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Abandonment of Oil and Gas Leases

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In judicially declaring that the mutual rights and obligations created by an oil and gas lease have come to an end, the court having jurisdiction of the matter frequently declares that the life of the lease has been terminated by "abandonment" on the part of the lessee. This term is, apparently, both fascinating and convenient. It has readily been accepted by judges and practitioners, sometimes, it is feared, without their giving sufficient attention to its applicability to the case at hand. The situations to which it has been applied may be classified into three distinct groups. It is the belief of the writer that only one of these groups involves abandonment in the proper legal sense, and that the use of the term in cases of the other two types is lax, confusing and productive of undesirable consequences. In the succeeding discussion an attempt will be made to give the reasons for this belief.

I

First let us consider the easements which involve abandonment in the proper sense. Title to land, it is settled, cannot be lost by abandonment.¹ If the right asserted to land "is the valid legal title, it is inconceivable how it can be abandoned."² But the interest of the lessee under an oil and gas lease stands upon quite a different footing. The right granted by the "lease" is merely to search for oil and gas and, if either is found, to remove it from the land. It is, therefore, a *profit à prendre*.³ As such, it is an incorporeal hereditament⁴ and title thereto may therefore be lost by abandonment.⁵

In order that title may be lost by abandonment, two things are

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¹See 3 Washburn, Real Property, 77. See also 1 Corpus Juris 10, and cases there cited.

²East Tennessee Iron & Coal Co. v. Wiggin, 68 Fed. 446 (1895).

³See note on "The Nature of Rights Involved in an Oil and Gas Lease," 31 Har. L. Rev. 882; James W. Simonton, "The Nature of the Interest of the Grantee under an Oil and Gas Lease," 25 W. Va. L. Q. 295; James A. Veasey, "The Law of Oil and Gas," 18 Mich. L. Rev. 749, 773; 2 Tiffany, Real Property, 2nd ed., 1397.

⁴See cases cited in Kulp, Cases on Oil and Gas, 106, note. See also Kolachny v. Galbreath, 26 Okla. 772 (1910), 38 L. R. A. (N. S.) 451; and Rich v. Doneghey, 71 Okla. 204 (1918), 3 A. L. R. 352.

⁵"Title to land cannot be lost by abandonment, notwithstanding the dictum of one learned judge to the contrary. * * * But it is otherwise of easements and incorporeal hereditaments." 3 Washburn, Real Property, 6th ed., 77. "The doctrine of abandonment * * * has to do with incorporeal hereditaments." Thompson, Title to Real Property, 131.

necessary. There must be an intention on the part of the owner to relinquish his title and also "a clear, unequivocal, and decisive act"⁶ done in pursuance of and evidencing this intention.⁷ The intent to abandon and the act of relinquishment must concur.⁸ "The relinquishment must be actual and the abandonment intentional."⁹

In the case of oil and gas leases, the "act" of abandonment need not necessarily involve the positive "doing" of something by the lessee. There are, of course, cases of that sort. The lessee may remove his machinery from the premises, tear down the rig, "pull" the casing from the wells, cease to pump oil from producing wells, all in pursuance of the intention to give up his interest under the lease.¹⁰ On the other hand, the "act" of abandonment is frequently no more than negative conduct, such as a failure to take possession under the lease¹¹ or, if done with the necessary intention, a failure to comply with the obligations, express or implied, imposed by that instrument.¹²

The important element, however, the characteristic which distinguishes the termination of a lease by abandonment from other forms of putting an end to the relation between the lessor and the lessee, is the intention on the part of the lessee to give up his interest under the lease.¹³ If this intention is absent, then there is no abandonment of the lease,¹⁴ although the lessee may have been remiss in the performance of the duties imposed upon him thereunder.¹⁵ Hence,

⁶See *Charleston, S. C. Mining & Mfg. Co. v. American Agricultural Chemical Co.*, 126 Tenn. 18 (1911).

⁷See cases cited 1 *Corpus Juris* 6.

⁸*Blackwell Oil & Gas Co. v. Whited*, 81 Okla. 45 (1921).

⁹*Cadillac Oil & Gas Co. v. Harrison*, 196 Ky. 290 (1922).

¹⁰For cases of this type see *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501 (1903); *Stage v. Boyer*, 183 Pa. 560 (1898); *Calhoon v. Neely*, 201 Pa. 97 (1902).

