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DIVISIBILITY OF COVENANTS IN OIL AND GAS LEASES

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INTRODUCTION

Modern oil and gas leases are generally of two types. Under the "or" lease the lessee covenants to drill a well within a stipulated time *or* pay a rental for delay.[1] For failure either to drill *or* pay the delay rental a forfeiture is usually provided. By the terms of the "unless" lease the lease becomes void *unless* the lessee either drills a well within a certain time or pays a certain sum for an extension of time.[2] If he neither drills nor makes the extension payments in this type of lease, the lessee's estate, being in the nature of a limitation, terminates without the necessity of re-entry or action by the lessor.[3] In both types the term is relatively short, and a lease provides that it shall be extended as long as oil or gas is produced in paying quantities.

It will be seen that in the "or" lease the lessee covenants in the alternative, to drill or pay a delay rental. In the case of the "unless" lease, the lessee is under no duty, but his estate is subject to be divested if he fails to drill or make the extension payments. There are also, in each type of lease, covenants concerning royalties, but these are beyond the scope of this paper.

The lessor's chief interest in an oil and gas lease is in the royalties derived from the production of oil and gas, which constitute the principal consideration for the making of the lease. Because of this fact and in pursuance of what is known as the "doctrine of development", courts have implied certain covenants in oil and gas leases which are designed to promote development. These are the covenants to drill a test well within a

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[1] See the Prairie Oil & Gas Company lease set out in Summers: Law of Oil and Gas (1927) Sec. 264.

[2] See the Producers' lease in Summers: Law of Oil and Gas (1927) Sec. 262.

[3] Summers: *op. cit.*, Sec. 161, n. 41. Harris v. Kerns, 144 Okl. 228, 291 Pac. 100 (1930); W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. (2d) 27 (1929); Woods v. Bost, 26 S. W. (2d) 299 (Tex. Civ. App. 1930); Keeler v. Dunbar, 37 F. (2d) 868, 869 (C. C. A. 5th, 1930).

reasonable time, to reasonably develop the premises after discovery of oil or gas, to protect the premises by drilling offset wells, and to market the products of the wells.[4] The covenant to test, however, is not important under the "or" and "unless" leases for in them there are provisions for delay. These covenants may be expressed, but usually are not. As a remedy for the breach of such covenants, the lessor may have an action for damages. Normally, however, the lessor will seek to have the lease canceled upon the theory of implied forfeiture, inadequacy of legal remedy, or abandonment.

I. THE PROBLEM DEFINED

In imposing duties upon assignees of oil and gas leases for the performance of covenants and conditions of such leases and liabilities for breach of such covenants and conditions, courts apply the ordinary rules of law applicable to covenants running with the land in leasehold estates.[5] All covenants of an oil and gas lease respecting the payment of delay rentals, drilling of test wells, reasonable development after discovery, drilling of off-set wells, and payment of royalties and gas well rentals, whether express or implied, are covenants running with the leasehold interest and bind the assignee of the lessee upon the theory that by the assignment of the entire interest of the lessee to him there is privity of estate between the lessor and the assignee.[6] The assignee of the whole interest of the lessee, by virtue of his acceptance of the assignment, assumes all of the duties of the lessee, takes subject to all of the liabilities imposed upon him by the lease, and at the same time acquires all of the rights and privileges of the lessee under the lease.

Aside from the total assignment, the lessee may make other types of transfers of his interest. First, the lessee may make a sublease in which he transfers something less than his interest in all or a part of the land. In this situation, since there is no privity of estate between the lessor and the sublessee, the sublessee is not bound by the covenants of the lease.[7] The sub-

[4] Summers: Law of Oil and Gas (1927) Secs. 126-131.

[5] Summers: *op. cit.*, Sec. 183.

[6] Summers: *op. cit.*, pp. 577-578, and cases cited; (1932) 79 A. L. R. 496; Lindow v. Southern Carbon Co., 5 F. Supp. 818 (W. D. La. 1932). (Implied covenant to protect.)

[7] 1 Tiffany: Law of Real Property (2d ed. 1920) Sec. 55b.

lessee is, however, under liabilities that he lose his interest if the conditions of the lease are not performed.[8] Conditions are usually expressed as covenants, with an added power on the part of the lessor to terminate the lease for nonperformance of the covenants.[9] Secondly, a lessee may transfer a part or all of his interest under the lease by partial assignments; that is, he may transfer all of his legal interest in one portion of the land to A, in another portion of the land to B, etc. These partial assignees are bound by the covenants of the lease because they are in privity of estate with the lessor.[10] They are likewise under liabilities that their interest be terminated by breaches of the conditions of the lease.[11]

The second situation is of immediate concern here. Both the lessee and his partial assignee have certain liabilities and certain duties, express and implied, under the lease. More specifically, in the ordinary situation, the lessee holds his interest subject to the liability that it will be terminated if he does not drill a well within a stipulated time or is not producing oil or gas at the end of the term. Assuming that oil or gas has been discovered, the lessee is under implied duties reasonably to develop and protect the premises and market the products. The lessee's partial assignee assumes these duties. Now, must the assignee and the lessee each drill a well on his particular portion of the land in order to avoid liability under the drilling clause, or will one well on any portion of the land suffice? Must the lessee and his partial assignee each develop and protect his particular portion as a unit, or is the land as originally granted the unit for these purposes? Courts faced with these questions have professed to find the answers by relegating the covenants involved into the categories of divisible and non-divisible covenants.

On the other side of the lease transaction, assume that there are several joint lessors, or that the lessors are co-tenants, or that the lessor assigns all his interest in portions of the land. Who can enforce the liabilities under express provisions of the

[8] 1 Tiffany: *op. cit.*, Sec. 87.

[9] See 2 Tiffany: Landlord and Tenant (1910) Sec. 194b.

[10] 1 Tiffany: Law of Real Property (2d ed. 1920) Sec. 56e.

[11] 1 Tiffany: *op. cit.*, Sec. 87; 2 Tiffany: Landlord and Tenant (1910) Sec. 194h; Carnegie Natural Gas Co. v. Philadelphia Co., 158 Pa. 317, 27 Atl. 951 (1893).

lease, or the duties under the implied covenants, of the lessee and his assigns?

The problem, then, is to discover what is meant by divisibility, what covenants, if any, are divisible, and what will make covenants divisible or non-divisible. In so doing it will be advantageous to consider, in the order named, the lessee's liabilities under the drilling and term clauses of the lease, the lessee's duties under the implied covenants, the lessor's rights under such covenants, and the provisions of leases which have been construed to provide for divisibility.

