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COMMENTS

THE HABENDUM CLAUSE AS A SPECIAL LIMITATION ON OIL AND GAS LEASES IN TEXAS

The modern habendum clause in oil and gas leases generally provides that the lessee's interest is vested for a fixed period, called the primary term, and as long thereafter as oil and gas, or either of them, is produced. This particular language is the outgrowth of an evolutionary process by which other habendum clauses were discarded, either because of certain inherent inadequacies or because of judicial construction which rendered them unsuitable to the needs of the oil and gas industry. This comment is devoted to the habendum clause in the belief that a study of its history and significance in the modern oil and gas lease is essential to a complete understanding of the more complex problems which arise when it is to be construed with the lease transaction as a whole.

It is important to recognize at the outset that the habendum clause becomes an important consideration to the lessee only when his lease is nearing the end of the primary term or has passed beyond the primary term, for the clause establishes the duration of the lease in the first instance, and then provides for its enlargement through the operation of the "thereafter" or "production" clause.

EVOLUTION OF THE MODERN HABENDUM CLAUSE

Although a thorough discussion of the history of the habendum clause in oil and gas leases is outside the scope of the present review, there are significant highlights in its development which must be considered before a basic understanding of the present language can be had.¹ The early oil and gas leases provided long fixed-terms of from fifteen to ninety-nine years. This type of lease, known as the "fixed-term" lease, proved unsatisfactory in that it was often impossible for the lessee who had expended vast sums of money developing his leasehold interest to hold his lease for the duration of production from the premises, and forced upon him two undesirable alternatives. The lessee could either continue production until the end of the term, hoping to recoup his investment, and then abandon his development, or he could negotiate a new lease with the landowner in an effort to preserve his interest. Obviously the

¹ See Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEXAS L. REV. 1 (1928); Veasley, *The Law of Oil and Gas*, 19 MICH. L. REV. 161 (1920); 2 SUMMERS, OIL AND GAS § 281-307 (perm. ed. 1954), for exhaustive research on this subject.

cost of such negotiation would be greatly inflated by the lessee's own previous improvement, and in many cases would be absolutely prohibitive.

This dilemma brought forth a new lease form called the "no term" lease, which provided no definite term but allowed the commencement of a well to be deferred indefinitely by the payment of delay rentals, and further provided that in the event a well was drilled the lease would continue as long as there was production. Unfortunately, "fixed-term" lease forms often were used in drawing "no term" leases. The parties to the transaction would add a clause allowing perpetuation of the lease beyond the fixed-term by the payment of delay rentals. Because the delay rental clause conflicted with the granting clause the lease was rendered ambiguous, and was the source of prolific litigation. The Texas courts, employing the "four corners" doctrine of instrument construction, resolved the ambiguity by giving controlling effect to the delay rental clause and not to the fixed term, and thereby permitted the lessee to maintain his lease beyond the fixed term by the payment of delay rentals.² Although the long fixed-term lease was discarded before oil and gas development progressed in Texas to any considerable extent, the "no term" lease enjoyed a temporary vogue here,³ as well as in other jurisdictions.⁴

The "no term" lease subsequently became unsuitable because the courts concluded either that the lease was unfair to the lessor, and therefore terminable at his will,⁵ or that after a reasonable time the lessor could, upon proper notice, insist upon the commencement of a well. If the lessee refused to comply, the lessor could declare the lease forfeited for breach of a condition not to indefinitely postpone development by the payment of delay rentals.⁶ As a result of this interpretation, the "no term" lease was discontinued in favor of a

² Rosson v. Bennett, 294 S.W. 660 (Tex. Civ. App. 1927). *Contra*, Fagan and Co. v. Burns, 247 Mich. 674, 226 N.W. 653 (1929); Humphreys v. Fletcher, 27 N.M. 639, 204 Pac. 70 (1922); see Carothers v. Leonard, 254 S.W. 779 (Tex. Comm. App. 1923), for specific language used in the lease to give the delay rental clause controlling effect.

³ See, e.g., Texas Co. v. Davis, 113 Tex. 321, 255 S.W. 601 (1923); Rosson v. Bennett, 294 S.W. 660 (Tex. Civ. App. 1927).

