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THE IMPLIED COVENANT FOR
ADDITIONAL DEVELOPMENT

by

Earl A. Brown*

PROBABLY the most controversial of the covenants implied in oil and gas leases is the covenant for additional development, more fully stated as "the implied covenant to conduct additional development after paying production is obtained." At least, the courts are called upon to construe and interpret this covenant more often than any of the others. The difficulty, of course, is that no two cases present the same fact situations, and where the rule is fixed but the facts vary in each case, precedents are not always conclusive.

It is noteworthy, also, that cases of this character very rarely, if ever, involve leases where the production is substantially profitable. In such case the lessee is usually just as eager as the lessor to extend development which will produce more oil and return more profit both to the lessor and lessee. In this respect the interests of the lessor and lessee are identical. It is the marginal lease that produces the conflict of interest between the lessor and lessee.

When the initial well is drilled on a lease, both the lessee and lessor are looking forward to securing paying production. If the first well drilled is a small, unprofitable well (a "stinker" as it is called in the oil fields) and the second well is no better, the lessee will ordinarily become discouraged and will hesitate about incurring the heavy expense of further development, especially where it appears doubtful that he will ever recover what he has already expended. The lessor, though disappointed, is still eager and demands further drilling. His eagerness and demands are stimulated by the fact that he will not have to bear the expense of further drilling. That is not to say that the lessor is always unreasonable and the lessee always reasonable. The cases have adjudicated these controversies both ways. Nevertheless, it is frequently the case that where the lessee delays further development, an action based upon the implied covenant of additional development follows.

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I. Basis of the Covenant

Generally, implied covenants in contracts have long been recognized. The basis of this rule in contracts other than oil, gas, and mineral leases is that implied covenants exist only when it is necessary that certain duties and obligations be implied in order to effect the purposes of the parties as expressed in the contract.1 In construing a mineral grant where the grantor reserved an interest and later instituted an action for nondevelopment of the premises alleging a breach of implied covenants, the Supreme Court of Texas stated: "It is not enough to say that an implied covenant is necessary in order to make the contract fair or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole."2 (Emphasis added.) This rule appears to apply universally to contracts in general.3

In the case of oil and gas leases, however, the courts have gone further in implying covenants than in other contracts. Where the common law held that there was no obligation to work a mine in the absence of an express covenant,4 "the American courts have liberalized the rule, especially in sales of minerals and mineral rights, in oil and gas leases, and have found an implied covenant for diligent and reasonable development and operation in leases which make the lessor's compensation depend upon development and operation."5 In a number of cases the courts have said that the implied covenant of development should be construed to "promote development."6 And the Supreme Court of Texas has said: "The true rule is that the implied covenant arises only out of necessity . . . in order that the purpose for which the lease is made, the production of oil and gas with payment of royalty to the lessor, may be accomplished." (Emphasis added.) The Supreme Court of the United States has stated

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2 Danciger Oil & Ref. Co. v. Powell, 137 Tex. 484, 490, 154 S.W.2d 632, 635 (1941), 137 A.L.R. 408 (1942).
4 Merrill, Covenants Implied in Oil and Gas Leases 455 (2d ed. 1940).
6 Grain v. Pure Oil Co., 25 F.2d 824, 831 (8th Cir. 1928); see also Tamisk v. Continental Oil Co., 158 Kan. 747, 130 P.2d 326 (1944); Severson v. Barstow, 103 Mont. 526, 61 P.2d 1022 (1936); Mistletoe Oil & Gas Co. v. Revelle, 117 Okla. 144, 245 Pac. 620 (1926); Garfield Oil Co. v. Champlin, 78 Okla. 91, 189 Pac. 514 (1920).
that the implied covenant is based upon "the relation of the parties and the object of the lease.""  

There is a wide difference of opinion as to whether implied covenants in an oil and gas lease are implied in fact or in law. One authority concludes that "the implication is viewed as one of fact and not of law."" Another thinks the implication is one of law, because "there is no basis upon which we can infer that lessors and lessees have in mind the implied covenant obligations when they contract."10

The decisions are, nonetheless, consistent in holding that the covenant is a flexible obligation in applying to leases where there are no express provisions as to exploration and development. The obligation to drill or develop arises from the "facts and circumstances" of each case, and the extent to which it is applied depends upon the conditions existing in each situation where the covenant is invoked.11

Viewed from this standpoint, the covenant might well be regarded as one of fact. However, the courts have experienced little difficulty in applying and enforcing the covenant regardless of whether its basis is in law or in fact.

II. IMPLIED DRILLING COVENANTS OTHER THAN FOR ADDITIONAL DEVELOPMENT

Three of the five12 generally recognized covenants implied in oil and gas leases deal with drilling and development. Brief mention will be made of the two other than the covenant for additional drilling before entering upon a lengthy discussion of the latter.

A. The Implied Covenant to Drill an Exploratory Well

This covenant arises in cases where a lease is granted without specifying any time within which the work of exploration shall be commenced and the lease contains no express provisions for delaying
the commencement of a well, as by the delay rental clause or other provision expressly referring to the time in which a well may be commenced.  

B. The Implied Covenant to Protect the Leased Premises Against Drainage

This obligation arises where there are producing wells on adjoining premises draining from the premises in question and it is shown that a well on said premises would be sufficiently productive to pay the lessee a profit over and above drilling and operating costs.

III. General Principles of the Implied Covenant of Additional Development

This is the covenant herein examined and discussed. One authority calls it "The Implied Covenant to Drill Additional Wells." Another refers to it as "The Implied Covenant of the Lessee to Reasonably Develop the Land After Discovery of Oil and Gas in Paying Quantities." A third names it "The Implied Covenant to Develop with Reasonable Diligence."

Regardless of the name given the covenant, the writers and authorities generally recognize that the covenant does not arise as to any oil and gas lease unless and until (1) there has been drilling and development on the lease, (2) oil or gas is being produced thereon in paying quantities, and (3) there are no express provisions in the lease defining the extent of drilling required of the lessee. In such case it has been uniformly held that there is an implied covenant to continue drilling or development with "reasonable diligence" (as that term is defined by the authorities) until a sufficient number of wells are drilled reasonably to develop the premises for oil and gas purposes.


16 Representative cases applying this covenant are: Stanolind Oil & Gas Co. v. Sellers, 174 F.2d 948 (10th Cir.), cert. denied, 338 U.S. 867 (1949); Hartman Ranch Co. v. Associated Oil Co., 10 Cal. 2d 232, 73 P.2d 1161 (1947); Carter Oil Co. v. Dees, 340 Ill. App. 449, 92 N.E.2d 519 (1950); Cloye v. North American Oil Consol., 201 La. 99, 9 So. 2d 473 (1942); Franklin v. Wigton, 132 Okla. 216, 270 Pac. 1 (1928); Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928), 60 A.L.R. 936 (1929); States v. Phillips Petroleum Co., 161 S.W.2d 366 (Tex. Civ. App. 1942) error ref. w.o.m.