II. LIABILITIES UNDER THE DRILLING AND TERM CLAUSES

It has been pointed out that in the "or" type of lease the lessee covenants in the alternative. In actions to cancel the lease for non-compliance with the drilling clause, the question may be raised as to whether the drilling of a single well by the lessee, his assignee or partial assignee, upon any part of the leased premises is such compliance as will prevent a forfeiture. The courts uniformly hold that the drilling of such a well will save the whole lease. This is true whether the situation be one in which there is a lease of a single tract with partial assignments by the lessee,[12] or one in which the lessor of a single tract assigns his interest in portions of the reversion,[13] or one in which several owners make a joint lease of their individually owned lands.[14]

The lease may, of course, be kept in force by the payment of rentals. Where the lessee has made partial assignments, although each assignee may pay a proportionate part of the rentals, the lease may still be terminated if the rent upon the whole lease is not paid. One partial assignee may prevent a forfeiture of the lease, however, by paying the whole of the rent,[15] and some leases expressly provide that the partial assignee may prevent the termination of the lease as to his portion of the land by paying a proportionate share of the rentals.[16]

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[12] Gypsy Oil Co. v. Cover, 78 Okl. 158, 189 Pac. 540 (1920); Harris v. Michael, 70 W. Va. 356, 73 S. E. 934 (1912).

[13] Keystone Gas Co. v. Allen, 227 Ky. 801, 14 S. W. (2d) 155 (1929); see Wilson v. Purnell, 199 Ky. 218, 250 S. W. 850 (1923).

[14] Ohio Oil Co. v. Fowler, 74 Ind. App. 1, 128 N. E. 626 (1920); Nabors v. Producers' Oil Co., 140 La. 986, 74 So. 527 (1917); see Brewster v. Lanyon Zinc Co., 140 Fed. 801, 808, 72 C. C. A. 213 (1905).

[15] Broyles v. Gilman, 222 S. W. 685 (Tex. Civ. App. 1920).

[16] See part V.

While there is no covenant on the part of the lessee under an "unless" lease to drill, he is under a liability that his interest be terminated if he fails to drill or pay for an extension of time. The question presented, then, in determining whether or not the lessee's interest under such a lease has terminated is similar to that presented in the case of the "or" lease. Similarly, the drilling of a well anywhere within the boundary of the land originally leased will relieve the lessee and his assignee or partial assignee of the liability that the lease be terminated, whether in the particular case the drilling has been done by the lessee, his assignee, or his partial assignee.[17] That the lessor has made an assignment of his interest in a portion of the premises,[18] or that the lease was jointly given by several lessors and covers more than one parcel of land,[19] is immaterial.

An analogous problem may be found in the cases involving termination under the habendum clause. Practically all present-day leases are for a short definite term with the added provision that the lease shall be extended as long thereafter as oil or gas is produced in paying quantities. Regardless of the type of drilling clause which a lease may contain, the lessee is under a liability that his lease be terminated if oil or gas is not being produced in paying quantities at the end of the term. As in the case of the "unless" drilling clause, the lease is extended if oil or gas is being produced in paying quantities from any part of the leased land by the lessee, his assignee, or his partial assignee,[20] even despite the fact that the lease embraces more than one tract[21] and is given by joint lessors.[22]

[17] Pierce Oil Corp. v. Schacht, 75 Okl. 101, 181 Pac. 731 (1919); Dow v. Whorley, 126 Okl. 175, 256 Pac. 56 (1926); Smith v. Gypsy Oil Co., 130 Okl. 135, 265 Pac. 647 (1928); Fisher v. Crescent Oil Co., 178 S. W. 905 (Tex. Civ. App. 1915). *Cf.* Battle v. Adams, 229 S. W. 930 (Tex. Civ. App. 1921).

[18] Walker v. Lane, 233 S. W. 634 (Tex. Civ. App. 1921).

[19] Wilson v. Mitchell, 245 Ky. 55, 53 S. W. (2d) 175 (1932); Harness v. Eastern Oil Co., 49 W. Va. 232, 38 S. E. 662 (1901); see United Public Service Co. v. Eaton, 153 So. 702 (La. App. 1934).

[20] Cowman v. Phillips Petroleum Co., 142 Kan. 762, 51 P. (2d) 988 (1935); Cadillac Oil & Gas Co. v. Harrison, 196 Ky. 290, 244 S. W. 669 (1922); Worrell v. Parsons, 133 Okl. 61, 271 Pac. 155 (1928); Galloway v. Kroeger, 169 Okl. 645, 34 P. (2d) 250 (1934); see Liddo v. W. T. Waggoner Estate, 31 S. W. (2d) 154 (Tex. Civ. App. 1930). Summers: Law of Oil and Gas (1927) Sec. 88 and cases cited in note 47.

[21] Pierce Oil Corp. v. Schacht, 75 Okl. 101, 181 Pac. 731 (1919); see Watchorn v. Roxana Petroleum Corp., 5 F. (2d) 636, 647 (C. C. A. 8th, 1925).

[22] South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 76 S. E. 961

So, for the purpose of determining the liabilities of the lessee and his assignees, the lease is said to be "entire",[23] meaning that the liabilities are not altered by any division which the lessor or lessee may choose to make of their interests.

III. DIVISIBILITY OF THE LESSEE'S DUTIES UNDER IMPLIED COVENANTS

It has been pointed out that there are four covenants generally implied in oil and gas leases. They are implied in order to carry out the doctrine of development and to effectuate the intention of the parties. Non-divisibility or divisibility of the covenants is said to determine whether the duties of the lessee and his assignees relate to the whole or to particular portions of the land leased. Before examining the cases in detail it will be necessary to draw some distinctions in order to clarify the decisions.

First, it is obvious that the parties may stipulate in the original lease that the lessee shall be under a duty to develop the land with particular portions as units.[24] Again, there may be an abandonment of a part of the premises, resulting in a court rendering a decree for cancellation of the interest which does not present a question of divisibility of covenants.[25] A court of equity may in some instances give equitable relief against forfeiture for breach of condition.[26] It may also cancel the lease on grounds of fraud, mistake, or inadequacy of legal remedy even though it does not consider that the implied covenants are conditions.[27] It follows that, in canceling a lease as to a part of the land upon equitable grounds of fraud, mistake, or hard-

(1912); see Garrison v. Hogan, 297 Pac. 87, 90 (Cal. App. 1931); Summers: Law of Oil and Gas (1927) Sec. 88 and cases cited, note 46.

[23] Gypsy Oil Co. v. Cover, 78 Okl. 158, 189 Pac. 540, 543 (1920).

[24] See part V.

[25] See *infra* note 68.

[26] 1 Tiffany: Real Property (2d ed. 1920) Sec. 88.

[27] W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. (2d) 27 (1929); Rendleman v. Bartlett, 21 S. W. (2d) 58 (Tex. Civ. App. 1929); Jennings v. Southern Carbon Co., 73 W. Va. 215, 80 S. E. 368 (1913); Lamp v. Locke, 89 W. Va. 138, 108 S. E. 889 (1921); Adkins v. Huntington Development Co., 113 W. Va. 490, 168 S. E. 366 (1932); Trimble v. Hope Natural Gas Co., 113 W. Va. 839, 169 S. E. 529 (1933); Dillard v. United Fuel Gas Co., 114 W. Va. 684, 173 S. E. 573 (1934).

ship, a court is not necessarily announcing the doctrine that covenants are divisible.[28]

Finally, under the principle, previously state, that an assignee of the lease on a part of the land takes subject to all the conditions of the lease, a court does not hold that the covenants are divisible when it cancels the partial assignee's interest upon a showing that there has been a breach of covenant considering the entire premises as the unit.[29] There are a number of cases where, in a suit against the lessee, the lease on a part of the land has been canceled, or such relief indicated proper, that belong in this class.[30] It is apparent from the language in these opinions that the court might have canceled the entire lease but saved the lessee the undeveloped portion out of equitable considerations.