⁴ Spaulding v. Porter, 94 Colo. 496, 31 P.2d 711 (1934); Simpson v. Buckner's Adm'r, 247 Ky. 564, 57 S.W.2d 464 (1933); Lloyd's Estate v. Mullen Tractor and Equipment Co., 192 Miss. 62, 4 So.2d 282 (1941); Consolidated Gas Co. v. Rieckhoff, 116 Mont. 1, 151 P.2d 588 (1944); Hicks v. Mid-Kansas Oil and Gas Co., 182 Okla. 61, 76 P.2d 269 (1938).

⁵ National Oil and Pipeline Co. v. Teel, 67 S.W. 545 (Tex. Civ. App. 1902), *aff'd on other grounds*, 95 Tex. 586, 68 S.W. 979 (1902); *accord*, Lanham v. Jones, 84 Colo. 129, 268 Pac. 521 (1928).

⁶ Rosson v. Bennett, 294 S.W. 660 (Tex. Civ. App. 1927); 2 SUMMERS, OIL AND GAS, § 289 and cases cited therein. Apparently *contra*, Lloyd's Estate v. Mullen Tractor and Equipment Co., 192 Miss. 62, 4 So.2d 282 (1941).

short fixed-term lease with a "thereafter" or "production" clause which allowed the lessee to maintain his lease in force by production and to thereby protect his investment beyond the primary term.

Although other variations from the habendum clauses herein-before mentioned have been used from time to time,⁷ the basic concept of a fixed term with a "thereafter" clause has produced a lease which, when considered in its entirety, is generally conceded to best satisfy the needs of the lessor, the lessee, and the oil and gas industry. The modern habendum clause has not escaped criticism completely, however, and sound suggestions for its improvement have been made.⁸

EXTENT OF PRODUCTION WITHIN THE PRIMARY TERM NECESSARY TO EXTEND THE LEASE BEYOND THE PRIMARY TERM

With respect to the habendum clause the lessee is interested in production within the primary term only insofar as it affects the extension of the lease beyond the primary term. Under Texas law, an oil and gas lease conveys a determinable fee, and the "thereafter" or "production" clause operates as a special limitation upon the lessee's estate.⁹ Production, therefore, is a condition precedent to the extension of the lease beyond the fixed term.¹⁰ It remains to be considered what production is necessary within the primary term and thereafter to extend the lease. The initial consideration is the requirement of *paying quantities*.

Where the habendum provides that the lease is to run for a fixed period and as long thereafter as oil or gas is *produced* from the land and does not provide that the production be in *paying quantities*, the Texas courts hold that it is the intention of the parties that *produced* and *produced in paying quantities* are synonymous.¹¹ There

⁷ 2 SUMMERS, OIL AND GAS § 290 and cases cited therein.

⁸ See Walker, *Defects and Ambiguities in Oil and Gas Leases*, 28 TEXAS L. REV. 895, 901 (1950).

⁹ Haby v. Stanolind Oil and Gas Co., 228 F.2d 298 (5th Cir. 1955), 5 OIL AND GAS REP. 1057; Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 360, 254 S.W. 290 (1923); Carothers v. Leonard, 254 S.W. 779 (Tex. Comm. App. 1923).

¹⁰ Watson v. Rochmill, 137 Tex. 565, 155 S.W.2d 783 (1941); Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929); Morrison v. Swaim, 220 S.W.2d 493 (Tex. Civ. App. 1949) *error ref. n.r.e.*

¹¹ Continental Oil Co. v. Barton-Texas Land Trust, 221 F.2d 127 (5th Cir. 1955); Humphrey v. Placid Oil Co., 142 F. Supp. 254 (E.D. Tex. 1956); West v. Continental Oil Co., 91 F. Supp. 509 (S.D. Tex. 1950); Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942); Holchak v. Clark, 284 S.W.2d 399 (Tex. Civ. App. 1955) *error ref.*, 5 OIL AND GAS REP. 592; *accord*, Benedum-Trees Oil Co. v. Davis, 107 F.2d 981 (6th Cir. 1939); Reynolds v. White Plains Oil and Gas Co., 199 Ky. 243, 250 S.W. 975 (1923); Woodruff v. Brady, 181 Okla. 105, 72 P.2d 709 (1937); Berthelote v. Loy Oil Co., 95 Mont. 434, 28 P.2d 187 (1933); 2 SUMMERS, OIL AND GAS § 298. *Contra*, Gillespie v. Ohio Oil Co., 260 Ill. 169, 102 N.E. 1043 (1913); Enfield v. Woods, 198 Ky. 328, 248 S.W. 842 (1923); Hudson v. Lyons, 199 Okla. 348, 186 P.2d 309 (1947). The minority