17 Merrill, op. cit. supra note 4, at 128.

18 2 Summers, op. cit. supra note 11, § 398.

19 Walker, op. cit. supra note 9, at 399, 411.
A. Historical Background of the Covenant

In early cases when this covenant was beginning to take form, it was compared with implied covenants in other contracts. The same reasoning applied; that is, its purpose was to carry out the expressed intention of the contracting parties. For example, the Supreme Court of Ohio, in a leading case decided in 1897, reasoned:

There is no express covenant, condition, or agreement in the lease as to the extent to which the lands should be developed, nor as to the number of wells that should be drilled after the completion of the first well. Is there an implied covenant, condition, or agreement as to such development, or as to the drilling of a reasonable number of wells? On principle, it would seem that there is such implied covenant in the written instrument. When no time is fixed for the performance of a contract, a reasonable time is implied. When a contract for the erection of a house or other structure is silent as to the quality of the materials or workmanship, it is implied that the same should be of reasonable quality. In a lease of a farm for tillage on shares, it is implied that the tenant shall cultivate the farm in the manner usually done by reasonably good farmers. So, under an oil lease which is silent as to the number of wells to be drilled, there is an implied covenant that the lessee shall reasonably develop the lands, and reasonably protect the lines. The development and protection of lines which is thus implied when the lease is silent is such as is usually found in the same business of an ordinarily prudent man,—neither the highest nor lowest, but about medium or average. We therefore hold, both on principle and authority, that there is an implied covenant in this lease to reasonably develop the lands, by drilling and operating such number of wells as would be ordinarily required for the production of the oil contained in such lands, and afford ordinary protection to the lines.18 (Emphasis added.)

An early case construed a lease having no definite term but providing for a test well and for what should be done if oil were produced in paying quantities. There was no provision as to what should be done if a dry hole was drilled. The test proved to be dry. Comparing this situation with that of other contracts where covenants are implied, the Supreme Court of Pennsylvania said:

The rule in regard to contracts is that, where the parties have expressly agreed on what shall be done, there is no room for the implication of anything not so stipulated for, and this rule is equally applicable to oil and gas leases as to other contracts. There is nothing peculiar about them in this respect. But here the parties have provided for a test well, and for what shall be done if it produces oil in paying quantities. But the other contingency, that it proves dry, is not provided for, and

18 Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N.E. 502, 505 (1897).
it is the omitted case that has occurred. The authorities are uniform
that, under such circumstances, there is an implied obligation on the
lessee to proceed with the exploration and development of the land
with reasonable diligence, according to the usual course of the business,
and a failure to do so amounts to an abandonment which will sustain
a re-entry by the lessor.19

In an earlier case the Pennsylvania Supreme Court had applied the
development covenant where the defendant owned the lease adjacent
to plaintiff's property and was draining oil from plaintiff's land
through wells on the adjoining property.20 This decision was offered
as authority in a later Pennsylvania drainage case where the facts
were somewhat similar but the element of fraud was absent.21 In
this case the court denied relief to the plaintiff, saying:

Every man who invests his money and labor in a business does it on
the confidence he has in being able to conduct it in his own way. No
court has any power to impose a different judgment on him however
erroneous it may deem his to be. Its right to interfere does not arise
until it has been shown clearly that he is not acting in good faith on
his business judgment, but fraudulently, with intent to obtain a dis-
honest advantage over the other party to the contract.22

To a somewhat lesser degree other courts have given great weight
to the good-faith judgment of the lessee as to the obligation to drill
additional and development wells on the leased premises.23 As late
as 1933 the Court of Appeals of Kentucky, after stating the "pru-
dent operator" rule, said: "A co-ordinate rule is that the honest
opinion of the lessee that the lease cannot be operated profitably or
protected from drainage is entitled to more weight than the opinion
of the lessor, or the experts or the judge who tries the case, or all
combined, in the absence on his part of fraud or bad faith."24

Notwithstanding these cases which constitute the good faith and

22 Id., 45 Atl. at 124. While the Kleppner case and the Colgan case were drainage
cases, nevertheless, the "courts have made no distinction in the application of covenants to
drill additional wells and covenants to protect against drainage." Ramsey Petroleum Corp.
23 In Grass v. Big Creek Dev. Co., 71 W. Va. 719, 84 S.E. 750 (1915), 1915E L.R.A.
1057, the court said:
In other words, the authorities hold that if, under such circumstances, the operator ex-
erises a sound and honest judgment, and not unreasonable or arbitrary one, in continu-
ing operations for mineral oils, he has faithfully discharged the duties implied devolv-
ing upon him by virtue of the lease, although he may not exercise that high degree of
diligence which the exaggerated expectations of the landowner may demand.
See Kellar v. Crag, 126 Fed. 630 (4th Cir. 1903); Steele v. American Oil Dev. Co., 80
W. Va. 206, 92 S.E. 410 (1917), 1917E L.R.A. 975; Jennings v. Southern Carbon Co.,
71 W. Va. 215, 80 S.E. 368 (1913).
24 Central Ky. Nat'l Gas Co. v. Williams, 249 Ky. 242, 60 S.W.2d 580, 584 (1933).
judgment of the lessee as the principal element in determining whether further drilling or development should be conducted on a producing lease, the weight of authority today is that this issue should be decided on the basis of what that mythical figure, the reasonably prudent operator, would do under the same or similar circumstances.

This rule, which was being developed in earlier cases, finally became crystallized and circumscribed in Brewster v. Lanyon Zinc Co.,

regarded today as the leading authority on the scope and extent of implied covenants in oil and gas leases. The opinion in the Brewster case was written in 1905 by Judge Van Devanter, then a judge of the Eighth Circuit Court of Appeals and later an outstanding Justice of the Supreme Court of the United States. It has been cited as an authority on implied covenants and followed in more than one hundred and fifty cases decided in our leading oil and gas producing states, including decisions by the courts of Texas, Oklahoma, California, Louisiana, Kansas, Illinois, Arkansas, Kentucky, West Virginia, Montana, Wyoming, Michigan, and others.

The Brewster case arose in Kansas. An oil and gas lease gave the lessee two years in which to drill a well on the leased premises and provided that the time might be extended by the payment of an annual rental from the expiration of the second year until the well was drilled, and if no well should be drilled upon "said premises" within five years the lease should be void. A well was drilled during the fifth year which produced gas in paying quantity. No other well was drilled on the lease for a period of fourteen months after the expiration of the five-year period, although many wells had been drilled in the territory adjacent to and surrounding the leased premises. These wells produced oil and gas in paying quantities.