As might be expected from the fact that the lessee covenants for delay under modern leases, the precise question as to whether, after a test well is drilled upon any part of the land, an assignee of the lease upon another portion of the leased premises is under a duty to test his part of the land seems not to have been directly before the courts. Nor has the question of divisibility of the

[28] See Adkins v. Huntington Development Co., 113 W. Va. 490, 168 S. E. 366 (1932); Dillard v. United Fuel Gas Co., 114 W. Va. 684, 173 S. E. 573 (1934). West Virginia is one of the jurisdictions holding that the only remedy for breach of implied covenants alone is damages, that is, that the covenants are not conditions. See also Swope v. Holmes, 169 La. 17, 124 So. 131 (1929) (allegation of fraud); Summers: Law of Oil and Gas (1927) Secs. 142-143.

Alford v. Dennis, 102 Kan. 403, 170 Pac. 1005 (1918), probably belongs here also.

If a court of equity, however, gives partial cancellation or divides the land for purposes of an alternative decree without requiring the lessor to prove the inadequacy of his legal remedy, one may question whether this is not, in effect, holding that the covenants are conditions and divisible. See Webb v. Croft, 120 Kan. 654, 244 Pac. 1033 (1926).

[29] Drummond v. Alphin, 176 Ark. 1052, 4 S. W. (2d) 942 (1928); Ezzell v. Oil Associates, 180 Ark. 802, 22 S. W. (2d) 1015 (1930); Mistletoe Oil & Gas Co. v. Revelle, 117 Okl. 144, 245 Pac. 620 (1926), explained in Worrell v. Parsons, 133 Okl. 61, 64, 271 Pac. 155, 157 (1928). In W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. (2d) 27 (1929), it did not appear that there had been any development on the land as to which cancellation was not sought.

[30] Stubbs v. Imperial Oil & Gas Products Co., 164 La. 689, 114 So. 595 (1927); Day v. Kansas City Pipe Lines Co., 87 Kan. 617, 125 Pac. 43 (1912); Brown v. Union Oil Co., 114 Kan. 166, 217 Pac. 286 (1923); Coffinberry v. Sun Oil Co., 68 Ohio St. 488, 67 N. E. 1069 (1903); Pelham Petroleum Co. v. North, 78 Okl. 39, 188 Pac. 1060 (1920); Carder v. Blackwell Oil & Gas Co., 83 Okl. 243, 201 Pac. 252 (1921); Donaldson v. Josey Oil Co., 106 Okl. 11, 232 Pac. 821 (1924).

implied covenant to market the products been considered by the courts. In *Sauder* v. *Mid-Continent Petroleum Corp.*,[31] the Supreme Court of the United States did say that there was a breach of a duty to drill a test well upon the undeveloped portion of the land. The case, however, seems to involve merely an erroneous interpretation of the reasonably prudent operator test.[32]

In *Amerada Petroleum Corporation* v. *Sledge*,[33] the Oklahoma court had occasion to consider the question of divisibility of the implied covenant to protect the land, along with the implied covenant to develop after discovery. The lessee there made a partial assignment of 40 acres, and the partial assignee drilled one producing well. Finding a breach of the implied covenants to develop and to protect, the trial court, in an action to cancel the lease, canceled the lease but excepted 20 acres around the producing well. On appeal the partial assignee argued that the lease upon the whole 40 acres should be excepted from cancellation, since there had been no breach of covenant as to that portion of the land. In affirming the decree of cancellation, the court overruled this contention, saying that "the division of the lease or an assignment of a part thereof will not relieve the lessee or his assigns from developing the property according to the express and implied covenants of the lease".

As concerns the duties of the lessee, it should make no difference whether the lessor assigns the reversion in a part of the land or whether he assigns the royalty interest on one portion. In *Galt* v. *Metscher*,[34] the lessor assigned the royalty interest in the south one-half of the tract leased. The lessee drilled a well, intending to drill it on the line so that the owners would share the royalties equally; the well was in fact drilled four feet north of the line. It was held that the assignee of the royalty interest could not require the lessee to drill an off-set well on the south one-half of the land, for "The rights of the lessee in the oil and gas mining lease were fixed before any conveyance of the royalty interest was made".

Since a breach of both the implied covenant to develop and

[31] 292 U. S. 272, 54 Sup. Ct. 671 (1934).
[32] See the opinion in the Circuit Court: Mid-Continent Petroleum Corp. v. Sauder, 67 F. (2d) 9 (C. C. A. 10th, 1933).
[33] 151 Okl. 160, 163, 3 P. (2d) 167, 170 (1931).
[34] 103 Okl. 271, 272, 229 Pac. 522, 523 (1923).

the implied covenant to protect was alleged in *Amerada Petroleum Corporation* v. *Sledge*,[35] that case stands for the proposition that the implied covenant to develop is indivisible.[36] Likewise, where two tracts were leased by one instrument and seventeen wells were drilled on one of the tracts, it was held that the implied covenant to develop was indivisible, that the development was sufficient upon the lease as a whole, and cancellation as to one tract at the suit of the lessor was refused.[37]

Where the lessor sells a part of the reversion, the assignee of the lessor may attempt to secure cancellation of the lease in so far as it affects his land. In this situation it has been held that the lessee is under no implied obligation to develop each particular tract of land.[38] The lessee's duty is to develop the original tract as an entirety.

Again, where the lessee assigns his interest in a part of the premises the lessor may seek to cancel the lease as to either the portion retained or the portion assigned. In this situation some confusion has arisen which necessitates an extended examination of the cases. *Hughes* v. *Cordell*[39] and *Duke* v. *Stewart*[40] held

[35] 151 Okl. 160, 3 P. (2d) 167 (1931).

[36] *Accord*: Worrell v. Parsons, 133 Okl. 61, 271 Pac. 155 (1928) (development by the partial assignee).

[37] Ardis v. Texas Co., 155 La. 790, 99 So. 600 (1924).

[38] McCallister v. Texas Co., 223 S. W. 859 (Tex. Civ. App. 1920); Texas Co. v. Curry, 229 S. W. 643 (Tex. Civ. App. 1921); Stephenson v. Glass, 276 S. W. 1110 (Tex. Civ. App. 1925).