was, however, early authority to the contrary, and a minority of jurisdictions still hold that *produced* does not mean *produced in paying quantities*.¹² Even under the minority rule, there must be more than a mere showing of oil or gas and the production must be tangible and substantial, although it need not be great.¹³ On the other hand, where production in paying quantities is necessary, there are two definitions of the term which must be distinguished. The definition used with respect to the habendum clause contemplates that in determining whether a well is producing in paying quantities at the end or after the primary term, the cost of drilling the well is excluded. Thus, a well may be a commercial producer if the production pays the lessee a profit after current operating and marketing costs have been deducted although the quantity produced may never repay the total investment and the well may result in a loss to the lessee.¹⁴ The other definition of paying quantities is used in connection with the express or implied covenant to drill offset wells. In order to impose this obligation the lessor must show that a reasonably prudent operator would expect the proposed offset well to yield a reasonable profit to the lessee after the entire cost of the well, including drilling costs, has been deducted.¹⁵

In situations where the continuance or termination of the lease is contingent upon whether oil or gas is being produced in paying quantities, the early cases indicated that the matter was to be left solely to the good faith judgment of the lessee.¹⁶ This holding apparently was predicated upon the thought that the lessee may speculate if he so desires. The more recent cases overrule this theory and hold that the judgment of either party will not be conclusive in determining the matter of paying production.¹⁷

decisions hold that unless "in paying quantities" is used in the lease, only production of either oil or gas in such quantities as to be susceptible of division is necessary. Annot., 91 A.L.R. 900 (1933).

¹² Adams v. Bennett, 282 S.W. 909 (Tex. Civ. App. 1926) *error dism.*

¹³ Enfield v. Woods, 198 Ky. 328, 248 S.W. 842 (1923).

¹⁴ Hanks v. Magnolia Petroleum Co., 24 S.W.2d 5 (Tex. Comm. App. 1930); Stephenson v. Little, 12 S.W.2d 196 (Tex. Comm. App. 1929); Cox v. Miller, 184 S.W.2d 323 (Tex. Civ. App. 1944) *error ref.*; Persky v. First State Bank, 117 S.W.2d 861 (Tex. Civ. App. 1938); Masterson v. Amarillo Oil Co., 253 S.W. 908 (Tex. Civ. App. 1923); Texas Pac. Coal and Oil Co. v. Bruce, 233 S.W. 535 (Tex. Civ. App. 1921); Aycock v. Paraffine Oil Co., 210 S.W. 851 (Tex. Civ. App. 1919); 2 SUMMERS, OIL AND GAS § 306.

¹⁵ Magnolia Petroleum Co. v. Page, 141 S.W.2d 691 (Tex. Civ. App. 1940) *error ref.*, also implying that an express covenant to drill offset wells destroys the "prudent operator" test during the primary term, on the general theory that when an express covenant appears, an implied covenant on the same subject disappears. Aycock v. Paraffine Oil Co., 210 S.W. 851 (Tex. Civ. App. 1919); 2 SUMMERS, OIL AND GAS § 306.

¹⁶ Bouldin v. Gulf Production Co., 5 S.W.2d 1019 (Tex. Civ. App. 1928) *error dism.*; Masterson v. Amarillo Oil Co., 253 S.W. 908 (Tex. Civ. App. 1923); Texas Pac. Coal and Oil Co. v. Bratton, 239 S.W. 688 (Tex. Civ. App. 1921).

