did not pass under the general words of con-

8. 29 Wyo. 163, 212 Pac. 758 (1923).
9. 44 Wyo. 352, 12 P.(2d) 370 (1932).
10. 57 Wyo. 523, 122 P.(2d) 842 (1942).

veyance. The Court, in reviewing defendant's contention, stated, ". . . we think that the royalty interest here involved cannot be considered to be personal property"; stating further that:

> " (2) It is true, of course, that when oil and gas have been brought to the surface, they become personal property. State v. Snyder, 29 Wyo. 163, 197, 212 P. 758. And if the right under the deed to Eades consisted only of the right to receive a certain amount of oil, without reference to its source, then it might well be said that the right is one merely to personal property. But it consists of a right to receive the oil and gas from particular pieces of land. That is a factor which cannot be ignored. We accordingly held in State v. Snyder, supra, that when oil is taken from the ground, part of the corpus thereof is taken. So that it can scarcely be doubted that the right is at least partially connected with the land, and cannot be said to be wholly unmixed with one in real property. It may be said, under our terminology dividing property into real and personal, to be one of a dual nature. It is not, then, perhaps suprising that some of the courts have, under particular circumstances, considered the right as personal property. Historically considered, the view is favored, we think, that it is an interest in real property, and a number of the courts now, some expressly, some impliedly, hold that the historical view coincides with public policy. . . . And by the great weight of authority, especially as clarified by the decisions in the last decade, a royalty interest, at least if of a permanent nature, has been held to be real and not personal property, though the reasons assigned do not all agree."

C. SEVERANCE OF MINERAL AND SURFACE ESTATES AND ADVERSE POSSESSION. In the case of *State ex rel. Cross v. Board of Land Commissioners,*[11] the Supreme Court decided that the Board of Land Commissioners had the unqualified right and authority to require, as a condition precedent to the issuance of a patent, that the mineral estate be conveyed to the state before patent would issue to the surface. In this case, the doctrine of severance of the mineral and surface estates was found to exist in the statutes defining board powers and was recognized by the Court as applicable to Wyoming lands. In reviewing a California case and the common law recognizing the separability of surface and mineral estates, the Wyoming court quotes Thompson on Real Property:

> "Since minerals in place are part of the land, the owner of the fee in the land has the absolute right of property in the mines and quarries beneath the surface (citing cases), and all the mineral substances, while thus in place, are things of a real, and not a personal character (citing cases). As we have seen, that part of the land consisting of minerals, or specified minerals, may become the subject of separate ownership, by grant of the minerals by the owner of the land, or by a grant of the land with an exception of the minerals, and in either case an estate in

11. 50 Wyo. 181, 58 P.(2d) 423 (1936).

fee simple is created in the minerals, as corporeal hereditaments. (Citing cases)."

And concluded by holding:

"It is evident that under these authorities, whose views would seem to be sound, when the board of land commissioners authorized the issuance of a patent to the land, excepting, however, minerals and mining rights, a fee-simple estate therein was thereby transferred to the purchaser, and the same would be true of a sale of the mineral rights only, with a reservation of the surface."

In 1947, the Wyoming Supreme Court again recognized the doctrine of severance of the surface and mineral estates and held that, after severance, the mineral estate is not lost by a tax sale or by foreclosure of an irrigation assessment on the surface estate. In this case, it was also established that, after severance and where no minerals had been discovered, the surface occupant cannot have adverse possession of the minerals, even though claiming under a deed that conveys the lands by customary description without reference to mineral rights reserved by an earlier recorded deed.[12] It is also clear that a "mineral fee" must be separately assessed:

"Under Wyoming statutes and decisions property must be assessed in the name of the true owner, if known. Hecht v. Boughton, 2 Wyo. 385, 400; McCarthy v. Union Pac. Ry. Co., 58 Wyo. 308, 131 P. (2d) 326. When the mineral estate is owned separately from the surface estate, and the land is assessed in the name of the owner of the surface, it would seem that even a valid tax sale will not carry the mineral estate. Washburn v. Gregory Co., 125 Minn. 491, 147 N.W. 706, L.R.A. 1916D, 304; Sims v. Vosburg, 43 N.M. 255, 91 P. (2d) 434; Kernkamp v. Wellsville Fire Brick Co., 237 Mo.App. 457, 170 S.W. (2d) 692."