"And we think it proper to add that the lease executed by John Black was to the four tracts, aggregating 800 acres as an entirety, and plaintiffs, having purchased two of the tracts, could not divide that contract into separate parts and enforce a forfeiture of the lease in part only while it was valid as to the remainder. John Black, their vendor, had no such rights, and the plaintiffs acquired no better right than he possessed." McCallister v. Texas Co., *supra*, at 863.

"In other words, the purchaser of the subdivision took the same estate that his vendor had; no more, no less. . . . He could not require the lessee to drill any more or other wells, or upon other locations or particular locations, not required of the lessee while the whole acreage embraced in the lease was intact. . . . The lessee's obligations were not affected in any way whatever by the sale of a part of the whole acreage covered by the lease." Stephenson v. Glass, *supra*, at 1113.

[39] 174 Ark. 757, 296 S. W. 735 (1927).

[40] 230 S. W. 485 (Tex. Civ. App. 1921), where the court said: "Appellants leased their land as an entirety to John S. Stewart. He assumed an obligation to develop this land or have it developed, according to the terms of this lease. He did not agree to develop or have developed any particular acre or any particular tract. . . . As the sublessees held under him, he was privity to their development, and the work done by Simms and Straiti accrued to his benefit and to the benefit of his assigns as to the balance of the tract."

that the implied covenant to develop was indivisible and that the lessor could not forfeit the interest retained by the lessee without showing a breach of covenant as applied to the whole of the leased premises.[41]

In *Standard Oil Co. of Louisiana* v. *Giller*,[42] however, the court concluded that the covenants were divisible, citing Texas cases and Thuss, *Texas Oil and Gas*,[43] as authority for the proposition that the Texas court holds that each assignee of the lessee must properly develop his segregated portion. The suit there was to cancel the portion of the lease assigned by the lessee. The case of *Cox* v. *Sinclair Gulf Oil Company*,[44] cited by the court, does contain some language indicating that the court thought the covenants divisible. The question before the court, however, was one of misjoinder of parties defendant in a suit to cancel the lease for abandonment, and the statements of the court are quite conflicting.[45] The case again reached the same

[41] Where the lessor did prove a breach of the covenant affecting the entire premises, he was given a decree of cancellation: Ezzell v. Oil Associates, 180 Ark. 802, 22 S. W. (2d) 1015 (1930); Drummond v. Alphin, 176 Ark. 1052, 1058, 4 S. W. (2d) 942, 944 (1928). In the latter case the court said:

"It was not the intention of this court, in the case of Hughes v. Cordell, supra, to extend the doctrine of the cases there cited and followed, and it is now held that, while the development of a portion of a lease inures to the benefit of the original lessee, that fact does not relieve the original lessee from the duty of proceeding with the development of the tract as an entirety in the manner contemplated by the express and implied covenants of the lease."

[42] 183 Ark. 776, 779, 38 S. W. (2d) 766, 767 (1931), where the court said:

"It appears from the record that several assignees of the various parts of the 440-acre tract had drilled twenty-six wells, twenty-five of which had produced, at the time of the trial, $180,000 in royalties for appellee. We do not understand that appellant can justify his failure to carry out the implied covenants in the lease on account of the large recoveries of oil from certain parts of the land assigned to others. This identical question has been decided against appellant's contention by the Court of Appeals of Texas in the following cases: Cox v. Sinclair Gulf Oil Co. (Tex. Civ. App.) 265 S. W. 196; Sinclair Oil & Gas Co. v. Bryan (Tex. Civ. App.) 291 S. W. 692; Fisher v. Crescent Oil Co. (Tex. Civ. App.) 178 S. W. 905."

[43] (1929) p. 188.

[44] 265 S. W. 196, 201 (Tex. Civ. App. 1924). The court held that there was a statement of a cause of action against all defendants for abandonment and reversed the decision of the lower court.

[45] "Appellees as assignees of Bailey secured just the same interest that he had in the lease at the time of the assignment. They also became bound to perform the express and implied covenants of the lease which affected it as a whole, and, at least, became bound to develop their respective segregated portions with diligence after the dis-

court and the later opinion indicates that the language respecting the question of divisibility in the first opinion was both erroneous and *dicta.*[46]

In *Sinclair Oil & Gas Co.* v. *Bryan,*[47] also cited as authority for the proposition that covenants are divisible, there was one lease of four tracts belonging to different owners. Although the court affirmed an award of damages for failure of the lessee to protect one of the tracts of land, the court did not hold that the covenant was divisible. The court held that the lease itself required each tract to be treated as a unit for purposes of development. *Fisher* v. *Crescent Oil Co.,*[48] the other case cited in *Standard Oil Co. of Louisiana* v. *Giller,* held that the drilling of a producing well by the lessee's partial assignee on the land

covery well was drilled." If the first part of this statement is true, the last part cannot be true. Probably the court was only intending to show that the assignees were not free of implied duties.

[46] 300 S. W. 116, 118 (Tex. Civ. App. 1927). The lower court had again found that the petition did not state a cause of action against all defendants, concluding that, because Bailey had the right to segregate and assign distinct portions, each assignee had the right to develop the portion assigned to him without reference to whether the lease as a whole had been developed in accordance with the express and implied covenants. This court again reversed and remanded with instructions to try the case on the merits, saying:

"Adjudication of the issue of Bailey's right to assign segregated portions of the lease was not involved under appellants' pleadings, and is not an issue either in law or in fact in the case; but the case pleaded is that of failure to develop the lease as a whole by all of the defendants, appellees here, and abandonment of the lease as a whole by all of them. If any of the appellees have developed any portion of the lease to such an extent that it constitutes development of the lease as a whole, then such may be pleaded as a defense to this suit, but such issue was not raised by any pleading by any appellee; and for this reason we held in our original opinion that the trial court's findings of fact and conclusions of law wholly ignore and do not adjudicate the cause of action alleged by appellants."

[47] 291 S. W. 692 (Tex. Civ. App. 1927).

[48] 178 S. W. 905, 906-907 (Tex. Civ. App. 1915), where the court said:

"If it shall be determined under the terms of the contract that discovering oil on the land leased was a compliance with the condition of the contract, then we believe it was sufficient, if either of the assignees discovered oil, to vest the right in the entire lease for the 25 years specified. It is not stipulated in the contract that oil should be discovered under any particular portion of the land or discovered in more places than one, but if oil was discovered the conveyance 'shall be in full force and effect for twenty-five years'. The conveyance so continued was not to any particular portion of the land . . . We therefore hold that the discovery of oil by one of the assignees inured to the benefit of both and to both parcels of land, in so far as it had the effect of vesting the right."

allotted him satisfied the drilling clause and saved the entire lease.