There were in this case the issues both of drainage and of the drilling of additional wells on the leased premises. Instead of making the judgment of the lessee determinative as to further drilling, the court said that in the absence of some stipulation to that effect neither the lessor nor the lessee would be the judge as to extent of diligence to be practiced in developing a lease, but that both are bound by the standard of what is reasonable. The test, therefore, is "reasonable diligence."

1. The Meaning of Reasonable Diligence

The Brewster case sets forth at least three principles as included in fixing the standard of "reasonable diligence." They are: (1) neither

150 Fed. 801 (8th Cir. 1905).
the lessor nor the lessee is the arbiter of the extent to which, or the diligence with which, the operations shall proceed; (2) no obligation rests upon the lessee to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them; and (3) the test of diligence required of the lessee is the "prudent operator" test; that is, whatever in the circumstances would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required. These three principles will be discussed separately in the above order.

a. Extent and Diligence of Operations.—Neither the lessor nor the lessee is the arbiter of the extent to which or the diligence with which the operations shall proceed. This rule was articulated in the Brewster case where the court said:

The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule in respect of all other contracts where the time, mode or quality of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases.28

This statement in the opinion followed a reference to and quotations from the cases of Keller v. Craig27 and Colgan v. Forest Oil Co.28 to the effect that the good-faith judgment of the lessee as to additional drilling was conclusive. The court in the Brewster case asserted its belief that this view is unsound and instead held that neither party is the arbiter, but that both are bound by the standard of what is reasonable.

The foregoing statement has been approved and applied generally by the courts throughout the oil-producing states.29 It is recognized that the drilling of wells and development of a lease is an expensive

20 Id. at 814.
27 126 Fed. 630 (4th Cir. 1903).
29 The following cases are representative: Becker v. Submarine Oil Co., 55 Cal. App. 698, 204 Pac. 245 (1921); Greenwood v. Texas Interstate Pipe Line Co., 143 Kan. 686, 66 P.2d 431 (1935); Warfield Natural Gas Co. v. Allen, 248 Ky. 646, 59 S.W.2d 534, 537 (1933), 91 A.L.R. 890, which refers to the Brewster case as the "principal case" on this covenant; Severson v. Barstow, 103 Mont. 526, 63 P.2d 1022 (1936); Robinson v. Miracle, 146 Okla. 293 Pac. 211, 213 (1930); Scott v. Price. 123 Okla. 172, 247 Pac. 103, 105 (1926); Donaldson v. Josey Oil Co., 106 Okla. 11, 232 Pac. 821 (1924); Indiana Oil, Gas & Dev. Co. v. McCrory, 42 Okla. 136, 140 Pac. 610 (1914); Rhodes Drilling Co. v. Alfred, 123 Tex. 229, 70 S.W.2d 576, 585 (1934); Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 432, 6 S.W.2d 1031, 1036 (1928), 69 A.L.R. 916 (1929); South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 76 S.E. 961, 962 (1912), 43 L.R.A. (N.S.) 848 (1913), refers to the Brewster case as "a very clear and able exposition."
A lessee should not be required to spend large sums for this purpose merely upon demand of the lessor. Likewise, the lessor should not be denied proper and prudent development of his property, especially since the principal consideration for executing his lease is the expectation of royalty.

b. Obligation to Conduct Operations Where Unprofitable.—No obligation rests upon the lessee to carry the operations beyond the point where they will be profitable to him even if some benefit to the lessor will result from them. This statement is taken from the Brewster case. The opinion then says: "It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required."\(^{20}\)

The rule in the Brewster case is followed in Texas. Quoting directly from that case, the Supreme Court of Texas held in a leading case\(^{21}\) that no obligation rests on the lessee to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. Continuing, the Court said: "Plaintiff was entitled to have the court give a charge such as it requested to the effect that it was under no duty to drill wells, at a loss to itself, for protection or for further development." The Court then quotes further from the Brewster case: "'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, requires that he proceed with due regard to his own interests, as well as those of the lessor.'"\(^{22}\)

The Oklahoma Supreme Court, citing the rule in the Brewster case, has said that "no obligation rests on the lessee of an oil and gas lease to carry operations beyond the point where they will be profitable to it, even though some benefit to the lessor might result therefrom."\(^{30}\)

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\(^{20}\) Brewster v. Lanyon Zinc Co., 140 Fed. 801, 814 (8th Cir. 1905).

\(^{21}\) Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 432, 6 S.W.2d 1031, 1036 (1928), 60 A.L.R. 916, 7 Texas L. Rev. 438 (1929).

\(^{22}\) Id. at 433, 6 S.W.2d at 1036. Other Texas cases announcing and following this rule are: Rhoads Drilling Co. v. Allred, 123 Tex. 329, 70 S.W.2d 576 (1943); Texas Co. v. Ramsower, 10 S.W.2d 537 (Tex. Comm. App. 1928); Senter v. Shanafelt, 233 S.W.2d 202 (Tex. Civ. App. 1950); Hutchins v. Humble Oil & Ref. Co., 161 S.W.2d 571 (Tex. Civ. App. 1942) et al.; State Line Oil & Gas Co. v. Thomas, 55 S.W.2d 746 (Tex. Civ. App. 1931).

\(^{30}\) Empire Gas & Fuel Co. v. Haggard, 112 Okla. 35, 3 P.2d 675, 677 (1931). Other Oklahoma cases following this rule are: Gerson v. Anderson-Prichard Prod. Corp., 149 F.2d 444, 445 (10th Cir. 1945); Carter Oil Co. v. Mitchell, 100 F.2d 945, 950 (10th Cir. 1939); Orr v. Comar Oil Co., 46 F.2d 59 (10th Cir. 1930); Smith v. McGill, 12 F.2d 32 (8th Cir. 1916); Ramsey Petroleum Co. v. Davis, 184 Okla. 155, 85 P.2d 427 (1938); Wilcox v. Ryndak, 174 Okla. 24, 49 P.2d 733 (1935); Robinson v. Miracle, 146 Okla. 31, 293 Pac. 211, 213 (1930); Eastern Oil Co. v. Besty, 71 Okla. 275, 177 Pac. 104, 105 (1918).
In Kansas, the supreme court in *Meyers v. Shell Petroleum Co.* said: "A lessee is under no implied duty to engage in an undertaking which is unprofitable to him, although it might, or would, result in some profit to the lessor . . . . It is only to the end of mutual benefit or profit to both lessor and lessee that reasonable diligence is required." The case cites the *Brewster* case among other authorities.