As to the irrigation district foreclosure, the Court stated:

"We think it clear that the lien of Sidon under this statute did not attach to the mineral estate which had been severed from the surface estate before the assessments were made. The owner of the mineral estate had no 'proportionate interest' in the Sidon Canal, and owned no land irrigable therefrom. The mineral fee was 'land' (State ex rel. Cross v. Board of Land Com'rs, 50 Wyo. 181, 199-201, 58 P. (2d) 423) but not, the land upon which Sidon had a lien under the statute. We would, of course, have a different case if the assessments had been levied against the owner of the land before the severance of estates. After severance, the two estates, owned separately, are held by separate and distinct titles. This has been emphasized in the cases. It has been said that the two estates are 'as distinct as if they constituted two different parcels of land.' Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 655, 180 N.W. 787, 790, quoting from 18 R.C.L. 1184, 1 Am.Jur. 858. It is not material that the plane by which the properties are separated is horizontal instead of verticle. Tiffany on Real Property (3d ed.) Sec. 1158, p. 470. *After the owner of the separated mineral estate records his title, he 'is not affected*

12. Ohio Oil Co. v. Wyoming Agency, 63 Wyo. 187, 179 P. (2d) 773 (1947).

by the state of the title to, or the possession of, the surface.' Algonquin Coal Co. v. Northern Coal & Iron Co., 162 Pa. 114, 118, 29 A. 402, 403. *'Each estate may be occupied, conveyed, incumbered, sold by the sheriff, or alloted in partition, without any effect upon the other.'* Delaware & H. Canal Co. v. Hughes, 183 Pa. 66, 38 A. 568, 569, 38 L.R.A. 826, 63 Am.St.Rep. 743. (Emphasis added.)

In answer to defendant's contention of title to the mineral estate by adverse possession of the surface estate, the Court held that:

"There could have been no adverse possession of minerals that have never been worked or even discovered. The authorities are unanimous in holding that where the surface and mineral estates have been severed, possession of the surface by its owner, cannot be adverse to the owner of the minerals, and that there can be no adverse possession of the severed mineral estate in the absence of mining operations. The cases are collected in notes, 13 A.L.R. 375; 67 A.L.R. 1442; 93 A.L.R. 1232. The rule is not changed by the fact that no one knows what minerals are or are not present. Stowers v. Huntington Development & Gas Co., 72 F. (2d) 969, 98 A.L.R. 536 (4th Cir.) It is immaterial that the surface occupant claims the minerals under a deed that conveys the land by its customary description without reference to mineral rights reserved by an earlier recorded deed. J. R. Crowe Coal & Mining Co. v. Atkinson, 85 Kan. 357, 116 Pac. 499, Ann.Cas. 1912D, 1196; Renfro v. Hanon, 297 Ill. 353, 130 N.E. 740; 1 Am.Jur., Adverse Possession, Sec. 119."

ABANDONMENT AND IMPLIED COVENANTS

In 1908, the Supreme Court of Wyoming was called upon to determine whether an oil and gas lease might be lost by abandonment for failure to develop the premises under the implied covenant in the lease to proceed with reasonable diligence to prospect and develop the premises, having due regard to the lessee's interests as well as those of the lessor.[13] This case, as concerns the doctrine of implied covenant to develop, was cited with approval by the United States Supreme Court in the case of *Sauder v. Mid-Continent Petroleum Corporation.*[14] The Court refused to decree a forfeiture of the lease under the principle that abandonment includes both the intention to abandon and the external act by which the intention is carried into effect. The Court held that the intention is the first and paramount object of inquiry and that there can be no abandonment in the absence of evidence showing such intention. On the matter of implied covenant, the Court quoted with approval from Judge Van Devanter's opinion in the case of *Brewster v. Lanyon Zinc Co.*[15] as follows:

"The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the lessor. . . .

13. Phillips et al. v. Hamilton, 17 Wyo. 41, 95 Pac. 846 (1908).
14. 292 U. S. 272, 54 S.Ct. 671, 78 L.Ed. 1255 (1934).
15. 140 F. 801 (8th Cir. 1905).

> Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business. *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.*" (Emphasis added.)

An implied covenant is defined by the Circuit Court of Appeals for the Tenth Circuit in the case of *Brimmer v. Union Oil Co. of California,*[16] as follows:

> "An implied covenant is one which may reasonably be inferred from the whole agreement and the circumstances attending its execution. Implication when used in that sense is synonymous with intention. An express covenant upon a given subject, deliberately entered into without fraud or mutual mistake, excludes the possibility of an implied covenant of a different or contradictory nature." (Citing authorities.)