None of the cases cited by the court in *Standard Oil Co. of Louisiana* v. *Giller* as holding the covenants of a lease divisible are authority for that proposition. As construed by the court, the statement in Thuss[49] represents a misinterpretation of the Texas cases. Yet, there was good Arkansas authority to the effect that the covenants implied in oil and gas leases are indivisible.[50]

In *Cosden Oil Co.* v. *Scarborough*,[51] the Federal Court reversed an alternative decree canceling a lease as to 400 acres upon the ground that there was no breach of the implied covenant reasonably to develop, considering the 400 acres as the unit. The original tract leased contained 10,254 acres. Citing *Standard Oil Co. of Louisiana* v. *Giller, supra,* and the cases there cited, the court indicated that the covenants were divisible.[52] Since the court purported to be applying Texas law, it would seem that no forfeiture could be decreed for breach of an implied covenant.[53] At most the case rests upon the decision in *Standard Oil Co. of Louisiana* v. *Giller,* which was based upon an erroneous interpretation of the Texas cases.

The court, however, cites one other case, *W. T. Waggoner Estate* v. *Sigler Oil Co.*[54] In that case there was a lease of 85,000 acres. The plaintiff sought to cancel the lease as to 3,000 acres

[49] Texas Oil and Gas (1929) p. 188.

[50] Hughes v. Cordell, 174 Ark. 757, 296 S. W. 735 (1927). See Drummond v. Alphin, 176 Ark. 1052, 1058, 4 S. W. (2d) 942, 944 (1928), quoted *supra,* note 41.

[51] 55 F. (2d) 634, 638 (C. C. A. 5th, 1932).

[52] The court admitted that the drilling of a well on any part of the land would satisfy the drilling covenant and vest the lessee's interest, but said: "On the other hand, as to the implied covenant, which running with the land is imposed on each taker of any part of the lease as a consideration for his holding it, we think it is quite generally held that the contract is severable, imposing upon the holder of each segregated part the obligation to develop that part without reference to the others."

[53] Grubb v. McAfee, 109 Tex. 527, 212 S. W. 464 (1919); Pierce v. Texas Pacific Coal & Oil Co., 225 S. W. 193 (Tex. Civ. App. 1920); Texas Co. v. Curry, 229 S. W. 643 (Tex. Civ. App. 1921); Marnett Oil & Gas Co. v. Munsey, 232 S. W. 867 (Tex. Civ. App. 1921); Stitz v. National Producing & Refining Co., 247 S. W. 657 (Tex. Civ. App. 1923); Texas Co. v. Davis, 113 Tex. 321, 254 S. W. 304 (1923); W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. (2d) 27, 28 (1929).

[54] 118 Tex. 509, 515, 19 S. W. (2d) 27, 28 (1929).

which had been assigned to the defendant. The Commission of Appeals canceled the lease as to all except 10 acres upon which two producing wells had been drilled. In reversing the decree the Supreme Court pointed out that, in absence of proof of abandonment or inadequacy of legal remedy, the lessor's only remedy for breach of an implied covenant is an action for damages. Incidentally, the court said that there was an implied duty that the defendant develop his 3,000 acres. Nevertheless, it cannot be said that the court held the covenants divisible. For, first, it does not appear that there was any development on the remainder of the 85,000 acres; so the court may have been talking about the defendant's duty under the covenants, considering them as entire. In the second place, even if the court did hold that there was a duty to develop the 3,000 acres as an independent unit, there was a provision in the lease which has been construed as making leases divisible.[55]

There was, of course, ample Texas authority that the express and implied covenants of an oil and gas lease are indivisible.[56] And, aside from the holdings in *Standard Oil Co.* v. *Giller* and *Cosden Oil Co.* v. *Scarborough, supra,* both based upon a misinterpretation of the existing decisions, it seems that no court has directly held the implied covenants of an oil and gas lease divisible, although there are some *dicta* to that effect.

The covenants, express[57] and implied, in the ordinary lease, then, are non-divisible. It should be immaterial whether the relief sought is an action for damages, cancellation upon the theory of implied forfeiture, in jurisdictions where such is per-

[55] The court said: "The estate of either party under the contract was declared to be assignable in whole or in part and the assignee of the lessee as to only a part of the leased lands was to continue payments of no more than his proportionate part of the rentals".

The lease also provided that "each producing well shall hold 2,000 acres in a square, said well to be the center and said 2,000 acres shall be released as to further annual rental". See the second appeal of this case: Liddo Oil Co. v. W. T. Waggoner Estate, 31 S. W. (2d) 154 (Tex. Civ. App. 1930).

[56] Fisher v. Crescent Oil Co., 178 S. W. 905 (Tex. Civ. App. 1915); McCallister v. Texas Co., 223 S. W. 859 (Tex. Civ. App. 1920); Duke v. Stewart, 230 S. W. 485 (Tex. Civ. App. 1921); Walker v. Lane, 233 S. W. 634 (Tex. Civ. App. 1921); Texas Co. v. Curry, 229 S. W. 643 (Tex. Civ. App. 1921); Stephenson v. Glass, 276 S. W. 1110 (Tex. Civ. App. 1925). See Cox v. Sinclair Gulf Oil Co., 300 S. W. 116, 118 (Tex. Civ. App. 1927), quoted *supra* note 46.

[57] See Watchorn v. Roxana Petroleum Corp., 5 F. (2d) 636 (C. C. A. 8th, 1925).

mitted, or cancellation upon the theory of inadequacy of legal remedy. The plaintiff must first show a breach of covenant. He can do so only by showing, "as a matter of fact",[58] that the lessee and his assigns have failed to comply with such covenants considering them as entire. While this conclusion is correct, the cases on partial abandonment are somewhat troublesome.

It is well-settled that a lease may be terminated by abandonment where the lessee's acts establish as a fact his intention to relinquish his interest.[59] It has also been held that there may be an abandonment of a part of the premises.[60] The lessee could surrender a part of the leased land, and there is no theoretical difficulty in a partial abandonment. A breach of an implied covenant, however, is practically always relied upon to establish the intention to abandon.[61] It would seem, then, that there cannot be an abandonment of a part of the premises if there is no breach of covenant, considering the whole lease as a unit, without violating the rule that covenants are indivisible.[62]

The question was before the Texas Court in *Leonard* v. *Prater*,[63] and the court held that there was a partial abandonment. While an appeal of that case was pending, doubts were expressed in *Scott* v. *Jackson*[64] as to the validity of partial abandonment where there was no breach of covenant. The court said, "It is difficult for us to see how one in possession of a tract of land under one title may abandon his title to a portion of his estate when that estate is, as here, indivisible, but that question is now pending in the Supreme Court in the case of *Leonard* v.

[58] "It cannot be said as a matter of law that, under the terms of this contract, there is not due and proper development for gas unless a well is drilled on each parcel of land included therein. What is due and proper development of the entire tract is a question of fact." Watchorn v. Roxana Petroleum Corp., 5 F. (2d) 636, 650 (C. C. A. 8th, 1925).

[59] Summers: Law of Oil and Gas (1927) Secs. 162–166.

[60] American Wholesale Corp. v. F. & S. Oil & Gas Co., 242 Ky. 356, 46 S. W. (2d) 498 (1932); Highfield Co. v. Kirk, 248 Pa. 19, 93 Atl. 815 (1915).