¹⁷ Stephenson v. Little, 12 S.W.2d 196 (Tex. Comm. App. 1929); Walker, *The Nature*

There are certain general rules to determine whether a lease has terminated by virtue of the habendum clause. If there is no production at the end of the primary term, the lease has expired by its terms as far as the habendum clause is concerned.¹⁸ If paying production has been obtained during the primary term but such production has ceased before the end of the primary term, and the lessee cannot fall under another clause in the lease, the habendum dictates that the lease has expired.¹⁹ However, a producing well drilled within the primary term which has continuously produced past the primary term will extend the lease, providing the paying quantities test has been met.²⁰ With regard to this last statement there arises a significant problem. Over what period of time is the production to be measured in determining whether production has been in paying quantities? Must there be sufficient production on the last day of the primary term to pay that day's operating and marketing costs? Or should the average of production and operating costs be figured over a six month period? This is no academic matter to the lessee, but is a real and definite problem, especially in view of decisions to the effect that acceptance by the lessor of royalty payments does not estop his subsequent assertion that the lease expired at the end of the primary term.²¹ This problem has not been solved by the courts. It has been suggested that the habendum clause be amended to read substantially as follows:

... so long thereafter as oil, gas or other mineral is produced in any quantity from the land by the lessee, provided, however, that the lessor may, at his option, and after written notice, declare the lease terminated if during a period of six or more consecutive months, oil, gas or other mineral is not produced in paying quantities.²²

Two exceptions have been made to the general rule that the habendum clause requires production at the end of the primary term. The first, which has become well recognized, involves the situation

of the Property Interests Created by an Oil and Gas Lease in Texas, 8 TEXAS L. REV. 483, 514 (1929). Also see *Texas Pac. Coal and Oil Co. v. Barker*, 117 Tex. 418, 6 S.W.2d 1031 (1928), which changes the "good faith" test to the "prudent operator" test with respect to the covenant to drill offset wells. For a collection of cases on this latter subject, see Annot., 60 A.L.R. 950 (1929).

¹⁸ 2 SUMMERS, OIL AND GAS § 298.

¹⁹ *Flato v. Weil*, 4 S.W.2d 992 (Tex. Civ. App. 1928).

²⁰ *Hanks v. Magnolia Petroleum Co.*, 24 S.W.2d 5 (Tex. Comm. App. 1930); 2 SUMMERS, OIL AND GAS § 298; accord, *Peckham v. Dunning*, — App. Div. —, 125 N.Y.S.2d 895 (1953), 3 OIL AND GAS REP. 833; *Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E.2d 338 (1955), 4 OIL AND GAS REP. 998.

²¹ *Gas Ridge, Inc. v. Suburban Agricultural Properties, Inc.* 150 F.2d 363 (5th Cir. 1945); accord, *Woodruff v. Brady*, 181 Okla. 105, 72 P.2d 709 (1937).

²² *Walker, Defects and Ambiguities in Oil and Gas Leases*, 28 TEXAS L. REV. 895, 901 (1950).

where the lessee has drilled a well and discovered gas in potential paying quantities, but has been unable to produce the gas because of the unavailability of a market therefor. The courts have held that the lessee has a reasonable time in which to find a market, even though the time required extends beyond the primary term.²³ This exception would seem to be based, however, upon the premise that a market does exist, either at the well or at some accessible place; and if no market is found to exist or if due diligence is not exercised in reaching an accessible market, the lease will terminate for nonproduction.²⁴

The second exception is that discovery alone is sufficient to extend the primary term, whether oil or gas is involved. It has been predicated upon two theories: first, that "discovery" of oil or gas within the primary term vests the lessee's estate permanently and any subsequent lapsation of the lease would be by operation of a condition subsequent to which equitable rules governing forfeiture are applicable; second, that the "thereafter" clause really means that the lease will endure as long as the premises are diligently operated, provided oil or gas has been discovered within the primary term.