In 1932, the question of abandonment was again considered by the Supreme Court.[17] In this case, actions were instituted by plaintiffs to quiet title to certain lands owned by them as against the claims of oil and gas lessee defendants. Defendants contended that the leases were valid and had not been terminated, and sought, by cross petition, to have the leases declared valid. Plaintiffs replied, alleging abandonment of drilling operations and of the leases. Without reviewing the lease provisions or the facts in detail, suffice it to say that the Court found that the leases had been abandoned and quieted title, as prayed for by the plaintiffs. The specific question before the Supreme Court was whether the estate granted by an oil and gas lease could be lost by abandonment. In holding that it could be, the Court stated:

> "While it is settled that title to land cannot be lost by abandonment . . . , it is equally well established that the interest of a lessee under the ordinary form of oil and gas lease presents a right of a different character. That right, created by the lease, is merely to search for oil and gas, and, if either is found, to remove it from the land lease. This would appear to make it a *profit à prende* . . . , and hence an incorporeal hereditament, which may be lost by abandonment. . . ."

Stating further that:

> *"Although the lessee may testify that he did not mean to abandon the premises* (Bartley v. Phillips, 179 Pa. 175, 36 A. 217; Hall v. McClesky, supra), *yet his testimony will not be controlling, and*

16 81 F.(2d) 437, 440 (10th Cir. 1936).
17. Boatman v. Andre, supra, note 9.

> *his actual conduct at the time may be resorted to for the purpose of indicating the existence of an intent to abandon.* As remarked in Logan, etc., Fuel Co. v. Great Southern Gas & Oil Co. 126 F. 623, 626 (C.C.A.): 'Counsel for the appellant contend that it had no intention of abandoning the contract, and that there can be no abandonment without a purpose to abandon. This proposition of law is no doubt correct, but in business transactions a man's intention is to be gathered from his conduct, rather than from what he meditates, if the latter is inconsistent with the former. Besides, it is a well-settled rule in the law of contracts that if the party upon whom rests the burden of active performance fails to proceed with it in substantial accordance with his stipulations the other party may treat it as abandonded.' " (Emphasis added.)

The United States District Court and the Circuit Court of Appeals for this circuit have followed the principles announced by the Supreme Court of Wyoming.[18]

FORM 88 LEASES

From the foregoing and because we as lawyers may be dealing with sage brush land having possibilities of substantial values, titles to minerals and the conveyancing and leasing thereof become a subject of primary and utmost importance if we are to discharge our duties to our respective clients. The lease form is certainly deserving of more than casual consideration.

Someone (knowing not whereof he speaks) has said that a lawyer is not needed if an "88 form lease" or "Producers' 88" is used. I believe the Supreme Court of Texas, in a decision denying specific performance of a contract for lease, clearly shows the uncertainty of the term "88 form lease."

> ". . . The particular character of the rights which were to be acquired by the proposed lessee, or the extent or duration of such rights, is not in any wise disclosed or made ascertainable. The provision relative to 'an 88 form lease' can shed no light on those matters, for the reason that the character of printed matter contained in any designated class of oil and gas lease forms depends on what matter various designers of such forms may deem appropriate—and may vary accordingly. As we see it, the reference to 'an 88 form lease' is as incapable of definite application as if the term 'oil and gas lease form' had been used instead."[19]

It is reported that the "88 form lease" originated in Oklahoma in 1916 as a result of a decision of the Supreme Court of that state in the case of *Brown v. Wilson.*[20] Although this decision was later overruled,[21] great consternation was caused by it and resulted in a new lease form being

18. Burke v. Horth, 296 F. 256, 260 (D. Wyo. 1924), on appeal, 12 F.(2d) 58 (8th Cir. 1926).
19. Fagg v. Texas Co., 57 S.W.(2d) 87, 89 (1933).
20. 58 Okl. 392; 160 Pac. 94 (1916).
21. Northwestern Oil & Gas Co. v. Branine, 71 Okla. 107 (1918), 175 Pac. 533, Rich v. Doneghey, 71 Okl. 204, 177 Pac. 86 (1918).

devised to avoid the holding in that case. Mr. A. W. Walker, Jr., reports:[22]