[61] For example, see Hughes v. Cordell, 174 Ark. 757, 296 S. W. 735 (1927); Highfield Co. v. Kirk, 248 Pa. 19, 93 Atl. 815 (1915); Grubb v. McAfee, 109 Tex. 527, 212 S. W. 467 (1919); Chapman v. Ellis, 254 S. W. 615 (Tex. Civ. App. 1923).

[62] American Wholesale Corp. v. F. & S. Oil Co., 242 Ky. 356, 46 S. W. (2d) 498 (1932). There the court thought that the implied covenants were divisible.

[63] 18 S. W. (2d) 681 (Tex. Civ. App. 1929).

[64] 37 S. W. (2d) 1068, 1070 (Tex. Civ. App. 1931).

Prather, supra, and the law will probably be declared before this case can be retried".

The second case of *Leonard* v. *Prater*[65] reversed the decision in the previous case, and it was indicated that there could be no intention to abandon while the lessee is in possession and developing a part of the land.[66] Likewise, in Arkansas, it has been properly held that there can be no abandonment of a part of the land when there is no breach of covenant,[67] although the lessor may secure cancellation of the lease as to the undeveloped portion if there is a breach of covenant as to the whole lease.[68]

By way of summary, consider the situation where A leases to B 80 acres of land for oil and gas purposes. Suppose that B drills six producing wells upon 60 acres and there are no wells upon the adjoining land. A sues to cancel the lease upon the 20 acres. B comes into court and proves that the development is sufficient upon the whole lease, that no reasonably prudent operator would drill any more wells either on the 60 acres or upon the undeveloped 20 acres. Upon this state of facts, there is no breach of any covenant. It would seem obvious that A should have no remedy whatsoever.[69] He could not get damages and he ought not be granted cancellation of a part of the lease upon any theory. The same conclusion should be reached if B had assigned the lease on the 60 acres to C prior to any drilling, and C had developed as set out above, and A had sued B to secure cancellation of the lease as to the 20 acres he retained.[70]

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[65] 36 S. W. (2d) 216 (Tex. Com. App. 1931).

[66] See also Liddo Oil Co. v. W. T. Waggoner Estate, 31 S. W. (2d) 154, 159 (Tex. Civ. App. 1930).

[67] Hughes v. Cordell, 174 Ark. 757, 296 S. W. 735 (1927).

[68] Drummond v. Alphin, 176 Ark. 1052, 4 S. W. (2d) 942 (1928); Ezzell v. Oil Associates, 180 Ark. 802, 22 S. W. (2d) 1015 (1930).

[69] The result in Sauder v. Mid-Continent Petroleum Corporation, 292 U. S. 272, 54 Sup. Ct. 671 (1934), American Wholesale Corp v. F. & S. Oil Co., 242 Ky. 356, 46 S. W. (2d) 498 (1932), and Highfield Co. v. Kirk, 248 Pa. 19, 93 Atl. 815 (1915) must be condemned on this ground.

[70] This was the situation in Worrell v. Parsons, 133 Okl. 61, 64, 271 Pac. 155, 157 (1928). In refusing the lessor any relief, the court said: "In the instant case the trial court found, and we think the evidence abundantly supports his finding, that the property of plaintiff embraced in the original lease had been diligently operated and developed, and that, even though all operations had been confined to the 60-acre tract, under all the facts and circumstances surrounding this case, all the rights of the plaintiff had been fully protected. Considerable testimony was produced on this point, and we think it was clearly established that under all the facts and circumstances in this case no

Assume, upon the other hand, a similar lease, but B or his assignee has drilled only one well upon the 60 acres, and there are a number of paying wells on lands adjoining on each side of the leased tract. B comes into court and says that, while it may be that a reasonably prudent operator would further develop the premises, he has complied with the drilling clauses of the lease and that is all he intends to do. There is a breach of covenant, and A certainly ought to have a remedy in damages. If he so desires, he ought to be able to secure cancellation of the lease upon the theory of implied forfeiture, in jurisdictions that permit such, upon the theory of inadequacy of legal remedy, or upon the theory of abandonment. Any such relief given will not offend the rule that the covenants are non-divisible, and that neither the lessor nor the lessee may increase the burdens or benefits of himself or the other by any divisions he may make of his interest.

IV. DIVISIBILITY OF THE LESSOR'S RIGHTS

Upon the lessor's side of a lease, the question arises as to whom run the benefits of the covenants. If cancellation is sought for breach of covenant, the covenants are being treated as conditions. At common law it was held that where the reversion in a part of the land was assigned the conditions of a lease upon such land were not thereby apportioned, but destroyed.[71] The rule has been severely criticized, and it has been said that in the United States it has been recognized only to be distinguished.[72] It remained the law in England, however, until changed by statute.[73]

In *Brewster* v. *Lanyon Zinc Co.*,[74] the court said, "No reference is made by learned counsel for the appellee to the rule that, where the reversion in part of the demised lands is assigned,

duty rested upon defendants to develop this 20 acres, either under the terms of the lease itself or the law applicable thereto."

[71] 1 Tiffany: Law of Real Property (2d ed. 1920) Sec. 86c; 1 Taylor's Landlord and Tenant (8th ed. 1887) Sec. 296; 2 Cruise on Real Property (1885) Tit. XIII, c. II, Sec. 58.

The rule was not applied to an apportionment by act of law: 1 Tiffany: Law of Real Property (2d ed. 1920) Sec. 86c; Cruger v. McLaury, 41 N. Y. 219, 223 (1869). *Cf.* Cochran v. Gulf Refining Co. of Louisiana, 139 La. 1010, 72 So. 718 (1916).

[72] Willard: *Dumpor's Case* (1873) 7 Am. L. Rev. 616.

[73] See Piggott v. Middlesex County Council [1909] 1 Ch. 134.

[74] 140 Fed. 801, 808 (C. C. A. 8th, 1905).

neither the lessor nor the assignee can take advantage of a condition broken, because the condition, being entire, is not apportioned by the assignment, but destroyed. . . . It is therefore assumed that the rule is not in force in the state of Kansas." Whatever the reason may be, it has never been contended that the conditions of a lease are destroyed by an assignment by the lessor of his interest in a portion of the land.

Some jurisdictions, however, require that tenants in common join in giving notice of forfeiture,[75] where notice is necessary, and in suing for cancellation of the lease.[76] There is a conflict in the cases, however, as to whether the lessor may sue the lessee without joining persons to whom he has assigned an undivided share in the royalty interest.[77] In support of the rule requiring joinder of tenants in common it is argued that those co-tenants who secure a decree canceling the lease in so far as it affects them may then claim an equal interest in the oil and gas recovered by the lessee as non-joining co-tenants. The rule, however, has been criticized,[78] and it is difficult to see why the courts should be so concerned in protecting a lessee who has breached the conditions of his lease.

Where the lessor has assigned his interest in part of the land, it would seem reasonable, if there has been a breach of the covenants considering the lease as entire, to allow either the lessor or a partial assignee of the lessor the benefit of the covenant.[79] Since the lessee has been guilty of a breach, any one whose interest is affected should have a remedy.[80] In some cases

[75] Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 Pac. 369 (1917).