¹¹See *Barnhart v. Lockwood*, 152 Pa. 82 (1892); *Crawford v. Ritchey*, 43 W. Va. 252 (1897); *Smith v. Root*, 66 W. Va. 633 (1910), 30 L. R. A. (N. S.) 176.

¹²See *Roesener v. Burdette*, 208 Ky. 137 (1925); holding that an abandonment was shown where lessee, after notice that lessor refused to accept delay rental, made no effort to develop the property nor took any "steps to assert his rights" for over two years; and *Harris v. Riggs*, 63 Ind. App. 201 (1916). See also cases cited in notes 39-42, 55, *infra*.

¹³"Abandonment consists of two parts, the intention and the act. * * * There must be an absence of *animus revertendi* in order to constitute abandonment." *Hall v. McClesky*, 288 S. W. (Tex. Civ. App.) 1004. (1921).

¹⁴As to the importance of intent in abandonment generally, see *Baglin v. Cusenier Co.*, 221 U. S. 580 (1911). The court there says: "There must be found an intent to abandon, or the property is not lost * * *"

¹⁵*Luman v. Davis*, 108 Kan. 801 (1921); *Sugg v. Williams*, 191 Ky. 188 (1921); *Cadillac Oil & Gas Co. v. Harrison*, *supra*, n. 9; *Trammel Creek Oil & Gas Co. v. Sarver*, 197 Ky. 594 (1923); *Strange v. Hicks*, 78 Okla. 1 (1920); *Hall v. Roberts*, —Tex. Civ. App.—(1921), 228 S. W. 1008; *Masterson v. Amarillo Oil Co.*, —Tex. Civ. App.—(1923), 253 S. W. 908; *Stitz v. National Producing & Refining Co.*, —Tex. Civ. App.—(1923), 247 S. W. 657; *Sult v. A. Hochstetter Oil Co.*,

it has been held, in alleging an abandonment, the lessor must not only set forth acts on the part of the lessee, such as removal of drilling machinery, etc., from the property without "productive development," but must also allege that these acts were done with intent to abandon the premises.¹⁶ A temporary cessation of operations under the lease, though intentional, does not constitute an abandonment, in the absence of the necessary purpose to give up all rights thereunder.¹⁷ The application of the principle extends even further. An intention to hold the lease without engaging in work of exploration or development, not being an intention to give up the rights conferred by the lease, does not constitute the purpose required for abandonment.¹⁸ Delay in exploration, development or operation may, under principles hereafter discussed, terminate the lease or make it forfeitable at the will of the lessor, but does not of itself constitute an abandonment.

It is sometimes said that an unexplained delay in carrying on operations under the lease is evidence of abandonment.¹⁹ This, however, does not mean that intention is disregarded in determining whether an abandonment has taken place. The true meaning of such a statement is that the failure to exercise the rights conferred by the lease is some indication of an intention to give them up. If uncontradicted by other evidence, it may well be considered sufficient to sustain a finding of the existence of such an intention, but this is merely an infer-

63 W. Va. 317 (1908); Garrett v. South Penn Oil Co., 66 W. Va. 587 (1909); Phillips v. Hamilton, 17 Wyo. 41 (1908); Douglas Oil Fields v. Hamilton, 17 Wyo. 54 (1908). The Supreme Court of Texas, in Grubb v. McAfee, 109 Tex. 527 (1919), appeared to consider, contrary to the decisions cited above from the several Courts of Civil Appeals, that intention to abandon was not indispensable to abandonment, but the recent case of Wisconsin-Texas Oil Co. v. Clutter, — 268 S. W. (Tex.) 921 (1925), clearly makes intentional relinquishment a necessary element thereof.

¹⁶"Abandonment depends on intention and conduct, and the conduct charged, standing alone, does not negative intention to fulfill the purpose of the grant." Luman v. Davis, 108 Kan. 801 (1921).

¹⁷Sugg. v. Williams, *supra*, n. 15; Trammel Creek Oil & Gas Co. v. Sarver, *supra*, n. 15.