> ". . . This new lease form was taken to a printer in Oklahoma by Mr. Veasey and a Mr. Barrett, a young lawyer for the Producers Oil Company, with the advice that it should be brought into general use because of the Brown-Wilson case. Mr. Burkhart, the printer, who is still living, supplied both the word 'producers' and the figures '88.' He employed the word 'producers' as an indication that the form should be used by producers generally, and the figures '88' were appended pursuant to a practice of the printing firm in connection with heading their legal forms. The lease did not have a heading when presented to the Burkhart Printing Company, and it appears that the Producers Oil Company actually protested the use of the word 'producers' on the form.
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> * * * * *
>
> "Thus appears to have been born the initial framework of 'Producers' 88' form leases. They are characteristically fixed-term leases with 'unless' drilling clauses. This form met with popular approval and prior to 1920 the use of 'Producers' 88' form leases had spread throughout Oklahoma, Kansas and Texas. So well-known and popular did the form become that landowners in leasing their lands frequently insisted upon the use of forms carrying this designation. Oil companies in printing their forms, as well as printing companies generally, were quick to capitalize upon the popularity of forms bearing the words, 'Producers' 88.' With the passage of years, bringing new problems and new troublesome court decisions, many revisions were made in the original lease form. These revisions were frequently made according to the individual ideas of particular oil companies or printing companies with the result that there are now in current use many different revisions of the original 'Producers' 88' form. . . .
> "The term 'Producers' 88,' therefore, does not today identify any particular lease form but merely a general type of form of which there are countless variations. . . ."

A. GRANTING CLAUSE. The granting clause grants a right to the oil and gas but frequently includes "all other minerals." What are "other minerals"? Does the grant include sand and gravel, potash, limestone or marble? If so, does it include them regardless of depth even though the surface estate might be entirely extinguished in mineral production? What justification is there for awarding an oil and gas lessee minerals which the landowner might discover or remove by excavation operations near the surface? In my opinion, the use of the phrase "all other minerals" in the granting clause is not desirable because it makes, rather than eliminates, uncertainty not only as to what is included within the grant, but also as to the duties of the lessee with respect thereto.

B. HABENDUM CLAUSE. The habendum clause in most of the form 88 leases provides for a fixed term for a specified number of years and "as long thereafter as oil or gas is produced." Frequently, the confusing phrase "or other mineral" is included.

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22. 28 Tex. L. Rev. 895, 896, 897.

Mr. A. W. Walker, Jr., very ably presents some of the problems inherent in the usual habendum clause in a recent article, in which he states:[23]

> ". . . Sometimes the phrase, 'produced in paying quantities,' is used in place of the word 'produced,' but since the decision in Garcia v. King[24] it has been settled that these two expressions are synonymous. Under that decision it is necessary that the production be sufficient under normal conditions to realize a profit over and above current operating costs after deducting the lessor's royalty. It is obvious that many uncertainties arise out of this customary type of habendum clause. What are normal conditions? What is the normal price of crude oil or petroleum gas? What are normal labor costs? What items must be included by the lessee in determining his operating costs? Over what period of time should a balance be struck for the purpose of determining whether the premises are being operated at a profit or at a loss? If there are a very large number of small wells on the leased premises of varying productive capacities must the lessee shut-in wells that are temporarily being operated at a loss for fear that the loss from these wells will cause an overall loss on the lease operations, or should the lease be regarded as producing in paying quantities if any one well on the premises could be operated by itself at a profit?[25] These are not merely academic questions; they affect the very life of the lease since the habendum clause is a clause of special limitation. Consider the problem that these questions present to the title examiner who is passing upon the title of the lessee to a marginal lease for a prospective purchaser. Consider also the problem that these unaswered questions present to the lessee of such a marginal lease where he desires to drill a deep well in search of new production, or where he plans to inaugurate a secondary recovery program to increase his production. It has been held that the lessor is not estopped to declare that the lease has already terminated simply because he has continued to accept royalty payments without protest.[26] The lessee or a prospective assignee of the lease cannot, therefore, rely upon the fact that the lessor has continued to accept royalty payments without protest. If the lessor is co-operatively inclined it is, of course, possible for the interested parties to get together and, by the preparation of appropriate instruments, to eliminate all doubt as to whether the lease is still in force. We are interested in this discussion, however, in the possibility of eliminating some of these troublesome uncertainties by appropriate provisions in the original lease so that the opportunities for disagreement may be reduced or avoided. The most troublesome feature of the uncertainties attending the use of the usual form of habendum clause is due to the fact that termination of the lease takes place auto-