A case arising in Louisiana held: "Under the implied covenant to develop, a lessee is not required to drill where the available information indicates a strong probability that the well will not pay out." There is one situation in which the reasonable expectation of profit requirement has been made subject to general equitable principles; that is where the failure to drill or develop has continued for an *unreasonable* length of time in view of all the facts and circumstances of the case. In Oklahoma, for example, the supreme court held in the *Doss* case that a prima facie case of breach of the covenant could be established by showing a failure to conduct further development for an "unreasonable length of time." The effect of this holding in Oklahoma is to shift the burden of proceeding to the defendant to justify the delay in drilling.

Prior to the decision in the *Doss* case, the Oklahoma Supreme Court had held that there could be "abandonment" of a lease or the undeveloped portion thereof even though the lessee did not evidence an intention to abandon. In the *Doss* case the court overruled the *Booker* case and other cases and said it would leave the doctrine of abandonment to be applied to those cases "where intention to abandon is accompanied by physical relinquishment." However, the

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39 Fox Petroleum Co. v. Booker, 123 Okla. 276, 253 Pac. 33 (1926).
court said that the lessor would not be left without remedy where there was an unreasonable delay in development, and then said that "we think the rights heretofore granted under the theory of abandonment should be granted under the true doctrine of breach of the implied covenant to fully develop." Apparently the court holds that the "unreasonable delay" which should now be applied in connection with the implied covenant to develop fully should be the same in point of time as that formerly required to constitute abandonment. Furthermore, whether or not the delay in any case is unreasonable is to be determined from all the facts and circumstances of the particular case. In a later Oklahoma case it was held that a delay of seven years was not unreasonable; and in a case arising in Oklahoma and decided by the Tenth Circuit Court of Appeals it was said: "No hard or fast rule can be laid down as to what constitutes an unreasonable delay. Ten years may not be unreasonable in one case while five years may be unreasonable in another. Each case depends upon its own peculiar facts and circumstances."

In another Oklahoma case, decided after the Doss case, the supreme court said that "after the passage of a reasonable length of time the duty to drill additional wells becomes progressively greater, and the standard of the prudent operator becomes progressively of less importance in determining whether such duty exists." In *Sauder v. Mid-Continent Petroleum Corp.*, a period of seventeen years had elapsed since two wells were drilled on a 360 acre lease without further development, and the lessees had testified they had no intention of "drilling at any time in the near or remote future." The court held that "this attitude does not comport with the obligation to prosecute development with due regard to the interests of the lessor," and that the petitioners were entitled to relief in equity. Accordingly, it rendered a judgment that the lease should be cancelled as to the 320 acres on which no development had been conducted "unless within a reasonable time an exploratory well should be drilled therein to the Mississippi lime." The Mississippi lime was the formation from which production was being obtained from the two wells already drilled on the premises.

Other cases have held that where there has been a long delay in development and the evidence shows that the lessee does not intend to conduct any further development, the lessor is entitled to relief.

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38 Doss Oil Royalty Co. v. Texas Co., 192 Okla. 359, 137 P.2d 934, 938 (1943).
in equity. In such cases the usual finding is that the lessee is holding the lease not for development but for speculative purposes and that such an attitude takes into consideration only the interest of the lessee and not those of both the lessor and lessee.\(^4\)

c. The Test of Diligence Required.—The test of diligence required of the lessee is the “prudent operator” test, that is, whatever under the circumstances would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee. This is taken from the Brewster case and is familiarly called the “prudent operator” rule. The rule has been quoted or adopted in the courts of practically all the oil-producing states.\(^5\)

A Texas case defines the word “prudence” as follows: “The Standard Dictionary . . . gives as one of the meanings of the word ‘prudence’ good judgment and foresight in practical affairs; economy; discretion; sagacity.”\(^6\) Also, under the definition and reasoning of the same case “what a person of ordinary prudence would or would not do under the particular circumstances is the true test of negligence.”

Often, courts refer to the lessee’s obligation under this covenant as the duty to use reasonable diligence in conducting exploration and development. This is no different from the “prudent operator” test. “Reasonable diligence” means “the doing of that which an experienced operator of ordinary care and prudence would do in the circumstances, having due regard for the interests of both lessor and lessee.”


\(^{46}\) Shell Petroleum Co. v. Shore, 72 F.2d 193, 194 (10th Cir. 1934); see Stanolind Oil
It should be remembered that not every operator is a prudent operator. There are times when operators of limited experience will take a "flyer" and drill on acreage which has been rejected by experienced operators. In one instance an operator had a vivid dream that a certain area would produce oil in paying quantities. It was so real that he purchased a number of leases in that area and drilled a well. He discovered there is merit to the old saw that "dreams often go by contraries."

Another type of operator obtains his drilling information from the man with the divining rod who takes his contraption over the surface of land and confidently says that when it begins to "dip" oil will be found under the spot where the "dip" occurs. A great deal of money has been wasted in this country by those who believed that oil and gas could be discovered in any such manner.

In the early days before the science of geology became such an important factor in locating oil and gas deposits there were those who believed in what was called "creekology." It was their belief that oil and gas formations were more likely to be found along the creeks and streams than elsewhere. Some of the "old-timers" still entertain this opinion, but the prudent oil producer of today knows that he must have all the information he can obtain about the underground formations before he decides to drill. Accordingly, he seeks all the geological and geophysical information he can get.

Another typical situation is where a man who has reaped large profits in some other business and is in a high income tax bracket, decides "to get his feet wet" in the oil business with "tax money." He cannot lose much, so he takes a long chance. Without the benefit of research, geological, and geophysical information the experienced operator requires, he assembles a block of leases and drills a dry hole. The prudent operator often drills dry holes too, but his prudence causes him to get all the information possible before drilling a well, and the records show conclusively that the practice of "prudence" results in success more often than would be the case without it.

These illustrations are mentioned in order to show that an operator may not be a "prudent operator" merely because he is willing to drill a well on a particular lease. A case somewhat in point is that of *Romero v. Humble Oil & Ref. Co.* There the plaintiff sought to cancel Humble's lease for failure to develop. Humble had drilled...
three wells on the leased property, but when a demand was made by
the landowner for a fourth well, it refused to drill further, taking
the position that the leasehold was sufficiently developed and that
no prudent operator would drill an additional well. It was further
shown that Humble and its associate had spent approximately half
a million dollars in developing the property and Humble's geological
witnesses presented extensive data and studies to show that it would
not be prudent to drill another well on the lease. The plaintiff pre-
vented one geologist, Courtney, who recommended that another well
be drilled. As to the qualifications of the geological witnesses the
court said:

Defendant and intervener rely on the testimony of three geologists, all
of whom maintain that Courtney has incorrectly interpreted the geo-
logical data on the Romero tract and that his correlation of the logs
of the wells on the Romero and Germany tracts is in error. It also
appears that at least one of the intervener's geologists has had years
of experience with the Little Bayou field, whereas Courtney admitted-
devoted but three weeks to his study of the oil and gas potential
under the Romero property... If the decision in this case were to
rest solely on the opinion of geologists there is little question but that
the defendant and intervener would prevail... In spite of the in-
sistence by defendants and intervener's geologists that no reason-
ably prudent operator would drill additional wells on the Romero
property, the bald fact remains that plaintiff has an experienced opera-
tor who is willing, ready and able to drill his land, and the oil com-
panies, while refusing to drill, are fighting desperately to maintain
their lease. (Emphasis added.)