[76] North Cent. Texas Oil Co. v. Gulf Refining Co. of Louisiana, 159 La. 403, 105 So. 411 (1925); Castile v. Texas Co., 170 La. 887, 129 So. 518 (1930); Howard v. Manning, 79 Okl. 165, 192 Pac. 358 (1920); Hawkins v. Klein, 124 Okl. 161, 255 Pac. 570 (1926); Utilities Production Co. v. Riddle, 161 Okl. 99, 16 P. (2d) 1092 (1932); Vaughn v. Littlefield, 4 S. W. (2d) 153 (Tex. Civ. App. 1928).

[77] That it is unnecessary to join the assignee of a portion of the royalty interest: Bayside Land Co. v. Dabney, 90 Cal. App. 122, 265 Pac. 564 (1928); Thiessen v. Weber, 128 Kan. 556, 278 Pac. 770 (1929); *contra*: Union Gas & Oil Co. v. Gillem, 212 Ky. 293, 279 S. W. 626 (1925); Bishop v. Sanford, 35 S. W. (2d) 800 (Tex. Civ. App. 1931).

[78] See the concurring opinion in Gypsy Oil Co. v. Champlin, 163 Okl. 226, 22 P. (2d) 102, 104 (1933).

[79] *Cf.* Metzler & Co. of California v. Stevenson, 217 Cal. 236, 18 P. (2d) 330 (1933).

[80] See Hitt v. Henderson, 112 Okl. 194, 240 Pac. 745 (1925), where an assignee of the reversion in a part of the land was allowed to

partial assignees have been allowed to sue without joining the lessor and without the question of joinder being raised.[81] Yet, since these suits to enforce the lessee's covenants are usually brought in equity, it is probable that the lessor and his partial assignee are both necessary parties, but it would seem that the non-joining party could be made a party defendant, as has been done where he fraudulently refused to join.[82]

V. EXPRESS PROVISIONS MAKING COVENANTS DIVISIBLE

While the lessee under the ordinary oil and gas lease is under a duty to develop the leased land as a unit, the parties may stipulate that he shall develop separate portions as units. If such is the intention, then it ought to be given effect, and the implied covenants should attach to the individual tracts. The question that arises is what language will be sufficient to show such an intention.

In the situation where the lessor leases a single tract of land, the lease upon a part of which is later conveyed by the lessee, the Louisiana Court has held that a provision which permits partial assignments and allows the partial assignee to extend the lease as to his portion by paying a proportionate part of the delay rentals makes the covenants divisible upon assignment.[83] Where the lessee retains an overriding royalty, however, the court has construed the transaction as a sublease, and held that the covenants remain indivisible.[84] Yet, the general rule is

maintain a suit to cancel the lease, in so far as it affected his portion, for abandonment, without joining the other owners.

[81] See McCallister v. Texas Co., 223 S. W. 859 (Tex. Civ. App. 1920); Texas Co. v. Curry, 229 S. W. 643 (Tex. Civ. App. 1921); Stephenson v. Glass, 276 S. W. 1110 (Tex. Civ. App. 1925).

[82] Bayside Land Co. v. Dabney, 90 Cal. App. 126, 265 Pac. 566 (1928).

[83] The provision which the court said made the lease divisible in Swope v. Holmes, 169 La. 17, 124 So. 131 (1929), was as follows: "It is hereby agreed in the event this lease shall be assigned as to part or as to parts of the above described lands, and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due for him to them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which said lessee or assignee thereof shall make due payment of said rental."

Similar: Roberson v. Pioneer Gas Co., 173 La. 314, 137 So. 46 (1931); Harrell v. United Carbon Co., 52 F. (2d) 790 (C. C. A. 5th, 1931). Similar in effect: Smith v. Sun Oil Co., 165 La. 907, 116 So. 379 (1928).

[84] Smith v. Sun Oil Co., 165 La. 907, 116 So. 379 (1928). *Cf.* Johnson v. Moody, 168 La. 799, 123 So. 330 (1929).

that a transfer for the entire term is an assignment, not a sublease, even though the transferor reserves rent, etc.[85]

This view is questionable. For the lessee could assign without an express provision therefor; and rents are apportionable without an express provision.[86] The only thing this provision adds is that the partial assignee may extend the lease as to his portion of the land, even though it may terminate as to the remaining portions. Under a lease containing a similar provision, it was held in *Young* v. *Jones*[87] that a lessee who reacquired the lease upon the whole of the land, after making a partial assignment, could not save a portion of the premises by making the extension payments only upon it. The inference is that the lease is non-divisible except in the actual situation provided for by the provision.[88]

This latter view was sustained in *Smith* v. *Gypsy Oil Co.*,[89] where the court said: "From the language of the lease contract it is clear that it was intended that that part of the contract hereinabove quoted was intended to provide for the payment of rentals and royalties, in case of assignment of a portion of the lease, and not intended to make provision for development of assigned portions of the premises in a different method than that provided in the lease contract. In the absence of such specific provision in the contract this court has repeatedly held that the development of one portion of the premises covered by the lease will keep in full force and effect the lease covering the other portions."

If a lessor executes separate leases, covering different tracts, though they are all given to the same lessee and executed on the same day, it would seem reasonable to infer that it was intended that each tract should be treated separately for purposes of development.[90] A similar conclusion would seem proper where

[85] 1 Tiffany: Law of Real Property (2d ed. 1920) Sec. 55.

[86] Stevenson v. Lombard, 2 East 575 (1802).

[87] 222 S. W. 691 (Tex. Civ. App. 1920).

[88] Similarly held where the lessee did not make a bona fide assignment: Flanigan v. Stern, 204 Ky. 814, 265 S. W. 324 (1924).

That the conditions of a lease may be indivisible although the covenants to pay rent are divisible, see Koppers Co. v. Asher Coal Min. Co., 226 Ky. 492, 11 S. W. (2d) 114, 116 (1928).

[89] 130 Okl. 135, 136, 265 Pac. 647, 648 (1928). It was held that a well commenced by the lessee's partial assignee within the term saved the whole lease.

[90] Newell v. McMillan, 139 Kan. 94, 30 P. (2d) 126 (1934).

a joint lease provides that the lessee must drill on some part of the land owned by each lessor.[91]

It is believed that the better rule is expressed by those cases which hold that the lease is ordinarily indivisible and that any provision providing for divisibility should be limited to the actual situation provided for by such provision. If the parties intend that separate portions of the entire land covered by the lease should be developed as units, the lease should expressly so state.[92]

CONCLUSION

Despite the statements to the contrary in *Standard Oil Co.* v. *Giller*,[93] and *Cosden Oil Co.* v. *Scarborough*,[94] under the ordinary oil and gas lease, the lessee's duties under the implied covenants,[95] as well as his liabilities under the drilling and term clauses,[96] are indivisible. The lessee's duties of development relate to the whole of the land leased, and not to separate units. Neither the lessor nor the lessee, merely by dividing his interest, can in any way change these duties into duties to develop particular portions of the demised premises as individual units.