23. 28 Tex. L. Rev. 895, 900.
24. 139 Tex. 578, 164 S.W.(2d) 509 (1942).
25. For recent cases of interest involving some of the foregoing questions, see Cowden v. General Crude Oil Co., 217 S.W.(2d) 109 (Tex. Civ. App. 1948); Transport Oil Co. v. Exeter Oil Co., 84 Cal. App.(2d) 616, 191 P.(2d) 129 (1948).
26. Gas Ridge, Inc., v. Suburban Agricultural Properties, Inc., 150 F.(2d) 363 (5th Cir. 1945). See also Woodruff v. Brady, 181 Okl. 105, 72 P.(2d) 709 (1937).

matically whenever production is no longer had in paying quantities plus the fact that neither the lessor nor the lessee can ever be sure when this termination of title occurs. There are numerous possible clauses that might be used to remove most of these objectionable uncertainties. . . . In the case of leases of large tracts of land a minimum royalty return per acre on all unsurrendered acreage might be required. And, even though no change is made in the wording of the present form of habendum clause, it would be helpful in removing some of the objectionable uncertainties to use a clause providing in substance that the lease will not terminate because existing production thereunder is not in paying quantities so long as the lessor without objection continues to accept royalties upon current production. These suggested possible improvements are by no means exhaustive. They are intended merely to indicate the nature of the problems presented by the habendum clause and some of the possible solutions."

C. CLAUSE EXTENDING LEASE BEYOND PRIMARY TERMS. Clauses closely related to the habendum clause provide for the continuation beyond the primary term if drilling or reworking operations are being conducted on the leased premises so long as there is no cessation of operations for more than sixty consecutive days, and that if such operations result in production so long thereafter as oil or gas is produced.

D. DELAY RENTAL OR UNLESS CLAUSE. The delay rental or "unless clause" is common to most "88 form leases." Generally speaking, it provides that if drilling is not commenced on or before a day certain that the lease shall terminate of its own force "unless" on or before that time the lessee pays to the lessor (or a named depository bank) a specified sum (delay rental) for the privilege of deferring drilling operations for a specified period of time during the primary term. Closely related clauses permit the resumption of delay rental payments (1) if the well is a dry hole, (2) if the well ceases to produce prior to the expiration of the primary term, (3) if drilling operations cease for any cause before it reaches the depth of known producing formations in the area, and (4) if it is impossible to secure a market for production for an indefinite period.

"These terms ('rental' and 'delay rental') have little in common with the conceptions of the term 'rent,' as used in landlord and tenant, since most leases have the effect of conveying the oil and gas in place. Delay rentals exist only to prevent the termination of an estate or right, where the lessee has failed to commence drilling operations. Their office is to delay the commencement of a well without the loss of any right or estate which the lessee had immediately after the execution and delivery of the instrument. Delay rentals are unimportant where drilling operations have commenced; but, where there has been a failure to drill, the delay rental is of paramount importance."[27]

E. ASSIGNMENT CLAUSE. This clause usually provides for the assignment by the lessee of a part or parts of the leased lands and that

27. Thuss, Texas Oil and Gas, p. 108.

failure or default on the part of an assignee in the payment of delay rentals shall not defeat or affect the lease to the other parts as to which due payment of the rentals is made.

> "The general rule is stated to be that, if the lease does not expressly permit assignment of a part of the lease acreage, then a proportionate payment of rental will not be authorized,[28] but the express right of assignment and conveyance either in whole or in part impliedly authorizes a payment of rental on a proportionate basis; therefore an assignee may tender a rental covering his portion and prevent a termination whether the balance is paid or not.[29]"[30]
>
> "Most leases expressly provide that in case of assignment the failure of the assignee of part of the lease to pay rentals shall not affect that part of the lease upon which the proportionate part of the rental shall be paid. These provisions are valid.[31]"[32]

F. ENTIRETIES CLAUSE. This clause provides for the operation of the premises as an entirety even though the premises may subsequently be owned in severalty; frequently also providing that royalties shall be divided between the separate owners in the proportion that the acreage owned by each bears to the whole.