The former of these two theories was first enunciated in the West Virginia case of *Eastern Oil Co. v. Coulehan*²⁵ in an attempt to protect a lessee who had found oil and gas in a certain stratum during the primary term but had not immediately produced any of the minerals. Instead he drilled deeper in an effort to find a sand capable of greater potential production. While so doing, the primary term expired and the lessor argued that the lease had terminated thereby. The court denied recovery by the lessor on equitable principles. The reasoning of the court to the effect that the lessee's in-

²³ *Union Oil Co. v. Ogden*, 278 S.W.2d 246 (Tex. Civ. App. 1955) *error ref. n.r.e.*, 4 OIL AND GAS REP. 1394; *Guleke v. Humble Oil and Ref. Co.*, 126 S.W.2d 38 (Tex. Civ. App. 1939); 2 SUMMERS, OIL AND GAS § 299; *accord*, *Bristol v. Colorado Oil and Gas Corp.*, 225 F.2d 894 (10th Cir. 1955), 5 OIL AND GAS REP. 50; *Christianson v. Champlin Refining Co.*, 169 F.2d 207 (10th Cir. 1948); *Tate v. Stanolind Oil and Gas Co.*, 172 Kan. 351, 240 P.2d 465 (1952), 1 OIL AND GAS REP. 341; *Fey v. A. A. Oil Corp.*, —Mont.—, 285 P.2d 378 (1955); *Strange v. Hicks*, 78 Okla. 1, 188 Pac. 347 (1920). For a similar construction involving a term royalty deed, see *Bain v. Strance*, 256 S.W.2d 208 (Tex. Civ. App. 1953) *error ref. n.r.e.*, 2 OIL AND GAS REP. 566.

²⁴ *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 278, 171 S.W.2d 339 (1943); *Cox v. Miller*, 184 S.W.2d 323 (Tex. Civ. App. 1944) *error ref.*; *Stanolind Oil and Gas Co. v. Barnhill*, 107 S.W.2d 746 (Tex. Civ. App. 1937) *error ref.* A shut-in royalty clause is used in modern leases to hold the lease where a gas well is completed during the primary term but no market is available, or where production ceases during the primary term and the lessee wishes to hold the lease by shut-in royalty payments rather than by the payment of delay rentals under a lease so providing. In some leases the lessee is not given his choice in this latter situation, but must pay one or the other according to the lease provisions.

²⁵ 65 W. Va. 531, 64 S.E. 836 (1909).

terest was inchoate until discovery and thereafter vested subject to a condition subsequent is diametrically opposed to the majority view that the lessee's estate or rights²⁶ are vested upon the execution of the lease and that actual production within the primary term is a condition precedent, to which equitable rules are not applicable, to an extension of the lease beyond the primary term. The reasoning of the *Coulehan* case misled the Oklahoma courts²⁷ as well as some Texas decisions.²⁸ The Texas Supreme Court has never considered the *Coulehan* case, although it recently refused writ of error in the case of *Holcbak v. Clark*²⁹ which expressly repudiated the *Coulehan* case and overruled early Texas decisions in accord with it. In the *Holcbak* case the court ruled that a term royalty interest with a thereafter clause had expired where there had been discovery of oil but no production within its primary term. Although the fact situation of this case did not involve the habendum clause of an oil and gas lease, its reasoning should be applicable. It is hoped that Texas has seen the last of the *Coulehan* decision.

The latter of the two theories in support of the second exception grew out of the case of *South Pa. Oil Co. v. Snodgrass*,³⁰ which allowed extension of a lease under essentially the same fact situation as was involved in the *Coulehan* case. This time the West Virginia court decided that *produced* really means *diligently operated*. The dissenting opinion wisely reflected that "the majority of the Court makes the contract between the parties to be other than that which they must have contemplated when the lease was executed." Since the Texas courts hold *produced* to mean *produced in paying quantities*, the *Snodgrass* case raises no problem.³¹

²⁶ For example, some states classify the lessee's interest as a profit a prendre, which is a non-possessory interest entitling the lessee to remove the minerals. See Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935); Wilson v. Holm, 164 Kan. 229, 188 P.2d 899 (1948); Boatman v. Andre, 44 Wyo. 352, 12 P.2d 370 (1932). Mississippi, on the other hand, follows Texas in holding that the lessee acquires a corporal estate in determinable fee. Koenig v. Colcote, 119 Miss. 435, 25 So.2d 763 (1946).

²⁷ Bristol v. Colorado Oil and Gas Corp., 225 F.2d 894 (10th Cir. 1955), 5 OIL AND GAS REP. 50; Roach v. Junction Oil and Gas Co., 72 Okla. 213, 179 Pac. 934 (1919).