"He could not require the lessee to drill any more or other wells, or upon other locations or particular locations, not required of the lessee while the whole acreage embraced in the lease was intact. . . . The lessee's obligations were not affected in any way whatever by the sale of a part of the whole acreage covered by the lease."[97]

Even were there no authority to support this contention, a court confronted with the problem should reach the same conclusion. Certainly no court would hold that each person taking an assignment of a part of the lease is under a duty to drill wells

[91] Odward v. Foster, 5 S. W. (2d) 240 (Tex. Civ. App. 1928). *Cf.* Sinclair Oil & Gas Co. v. Bryan, 291 S. W. 692 (Tex. Civ. App. 1927); Read v. Gibson & Johnson, 12 S. W. (2d) 620 (Tex. Civ. App. 1928); Gibson & Johnson v. Ward, 35 S. W. (2d) 824 (Tex. Civ. App. 1931); Gibson & Johnson v. Hill, 34 S. W. (2d) 346 (Tex. Civ. App. 1931). For a similar result where one lessor leased several tracts, see Jackson v. Kent, 106 W. Va. 37, 145 S. E. 572 (1928).

[92] This inference has been drawn from a drilling clause which provides that delay rental is liquidated by the drilling of a well only upon the particular 40 acres or quarter section of land upon which the well is drilled: Wescott v. Bailey, 109 Kan. 163, 198 Pac. 189 (1921); Producers Oil Co. v. Snyder, 190 S. W. 514 (Tex. Civ. App. 1916).

[93] 183 Ark. 776, 38 S. W. (2d) 766 (1931).

[94] 55 F. (2d) 634 (C. C. A. 5th, 1932).

[95] See cases cited *supra* notes 33-34, 36-41.

[96] See cases cited *supra* notes 12-14, 17-22.

[97] Stephenson v. Glass, 276 S. W. 1110, 1113 (Tex. Civ. App. 1925).

to offset those drilled by other partial assignees deriving their interests from the same source, that is, that the implied covenant to protect the premises is divisible. Yet, carried to its logical conclusion, a rule that the covenants are divisible would lead to such a result. For example, consider the situation diagramed in Figure 1. A leases a tract of land, containing 180 acres, to B for oil and gas purposes. B makes partial assignments of his interest to C, D, and E, in the manner indicated by the solid lines. A sells the reversion in three portions to F, G, and H, in the manner indicated by the dotted lines. Suppose that D drills four wells (w) on tract 5, as indicated. If the covenants are considered divisible, the logical result would be that offset wells must be drilled on each of the other eight tracts, and each tract of 20 acres must be developed as a unit. It is believed that no court would go so far.[98]

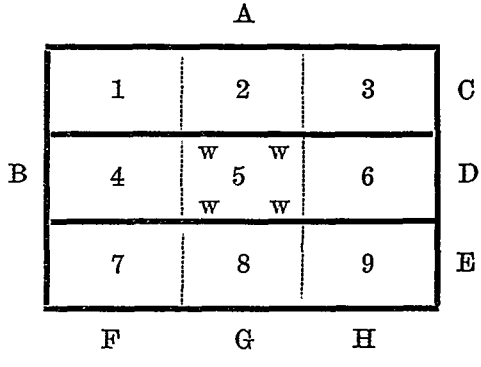

Figure 1.

The rule of indivisibility of covenants is further strengthened by a reference to policy. In the early history of the oil and gas industry the courts, upon the basis of physical and economic facts with which they were coversant, construed oil and gas leases so as to promote development and prevent delay. By implication, they created many duties on the part of the lessee where the lease did not, or from the nature of the subject matter could not, so do; and they set up the reasonable prudent operator test for measuring compliance with such implied duties. In so doing the courts did what they conceived

[98] See Galt v. Metscher, 103 Okl. 271, 229 Pac. 522 (1923), commented upon *supra*, note 34.

to be to the best interests of both parties to the lease and to society generally. Now, new physical and economic facts of oil and gas have been discovered, or have come into existence, which indicate that the means invented by the courts to achieve these purposes no longer attain the desired end.

Briefly, it may be pointed out that gas performs two important functions in the production of oil. Its dissolution with the oil gives the latter the desirable qualities for propulsion through the sand and the pressure of its expansive force acts to drive the oil to the point of lowest pressure in the sand, that is, the well opening.[99] Modern scientific knowledge and methods make it possible to balance these two functions.[100] The maximum amount of oil is recovered under conditions of wide spacing and slow drainage.[101] Over-drilling causes large production, resulting in a low price which encourages waste; it also destroys the balance between the two functions of natural gas so that it is not possible to recover the maximum amount of oil. Under these circumstances, even the application of the doctrine of implied covenants and the reasonably prudent operator test to the lease as a whole may result in waste, contrary to the best interests of the parties and the policy of conservation. In the face of such circumstances, no rule of construction should be adopted which will tend to increase development further. The duties of the lessee, his assignee or partial assignee, should be determined by the lessee's duties under the original lease. In the ordinary lease, the lessee's express duties center about the entire tract leased as a unit. His implied duties should rest upon the same basis. Public interest in conservation and private interests of lessor and lessee in profits would justify such a conclusion in the absence of authority.

It follows that in order for the lessor to have any remedy he must show a breach of covenant upon the entire lease or a liability of similar nature. If there is no such breach, the lessor, his assignee or his partial assignee, should not be able to maintain a suit against the lessee, his assignee, or his partial assignee, upon any theory.[102]

[99] Miller: Functions of Natural Gas in the Production of Oil (1929) p. 40.
[100] Miller: *op. cit.*, p. 47.
[101] Miller: *op. cit.*, p. 52.
[102] Worrell v. Parsons, 133 Okl. 61, 271 Pac. 155 (1928).

If, however, there is a breach of covenant upon the entire lease, anyone affected by the breach and in privity of estate with the lessor, should be allowed to maintain an action. There would seem to be no reason to deny an assignee of the lessor's interest in a part of the land a remedy merely because he is unable to get the other owners to join with him in a suit to enforce the covenants. Yet, some jurisdictions do require that lessors who are tenants in common join in notice of forfeiture and in a suit against the lessee. At most, it would seem sufficient if the lessor, who refuses to join his partial assignee in a suit against the lessee, is made a defendant.

While the lessee's duties under the usual form of lease are indivisible, if the parties have stipulated that his duty shall be to develop the lease in portions, and not as a whole, then that duty must be enforced. It should be plain, however, that such was the intention, and a mere stipulation that the rent shall be apportioned in cases of partial assignments would seem insufficient.[103]

[103] Smith v. Gypsy Oil Co., 130 Okl. 135, 265 Pac. 647 (1928); see Young v. Jones, 222 S. W. 691 (Tex. Civ. App. 1920).

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