Thus the court rejected all the geological evidence of defendant
and intervener, all of which is admittedly reliable and would have
prevailed over the geological evidence of plaintiff, and based its deci-
sion on the "bald fact" that there was an operator willing to drill
another well on the premises. There was no evidence to show
whether that operator was prudent or imprudent other than the
geological testimony, and that established the fact that a prudent
operator would not drill another well. Apparently, the court took
the position that any operator who would drill would fulfill all the
requirements of a prudent operator. The court's reasoning is con-
trary to all the settled law on the subject.

The appellate court found that the decision of the trial court was
based "not upon a preponderance of competent geological opinion
that a theoretical reasonably prudent operator would drill an addi-
tional well or wells, but entirely upon the assurance of Rebstock that

48 Id. at 119, 120.
if he could obtain the property free of defendant's lease he would drill as recommended by Courtney. . . ." (Emphasis added.)

A review of the opinions of both courts in this case reveals the fact that there was no competent testimony to show that a reasonably prudent operator would drill another well on this property. The issue was not "would Rebstock drill" but "would a reasonably prudent operator drill"? It would appear that the principal question, the prudent operator test, was completely sidetracked by the courts.

The reasoning in the Romero case has not been followed by state courts. It was specifically rejected in a Texas case, and treated only as cumulative evidence in the Oklahoma case of Knight v. Herndon Drilling Co., and in the Louisiana case of Carter v. Arkansas Louisiana Gas Co. In substance, the Romero doctrine has also been rejected generally by many other courts in the enumeration of the factors and circumstances that must be considered in determining whether further drilling should be conducted under this implied covenant. If these factors are to be given effect as prescribed by the courts, they eliminate the theory that the lessee is required to drill if only the plaintiff can produce a witness who will testify that he would drill if he could obtain the lease. These factors are discussed in the succeeding paragraphs.

2. "The Reasonable Diligence" Required of the Lessee Is Subject to a Variety of Facts and Circumstances

The first case to enumerate some of the factors which affect the lessee's obligation to conduct further drilling under the "prudent operator" or "reasonable diligence" test was the Brewster case. The expressions of this case have been adopted generally and additional factors have been enumerated in some jurisdictions.

Based on the Brewster case the Supreme Court of Oklahoma has commented in a leading case as follows:

The courts have made no distinction in the application of this test to covenants to drill additional wells and covenants to protect against

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49 Humble Oil & Ref. Co. v. Romero, 194 F.2d 383, 386 (5th Cir. 1952).
52 213 La. 1028, 36 So. 2d 26 (1948).
53 Brewster v. Lanyon Zinc Co., 140 Fed. 801 (8th Cir. 1905). The court there said: 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.
drainage. . . . But in each instance, depending on the particular circumstances, many factors must be considered, including: (1) Location of lease premises—whether in wildcat territory, or producing field, (2) probable quantity of oil and gas capable of being produced from the lease premises as indicated by the prior development, (3) market conditions and transportation facilities, (4) the extent and result of operation on adjacent lands, (5) the extent of the area which is normally drained by a well in that field, (6) the character and extent of the subsurface structure and sand in that area, (7) the expense necessary to secure production and operate producing wells for protection against drainage, (8) whether the well to be offset is producing oil or gas in paying quantities, (9) usage of the business, and cost of drilling, producing, and marketing.\(^{54}\)

A recent Texas case found that the plaintiff had failed to make a case based on breach of this covenant, assigning the following reasons:

The lessee is not required to continue in performance of the implied obligations unless continuance will be profitable, not only to his lessor, but also to him. . . . We find there is insufficient evidence to support a judgment for appellees because it is not shown by competent evidence (1) that the lease as a whole was not reasonably developed; (2) that if additional wells would be drilled on said 40 acres that same would probably result in the production of oil or gas in paying quantities; (3) the evidence is insufficient to show damage by drainage from offset wells; (4) the evidence is insufficient to establish that appellant had abandoned the lease or any part thereof; (5) the only evidence in the record is to the effect that no wells have been drilled on said 40 acres, which alone will not support a cause of action for cancellation; (6) the evidence is insufficient to establish that an ordinary prudent person in the oil business would under the same or similar circumstances drill a well on said 40 acres; and (7) extent of our State spacing rules covering said field is not in the record.\(^{55}\)

A Kansas case cited the factors named in the \textit{Brewster} case and then added another, it being the same as the last element cited in the \textit{Senter} case. The court emphasized this element as follows:

One of these economic facts was the current limitation of production, under state order. Such restrictions upon production, under lawful orders of either federal or state authority are certainly pertinent factors to be considered along with other economic factors, on an issue of prudent development.\(^{56}\)

\(^{54}\)Ramsey Petroleum Corp. v. Davis, 184 Okla. 151, 85 P.2d 427, 430 (1938).


\(^{56}\)Fischer v. Magnolia Petroleum Co., 156 Kan. 367, 133 P.2d 95, 101 (1943). Other cases defining the factors and outlining the circumstances to be considered on the issue of the prudent development obligation are: Gerson v. Anderson-Prichard Prod. Corp., 149 F.2d 444 (10th Cir. 1945); Stanolind Oil & Gas Co. v. Kimmel, 68 F.2d 520 (10th Cir.)
An examination of the foregoing factors reveals that they deal mostly with underground conditions, such as the productivity of the formation underlying the lease in question and other properties in the vicinity, the extent of the "subterranean oil reservoir," the character and extent of the subsurface structure and sand in that area, etc., as establishing whether or not the additional well would be required under the "reasonable diligence" or "prudent operator" test. Consequently, most of the evidence offered in a case where this covenant is invoked is "expert" testimony, such as the opinions of geologists, geophysicists, petroleum engineers, and experienced operators acquainted with the facts and circumstances of the particular case. Professor Summers says:

But the ultimate issue, that is, whether the lessee has exercised reasonable diligence in development and protection of the land, must be decided by reaching a conclusion from all the facts presented. It is within the province of the court or jury to make this conclusion, but the opinions of those skilled in such matters are of great value to the court or jury. Consequently, it is common practice to permit petroleum geologists, engineers and practical oil operators, properly qualified, to express opinions as to whether, under the evidence presented, a reasonably prudent operator with knowledge of such facts, would or would not have drilled additional or protection wells with a reasonable expectation of profit to himself from the venture. (Emphasis added.)