²⁸ Bouldin v. Gulf Production Co., 5 S.W.2d 1019 (Tex. Civ. App. 1928) *error disp.*; Scarborough v. New Domain Oil and Gas Co., 276 S.W. 331 (Tex. Civ. App. 1925) *error disp.*; Texas Pac. Coal and Oil Co. v. Bratton, 239 S.W. 688 (Tex. Civ. App. 1921).

²⁹ 284 S.W.2d 399 (Tex. Civ. App. 1955) *error ref.*, 5 OIL AND GAS REP. 595.

³⁰ 71 W. Va. 438, 76 S.E. 961 (1912).

³¹ The *Coulehan* and *Snodgrass* cases are defended in Kerr, *Maintaining the Lease in Effect Other Than by the Payment of Delay Rentals and Shut-in Royalties*, FIFTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 337-382 (1956). Where the well is completed but no market is available, the well must be capable of producing in paying quantities, and the lessee must exercise due diligence to find a market. Bristol v. Colorado Oil and Gas Corp., 225 F.2d 894 (10th Cir. 1955), 5 OIL AND GAS REP. 50; Nystel v. Thomas, 42 S.W.2d 168 (Tex. Civ. App. 1931). Furthermore, shut-in royalty payments must be made prior to the expiration of the primary term. Freeman v. Mag-

Two further points should be noted with regard to production within the primary term insofar as it affects the habendum clause. Where oil or gas has been discovered but the lessee is prevented from producing within the primary term because of the conduct of the lessor, the courts generally extend the primary term for the length of time the lessor refused to allow entry or otherwise to recognize the rights of the lessee under a valid and subsisting lease.³² Finally, in computing the last day of the primary term, the date of execution of the lease is generally excluded.³³ This fact was assumed without discussion in one Texas case.³⁴

CESSATION OF PRODUCTION AFTER THE PRIMARY TERM

It is well settled that a complete cessation of production after the primary term automatically terminates the lease as far as the habendum clause is concerned,³⁵ and that equitable rules against forfeiture have no application.³⁶ Temporary cessation, however, caused by sudden stoppage of the well or by mechanical breakdown, will not operate as a termination of the lease, and the lessee is given a reasonable time in which to resume production.³⁷

nolia Petroleum Co., 141 Tex. 278, 171 S.W.2d 339 (1943). The draftsman should be careful to provide that such payments may be made not only where production ceases during the primary term, but also where a gas well is completed during the primary term but the gas cannot be marketed before the expiration of the term. Consider *Lamezyk v. Allen*, 8 Ill.2d 547, 134 N.E.2d 753 (1956), 6 OIL AND GAS REP. 290, to the effect that a shut-in royalty provision which defines rights in the event of cessation of production has no application where a well has never produced. A Texas court, however, has refused to follow the literal terms of the shut-in royalty clause in reaching a contrary result, one probably more in accordance with the intention of the parties. *Union Oil Co. v. Ogden*, 278 S.W.2d 246 (Tex. Civ. App. 1955) *error ref. n.r.e.*, 4 OIL AND GAS REP. 1394. For a discussion of this topic, see Walker, *Clauses in Oil and Gas Leases Providing for the Payment of an Annual Sum as Royalty on a Non-Producing Well*, 24 TEXAS L. REV. 478 (1946).

³² *Miller v. Hodges*, 260 S.W. 168 (Tex. Comm. App. 1925); 2 SUMMERS, OIL AND GAS § 301; Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 8 TEXAS L. REV. 483, 517 (1929); *accord*, *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S.E. 836 (1909).

³³ 2 SUMMERS, OIL AND GAS § 304.

³⁴ *Guleke v. Humble Oil and Ref. Co.*, 126 S.W.2d 38 (Tex. Civ. App. 1939).

³⁵ *Wagoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27 (1929); *Francis v. Pritchett*, 278 S.W.2d 288 (Tex. Civ. App. 1955) *error ref.*, 4 OIL AND GAS REP. 1365; *Shell Oil Co. v. Goodroe*, 197 S.W.2d 395 (Tex. Civ. App. 1946) *error ref. n.r.e.*; *Flato v. Weil*, 4 S.W.2d 992 (Tex. Civ. App. 1928); *Live Oak Basin Oil Ass'n v. Reagan*, 289 S.W. 1052 (Tex. Civ. App. 1927); *Stephenson v. Calliham*, 289 S.W. 158 (Tex. Civ. App. 1926). See *Duff v. DuBose*, 27 S.W.2d 122 (Tex. Comm. App. 1930) for a case dealing with termination of a lease after the termination of a pooled area.