> Mr. Summers, in his text on Oil and Gas, states:[33]
>
> "While a majority of the courts hold, as explained in the previous section, that where a tract of land has been leased for oil and gas and is afterwards subdivided and sold in separate tracts subject to the lease, the owners of such separate tracts are entitled to all of the rents and royalties accruing from their separate tracts, yet some of these courts have admited the hardship that may result to the owner of a separate tract, due to the fact that as to development the lease is indivisible and the lessee is under no duty to develop and protect these separate tracts as units. Those courts which hold that under the situation detailed the royalties accruing under the lease should be apportioned among the owners of separate tracts on the basis of acreage, base their holdings, in part, upon this very hardship.
>
> "To avoid the litigation that so commonly arises out of situations of this sort, lessees have inserted in many modern leases a provision to the effect that if the lands leased shall subsequently be owned in separate tracts, the lessee may develop the original tract as a unit and royalties shall be apportioned among the owners of the separate tracts in the proportion that their acreage bears to the entire tract covered by the lease.[34] The provision for devel-

28. Oil & Gas, Mills-Willingham, 146.
29. Hitson v. Gilman, 220 S.W. 140 (Tex. Civ. App. 1920); Coker v. Benjamin, 83 S.W.(2d) 373 (Tex. Civ. App. 1935).
30. Thuss, Texas Oil and Gas, p. 116.
31. Dormon Farms Co. v. Stewart, 157 Ark. 194, 247 S.W. 778, 4 O. & G. 632; Young v. Jones, 222 S.W. 691 (Tex. Civ. App.)
32. Oil & Gas, Mills-Willingham, 146.
33. 3 Summers Oil and Gas, Sec. 609, p. 533.
34. Shell Petroleum Corporation v. Calcasieu Real Estate & Oil Co., 185 La. 751, 170 So. 785 (1936); Schrader v. Gypsy Oil Co., 38 N.M. 124, 28 P.(2d) 885 (1933); Gypsy Oil Co. v. Schonwald, 107 Okl. 253, 231 Pac. 884 (1924); Eason v. Rosamond,

opment of the demised land as a unit merely states expressly what the courts have implied. The provision for the apportionment of royalties on the basis of acreage makes certain the matter of the division of them among the owners of the separate tracts and avoids much of the litigation that might otherwise arise."

G. LESSER INTEREST CLAUSE. This clause is found in most 88 leases. It provides for a proportionate reduction in rentals and royalties if the lessor owns less than the entire fee in the leased lands. It is not an entireties clause or to be confused therewith.

". . . It has long been a usual provision commonly carried in oil and gas leases, and its obvious purpose is merely to provide that if it develops subsequent to the lease, that the lessor did not in fact have full title to the tract, he should receive royalties only in the proportion which his interest bears to the full title. The provision has no reference to any future subdividing of the original tract. This is clear not only from the wording itself but is further indicated by the fact that leases which now include the new 'entirety clause' ordinarily still retain the old provision upon which appellant relies."[35]

There are numerous other clauses appearing in variations of form in many of the "88 form leases," but I will not endeavor to discuss them now. Many of those clauses are desirable, but some are not essential. Experience and decisions have taught us, however, that we should have something more than the provisions of the first oil lease executed nearly one hundred years ago.

" 'Agreed this fourth day of July, A.D. 1853, with J. D. Angier of Cherrytree Township, in the County of Venango, Pa., that he shall repair up and keep in order the old oil spring on land in said Cherrytree Township, or dig and make new springs, and the expenses to be deducted out of the proceeds of the oil, and the balance, if any, to be equally divided, the one-half to J. D. Angier and the other half to Brewer, Watson & Co., for the full term of five years from this date. If profitable.

'Brewer, Watson & Co.
'J. D. Angier.' "[36]

These clauses I have discussed may not be perfect and may need changing. However, and in closing, I wish to affirm Mr. Walker's admonition:

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173 Okl. 10, 46 P.(2d) 471 (1935).
The provisions in the leases in the above cases were practically identical and provided as follows: 'If the leased premises shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage.'

35. Carlock v. Krug, 151 Kan. 407, 99 P.(2d) 858, 862 (1940).
36. Vol. I, Thornton's Law of Oil and Gas, p. 58.

". . . Perfection has not yet been achieved even in those clauses, and we may look forward to further refinements and revisions. To the conveyancer who desires to anticipate these defects and to make appropriate revisions of clauses now in general use, this word of caution should be given: Be sure that the revised clause in eliminating some of the old defects does not create some entirely new ones. The clauses in the modern oil and gas lease have been evolved through many years of trial and error and after a great amount of litigation and judicial construction. Revisions of the basic clauses of oil and gas leases should be made with great care and only by persons familiar with the evolutionary development of modern forms."[37]

37. A. W. Walker, Jr., 28 Tex. L. Rev. 909.