It is recognized that the extent or productivity of underground formations cannot be determined with certainty unless there is actual drilling. So, if the operator is to be obligated to drill into a section of the producing area not theretofore explored on the basis of opinion evidence, that evidence should be the best obtainable under the circumstances.

As said in the case of Stanolind Oil & Gas Co. v. Kimmel:

The oil industry is not an exact science, and whether or not in a particular situation additional wells should be drilled, or what results would follow if drilled, is at best a matter of opinion. So we are relegated to, and must rely to some extent, at least, upon the judgment of experienced and practical operators and qualified geological experts alike; and where the evidence produced is the best available, relief cannot be denied simply because it is not as exact as a court might wish

1934); Watchorn v. Roxana Petroleum Corp., 5 F.2d 636, 647 (8th Cir. 1925); Becker v. Submarine Oil Co., 51 Cal. App. 698, 204 Pac. 245 (1922); Wadkins v. Wilson Oil Corp., 199 La. 750, 6 So. 2d 726 (1942); Robinon v. Miracle, 146 Okla. 31, 293 Pac. 211 (1930); Pelham Petroleum Co. v. North, 78 Okla. 39, 188 Pac. 1069 (1920); Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928), 60 A.L.R. 936 (1929).

27 2 Summers, Oil & Gas § 414, at 379 (2d ed. 1932).
for. Parties to contracts of this nature are charged with knowledge of their uncertainties and speculative character.\(^{68}\)

The importance of expert testimony in these cases is reflected by an examination of the many cases in which the covenant has been invoked.\(^{69}\)

**B. When the Implied Covenant Is Not Applicable**

If there are express covenants in a lease specifying the extent of further development, there is no implied covenant of development. This principle was expressly considered in the *Brewster* case, based on the fact that the lease gave the lessee two years to drill a well, with provision that upon payment of an annual rental of seventy-eight dollars the time for drilling might be extended from the expiration of the second year until the well should be drilled and with the further provision that the well must be drilled within the period of five years from the date of the lease or the lease should terminate. Commenting upon these provisions, the court said that "the measure of diligence which the lessee was required to exercise in prosecuting the work of exploration and development during the first five years was expressly and definitely prescribed, and was not left to any implication which otherwise might arise from the nature of the lease or from the other stipulations therein."\(^{61}\) This rule has been followed by the courts generally.\(^{61}\)

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68 F.2d 120, 522 (10th Cir. 1934).
69 E.g., Stanolind Oil & Gas Co. v. Sellers, 174 F.2d 948, 954 (10th Cir. 1950); Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286 (1921), 19 A.L.R. 430 (1922); Temple v. Continental Oil Co., 182 Kan. 213, 320 P.2d 1019 (1958); Compton v. Fisher-McCall, Inc., 298 Mich. 648, 299 N.W. 750 (1941); Empire Gas & Fuel Co. v. Haggard, 152 Okla. 31, 3 P.2d 675 (1941); State Line Oil & Gas Co. v. Thomas, 35 S.W.2d 746, 748 (Tex. Civ. App. 1931) error dism.; Lido Oil Co. v. W. T. Waggoner Estate, 31 S.W.2d 154 (Tex. Civ. App. 1930) error ref. The case of Humble Oil & Ref. Co. v. Remero, 194 F.2d 383 (5th Cir. 1952), affirming Remero v. Humble Oil & Ref. Co., 93 F. Supp. 117 (E.D. La. 1950), appears to furnish an exception to the rule that the obligation to conduct additional drilling is based on all the facts and circumstances of the case. There, the geological testimony was "preponderant" in favor of the lessee, as the court said, but the case was decided against the lessee because of the "bald fact" that one witness testified that he would drill a well on the property if he could obtain a lease.
70 Brewster v. Lanyon Zinc Co., 140 Fed. 801, 808 (8th Cir. 1905).
C. Scope of the Covenant—Additional Development in Producing Sands and Deeper Formations

Often there is more than one producing formation in a general area. Where there are deeper untested formations underlying a lease that is producing from an upper sand, is the lessee under an obligation to drill and develop the lower sands?

Of course, if there is production on an adjacent property near enough to drain oil from under the lease, the so-called drainage covenant would apply. This covenant, often called "the implied covenant to protect the leased premises against drainage," would require the lessee to drill a "protection" well or wells, provided (1) there is no express covenant defining the duty of the lessee in such cases, and (2) it is shown that such a well would be sufficiently productive to pay the lessee a profit over and above operating costs.15

Ordinarily, the drainage covenant is sufficient to protect both the lessor and lessee and to provide the "reasonable diligence" necessary therefor. However, there have been cases where the lessor has demanded drilling to the lower sands where the wells on other lands are located at such distance as to make the drainage covenant inoperative. In many of the cases where this issue has been raised, the lessor has demanded further development both in the formation from which production is being obtained and the deeper unexplored formation. The courts have applied the "prudent operator" test to both situations. Of course, the degree of proof will vary in each case. What would be sufficient evidence to require a lessee to develop further a formation already producing on his lease would ordinarily not be enough to require him to drill deeper where the deeper production was some distance from his lease. But the principle is the same; 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.


Many cases have applied the prudent operator test to the lessee's obligation to drill to deeper sands which might exist beneath producing sands. In each case the rule has been announced that such an obligation depends upon whether there is a reasonable expectancy of profit in such operations. These cases hold also that the "hazards and costs" of that character of development should be considered in determining whether the duty to drill exists in any particular case.\(^6\)

Several noted writers have analyzed the cases and expressed their opinions on the obligation of the lessee to drill deeper and untested formations on a producing lease. Professor Maurice Merrill says: "There is an obligation to attempt to develop production from lower strata where the data available gives reasonable ground for believing that they may contain profitable deposits." Expressing it in different words he refers to the "obligation to exploit deeper sands if reasonable ground for expecting profitable production exists."\(^6\)

Professor A. W. Walker also discusses the "deeper drilling" obligation, saying: "It would seem that this implied duty would not exist unless there were wells in the vicinity producing in paying quantities from the lower stratum and unless the known geological formations were such as would lead a reasonably prudent operator to believe that the possibility that this lower producing horizon

\(^6\)Typical of the reasoning in these cases is that in Texas Pac. Coal & Oil Co. v. Stuard, 269 S.W. 482, 486 (Tex. Civ. App. 1925) error dism., as follows:

The implied obligation on the part of a lessee, under a contract like the one under consideration, is to exercise good faith and sound discretion to drill to a depth that is reasonably necessary to test the land. The lessee is not required to peer down into the soil with an X-ray vision and determine whether at any depth there can be found oil or gas, but merely to exercise good faith and sound discretion as to whether oil or gas may be found. We think the evidence fully supports the trial court's finding to the effect that the lessee in this case exercised good faith and discretion in its conclusion that it would not be profitable to drill deeper the two wells sunk on the Stuard lease, or to sink another well on it, and that such is all that a lessee is required to do.