³⁶ *Empire Gas and Fuel Co. v. Saunders*, 22 F.2d 733 (5th Cir. 1927); *Flato v. Weil*, 4 S.W.2d 992 (Tex. Civ. App. 1928); *Stephenson v. Calliham*, 289 S.W. 158 (Tex. Civ. App. 1926); *McClellan v. Kishi*, 173 S.W. 502 (Tex. Civ. App. 1915).

³⁷ *Francis v. Pritchett*, 278 S.W.2d 288 (Tex. Civ. App. 1955) *error ref.*, 4 OIL AND GAS REP. 1365; *Giles v. McKanna*, 200 S.W.2d 709 (Tex. Civ. App. 1947) *error ref. n.r.e.*; *Cox v. Miller*, 164 S.W.2d 323 (Tex. Civ. App. 1944) *error ref.*; *accord*, *Reynolds v. McNeill*, 218 Ark. 453, 236 S.W.2d 723 (1951); *Wilson v. Holm*, 164 Kan. 229,

If the lease expressly provides that in the event production ceases after the primary term the lessee shall have a certain time in which to resume drilling operations, the courts hold that the parties have agreed that the period mentioned is the only one in which cessation will be regarded as temporary, and that if drilling operations are not commenced before the end of that period, the lease is terminated, whether or not the drilling operations would have been economically practical.³⁸ Thus, the rule applies where production ceases because of a shut-in order of the Railroad Commission, even if the order is subsequently declared invalid.³⁹ This harsh result can be avoided through the use of a properly drawn force majeure clause in the lease.

CONCLUSION

In the development of the modern oil and gas lease, there have been various clauses devised to modify the strict provisions of the habendum clause. For example, it may be necessary to construe the literal terms of the habendum clause in relation to a clause allowing extension of the lease beyond and after the primary term where there is no production but the lessee is engaged in drilling or reworking activities. The lease may also provide that the lessee shall have the right to pool, unitize or combine the land under lease with other leased tracts, and that production from any part of the pooled, unitized or combined area will be production within the meaning of the habendum clause. A carefully worded force majeure clause may protect the lessee where acts of God or regulations of governmental agencies frustrate the purpose of the lease transaction. The effect of a shut-in royalty provision has been discussed in footnote 24. Consequently, the habendum clause alone is seldom conclusive of whether the lease has terminated and must be considered in conjunction with all of the lease provisions in determining the status of the lease. It should also be noted that the delay rental clause and the duty of devotion of the premises to the purposes of the lease may terminate the lease in spite of the habendum clause because they too are special limitations upon the leasehold estate. The

188 P.2d 899 (1948); *Lamb v. Van Syckle*, 205 Ky. 597, 266 S.W. 253 (1924). Annot., 72 A.L.R. 372 (1931). For a similar holding construing a term mineral interest, see *Postier v. Postier*. —Okla.—, 296 P.2d 138 (1956), 5 OIL AND GAS REP. 1234.

³⁸ *Woodson Oil Co. v. Pruett*, 281 S.W.2d 159 (Tex. Civ. App. 1955) *error ref. n.r.e.*, 4 OIL AND GAS REP. 2002.

³⁹ *Haby v. Stanolind Oil and Gas Co.*, 228 F.2d 298 (5th Cir. 1955), 5 OIL AND GAS REP. 1057; *Shell Oil Co. v. Goodroe*, 197 S.W.2d 395 (Tex. Civ. App. 1946) *error ref. n.r.e.*

interrelation of all of the clauses in an oil and gas lease makes up almost the entire field of oil and gas law, and cannot be undertaken here. It is submitted that the habendum clause is the backbone of the lease, and that because of its importance it will be interesting to observe the next steps in its evolution as the courts handle the problems surrounding its function in the oil and gas lease.

Ivan Irwin, Jr.