\(^6\)Merrill, Covenants Implied in Oil and Gas Leases 174 (2d ed. 1940).
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underlay the leased premises justified the drilling of a test well.165

Professor Wilmer D. Masterson, Jr., in discussing the covenant to drill additional wells after production, says: "It seems that in no case has this obligation been restricted to drilling to the stratum to which the prior well or wells were drilled . . . . The correct test, it is believed, is not what public policy dictates, but what the provisions of the lease are and what covenants can be reasonably implied therefrom. Usually this would result in application of the reasonable and prudent operator test."166

Professor C. J. Meyers, however, has proposed a new covenant to apply to deeper drilling on a lease already producing. He would require a lessee to "explore" deeper formations if production from deeper sands is discovered in the general area of the leased premises. His illustrative case was that of a rancher whose lessee has drilled three producing wells on the leased premises and later a deeper producing sand is discovered two miles from the lease. Under this latter view, such a covenant would impose upon the lessee, where the rancher demanded it, the obligation to "explore" the deeper formation on the rancher's land without considering the prudent operator rule and whether there is any reasonable expectation of profit from such drilling or not.167

This writer has taken issue with Professor Meyers, both as to the "reasonableness" of his proposed covenant, and also as to the applicability of the authorities cited in support of it. These differences are revealed in a recent book68 and in subsequent law review articles.69 It is this writer's position that the proposed new covenant is unnecessary; that the "prudent operator" test fully protects the lessor in such case; and that there is no difference in principle in applying this test to development of known producing sands and to deeper sands to which no wells have been drilled on a particular lease.

D. Applicability of the Covenant During the Primary Term of Lease

In most of the cases reported the implied covenant has been invoked following the expiration of the primary term of the lease and during the period thereafter when the lease is continued by produc-

65 Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 11 Texas L. Rev. 399, 425 (1933).
tion. However, in the recent Kansas case of *Berry v. Wondra* the lease was for a term of five years from June 4, 1947, and as long thereafter as oil or gas was produced from the land by the lessee. An oil-producing well was completed on October 7, 1947, and thereafter a dry hole was completed on March 22, 1948. The suit appears to have been filed in May 1951, and was tried in August 1951, at which time the well was producing seven barrels of oil per day. The Kansas Supreme Court reviewed its former decisions, none of which was in point, on applying the covenant during the primary term, and, reversing the trial court, reached the decision:

When the lessee of an oil and gas lease undertakes to develop the leased premises the implied covenant to fully develop the leased premises with reasonable diligence applies during the primary term of the lease as effectively as when the term of the lease is extended by production within the primary term. (Syllabus by the court)

The court directed an alternative decree providing that the lease should be cancelled as to all but the ten acres on which the producing well was located unless the lessee within a specified time should commence the drilling of another well and complete it as soon as reasonably possible, and thereafter develop the lease in good faith as a prudent operator should do.

In an early Oklahoma case the court announced the same rule, holding that the implied covenants in an oil and gas lease for further exploration and development after discovery of oil or gas are operative within the fixed term as well as when the lease is held thereafter under the production clause.

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71 Id., 246 P.2d at 283. A strong dissenting opinion was filed by Mr. Justice Wedell, 246 P.2d at 293. He based his dissent both on an analysis of the lease provisions and general equitable considerations. Among other things he said, 246 P.2d at 296:

I also pause to observe plaintiff's declared right to cancellation during the primary term, in my opinion, is contrary to the common operative interpretation of leases of this character by both lessors and lessees over a long period of years. The decision renders literally hundreds of oil and gas leases so interpreted and operated subject to cancellation.

This, as previously stated, is an important decision. It purports to be based on an equitable doctrine that a landowner is entitled to have the lease reasonably developed during the primary term, if the lease owner undertakes to drill and obtains one producing oil well during such term, instead of paying rentals. The right to cancellation is declared to be equitable notwithstanding the fact the producing well provides a much more substantial return to the landowner than payment of annual rentals. In other words, the decision means the lease owner, in equity, is to be penalized for having provided a much greater return to the landowner out of production during the primary term than the parties agreed the landowner was entitled to demand. . . . The decision that plaintiff was entitled to cancellation during the primary term is the most staggering blow that could be dealt to the small independent oil and gas lease operators in this state. I likewise have no doubt experience will prove the decision will not, over the long run, inure to the benefit but will result in substantial loss to landowners generally. Its effect is to reduce competition in the development of leases.

72 Fox Petroleum Co. v. Booker, 123 Okla. 276, 253 Pac. 33 (1926).
E. Remedies for Breach of the Covenant

Although the implied covenant for additional drilling or development is, in substance, uniformly construed in practically all the oil and gas producing states, there is considerable variance as to the remedy for breach of the covenant. In most of the states the remedy by action for damages is either exclusive or preferred. In others, the principal remedy is by cancellation of the lease in whole or in part. Some states that recognize cancellation also give relief by way of damages in a proper case.

In Texas, some of the earlier cases announced the rule that cancellation was a proper remedy. Then came the landmark case of *Waggoner Estate v. Sigler Oil Co.* There the Supreme Court held: "The usual remedy for breach of the lessee’s implied covenant for reasonable development of oil and gas is an action for damages, though, under extraordinary circumstances—where there can be no other adequate relief—a court of equity will entertain an action to cancel the lease in whole or in part." Practically speaking, this case has established the recovery of damages as the remedy for breach of this covenant, and the rule has been reaffirmed in subsequent decisions.

The rule in Kansas is very similar to the Texas rule. In *Christensen v. Virginia Drilling Co.* the court said: "Instances are rare where equity will enforce a forfeiture for breach of an implied covenant;
it will never do so where less drastic redress will satisfy the demands of justice, and forfeitures of oil and gas leases for breach of implied covenants are seldom decreed and never arbitrarily. 7 However, since the Christensen decision, the Supreme Court of Kansas has handed down two decisions 8 in which decrees of cancellation were entered if the respective lessees failed to commence additional drilling within a specified time. The Christensen case was not overruled; it is presumed the court found that no remedy other than cancellation would "satisfy the demands of justice."

The Supreme Court of Oklahoma early recognized forfeiture of a lease as a remedy for breaching implied covenants of development. One of the first cases was Indiana Oil, Gas & Dev. Co. v. McCrory 9 where the court said: "A court of equity will decree a forfeiture of an oil and gas lease on account of a breach of an implied covenant to diligently operate and develop the property when such forfeiture will effectuate justice." That rule has been followed consistently in Oklahoma since its first announcement. 10 There may be partial cancellation or cancellation only of the undeveloped portion of a lease when the facts and circumstances justify that action. 11 Also, a lessor in a proper case, such as an action for breach of implied covenant to protect against drainage, may have his remedy in damages. 12

The remedy of forfeiture has also been applied and enforced in Louisiana, 13 Kentucky, 14 Arkansas, 15 and New Mexico, 16 but repudi-
ated in Illinois,\textsuperscript{90} Ohio,\textsuperscript{91} West Virginia,\textsuperscript{92} California,\textsuperscript{93} and Indiana.\textsuperscript{94} In Pennsylvania the courts have not clearly announced the rule as to forfeiture for breach of implied covenants. There are a number of cases, however, in which forfeiture has been decreed on the ground of abandonment.\textsuperscript{95} In a very late case\textsuperscript{96} the Supreme Court of Pennsylvania uses language which would appear to limit the remedy of cancellation to cases in which there has been abandonment by the lessee.

Thus it appears from the decisions of the thirteen oil and gas producing states mentioned above that (1) six reject forfeiture as a remedy for breach of implied covenants, limiting such remedy to violation of expressed covenants, (2) five recognize and apply the remedy of forfeiture to breaches of implied covenants, and (3) two—Texas and Kansas—make an action at law the preferred remedy and will not enforce forfeiture unless there can be no other adequate relief.

1. Procedure

There are some substantial variations in the procedure for enforcing the remedy among different jurisdictions. In Oklahoma, for example, and most other states, a suit to establish a breach of implied covenants is an equitable action and is triable to the court without a jury. In Texas, where all cases with disputed fact questions, whether legal or equitable, are triable to a jury, the implied covenant cases are almost always submitted to a jury for a determination of the fact questions. In Louisiana, where in all cases a verdict of the jury is only advisory, practically all implied covenant actions are tried to the court as are other cases.

a. Notice and Demand to Develop.—It is the general rule that as a prerequisite to the bringing of an action based on breach of implied covenants the plaintiff-lessee must serve his lessee with a notice specifying the manner in which the lessee has not complied with his development covenants and allowing a reasonable time thereafter for the lessee to comply.\textsuperscript{96}

\textsuperscript{90} Daughetee v. Ohio Oil Co., 263 Ill. 518, 105 N.E. 308 (1914).
\textsuperscript{91} Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N.E. 502 (1897).
\textsuperscript{92} McGutcheon v. Enon Oil & Gas Co., 102 W. Va. 345, 135 S.E. 238, 241 (1926).
\textsuperscript{93} 95 Cal. App. 2d 402, 212 P.2d 927, 933 (1949).
\textsuperscript{94} 33 Ind. App. 1, 70 N.E. 552 (1904).
\textsuperscript{97} Metzler & Co. v. Stevenson, 217 Cal. 236, 18 P.2d 330 (1933); Jameson v. Chans-
b. Burden of Proof.—In actions based upon alleged breach of implied covenants it is the uniform rule that the burden of proof is upon the lessor to establish such breach by a preponderance of the evidence.\(^7\)

In Oklahoma this rule has been modified. Beginning with the case of *Doss Oil Royalty Co. v. Texas Co.*,\(^8\) the Supreme Court of Oklahoma has held in several cases that where there has been an “unreasonable delay” in drilling additional wells, after discovery of oil and gas in paying quantities, a prima facie case can be made by the lessor by showing a failure to continue development for an “unreasonable length of time.” What would be an unreasonable length of time or the nature of the proof that would be required to establish such unreasonableness is not detailed by the court. It simply said in the Doss case: “What may be an unreasonable length of time must necessarily depend upon the circumstances of each case.” However, the court did throw some light upon this issue by its statements concerning the doctrine of abandonment. Overturning a former decision,\(^9\) the court said in the Doss case: “In Oklahoma we have granted relief under similar fact situations and called the theory abandonment... We leave the doctrine of abandonment to be applied in cases where intention to abandon is accompanied by physical relinquishment.”\(^10\) It seems reasonable to infer that the “unreasonable length of time” which would now enable a lessor to make

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\(^8\) 192 Okla. 359, 137 P.2d 934 (1943).

\(^9\) Fox Petroleum Co. v. Booker, 123 Okla. 276, 213 Pac. 33 (1926).

\(^10\) *Doss Oil Royalty Co. v. Texas Co.*, 192 Okla. 359, 137 P.2d 934, 937-38 (1943).
out a prima facie case without anything further would be such as the court in former cases has held to justify abandonment. 101

2. Alternative Decree

In applying equitable principles and in pursuance of their broad equitable powers, courts of equity generally follow the practice of rendering an "alternative" decree where cancellation is sought for breach of implied covenants and the plaintiff proves his case. Under such a decree, if the court decides there has been a breach of an implied covenant, it will specify the particulars which constitute the breach, what the lessee must do to remedy it, and then give the lessee a reasonable time to comply with the directions of the court. Failure to comply as directed will result in making the decree absolute. 102

IV. Conclusion

An examination of the many decisions involving implied covenants of development or additional drilling reveals the difficulty courts have in applying fixed principles to varying fact situations. No two cases present the same facts. The standard of "reasonableness" is applied both to the lessor's demands and the lessee's duty. And, what is reasonable in one case may not be reasonable in another. For example, a delay of seven years was held in one case 103 not to be unreasonable in developing both known and untested sands under a lease. In another case 104 where a well drilled produced some oil but was completed as a dry hole and there was evidence that the "hydrofrac method," unknown when the so-called dry hole was completed, would have changed the "dry hole" into a paying well, the court ordered the lessee to drill another well after a lapse of some three or four years from the completion of the dry hole. In the same case the court said: "No hard or fast rule can be laid down as to what con-


stitutes an unreasonable delay. Ten years may not be unreasonable in one case, while five years may be unreasonable in another.100

The "reasonableness" depends upon the facts and circumstances of each case. Many of these factors have been set out above, such as the amount already expended by the lessee; the prospect or expectation of ultimate profit; probable quantity of oil or gas capable of being ultimately produced as indicated by prior development; the character of the subsurface structure and sands in that area; facts derived from geological and geophysical operations in that area; the extent and result of operations on adjacent lands; improved methods of operation and development; market conditions and transportation facilities; the cost of drilling and operating wells; the nature of the producing formation, whether sand, lime or other formation, and its thickness, saturation, and general character; and restrictions upon production under lawful authority of state or federal agencies. All of these factors and others peculiar to the case before the court have a bearing on what is "reasonable diligence" and what is a reasonable delay in development, both of known and untested formations.

It is for the court, in the exercise of its equitable powers to apply the rule and base its decision upon whatever in the circumstances would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee.

100 Id. at 4.