¹⁸Southwestern Oil Co. v. McDaniel, 71 Okla. 142 (1918), holding that exercise of option to pay delay rental in lieu of drilling is not an abandonment; Buie v. Porter, — 228 S. W. (Tex. Civ. App.) 999 (1921); Lane v. Urbahn, — 265 S. W. (Tex. Civ. App.) 1063 (1924); Reserve Gas Co. v. Carbon Black Mfg. Co., 72 W. Va. 757 (1913).

¹⁹"An unexplained cessation of operations for the period involved in this case gives rise to a fair presumption of abandonment, and, standing alone and admitted, would justify the court in declaring an abandonment as matter of law." Aye v. Philadelphia Co., 193 Pa. 451 (1899), "The very nature of the contract would seem to raise a presumption of abandonment when there is unreasonable delay in doing under the lease what the parties originally contemplated should be done under it." Harris v. Michael, 70 W. Va. 356 (1912). "An unexplained cessation of operations may give rise to a fair presumption of abandonment, * * *." Strange v. Hicks, *supra*, n. 15. See also Barnhart v. Lockwood, *supra*, n. 11; Hall v. McClesky, *supra*, n. 13; Hall v. Roberts, *supra*, n. 15.

ence, rebuttable by showing a contrary intention.²⁰ The lessee may testify that he did not mean to abandon the premises.²¹ His testimony will not, of course, be conclusive. His actual conduct at the time may be resorted to for the purpose of indicating the existence of intent to abandon.²² Such an intention, notwithstanding present protestations to the contrary, may be inferred from a failure to comply with the implied covenants of the lease²³ or with its express provisions, though not specified as a ground of forfeiture in the instrument.²⁴ On the other hand, the lessee's conduct may be such as to negative the presumption arising from "unexplained delay."²⁵

It seems clear, then, that abandonment of an oil and gas lease, like abandonment of other property, requires the concurrence of a definite act of abandonment and an intention to relinquish all claims to the property. If the intention is absent, there is no abandonment, though the conduct of the lessee may have brought the lease to an end or rendered it subject to forfeiture upon some other ground.²⁶

II

Many cases present a state of facts in which, by virtue of its express terms, the lease has either expired or has become subject to forfeiture at the option of the lessor. A brief summary of the more common situations may make the above statement more concrete. For instance, the duration of the lease may be made to depend upon a given contingency, which has taken place. The lease is thereupon terminated.²⁷ Most modern leases contain a provision for the payment

²⁰"The *** cessation of operations may, however, be satisfactorily explained." *Strange v. Hicks*, *supra*, n. 15.

²¹*Bartley v. Phillips*, 179 Pa. 175 (1897). See also *Hall v. Roberts*, *supra*, n. 15.

²²"In business transactions a man's intention is to be gathered from *** his conduct, rather than from what he meditates, if the latter is inconsistent with the former." *Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co.*, 126 Fed. 623 (1903).

²³"In view of this implied agreement to use diligence in making development, the failure to do so *** becomes a potent element of proof of intention to abandon." *Smith v. Root*, *supra*, n. 11.

²⁴*Crawford v. Ritchey*, *supra*, n. 11.

²⁵Conduct held to have this effect: *Sale of interest in lease*, *Fisher v. Crescent Oil Co.*, 178 S. W. (Tex. Civ. App.) 905 (1915). Demand to be allowed to sell interests in the lease, *Lane v. Urbahn*, *supra*, n. 18. Payment of delay rental, *Reserve Gas Co. v. Carbon Black Mfg. Co.*, *supra*, n. 18.

²⁶It has been said that it is not necessary that the existence of "a specific mental conclusion *** to so abandon the right" shall be found in order to constitute an abandonment. *Munsey v. Marnet Oil & Gas Co.*, — 199 S. W. (Tex. Civ. App.) 686 (1917). An examination of the case, however, shows that the court merely intended to point out that the conduct of the lessee, taken in consideration with surrounding circumstances, may establish the intention to abandon.

²⁷Lease, as construed by court, was dependent for its continuance upon the discovery of oil: *Eaton v. Alleghany Gas Co.*, 122 N. Y. 416 (1890). Similar situation: *Pettitt v. Double-O Oil Co.*, 82 Okla. 13 (1921). Continuation of lease

of "delay rental" by the lessee in lieu of drilling wells. The clauses governing this subject differ in wording and in legal effect. Some leases provide that the lessee shall drill a well within a given time or pay the specified rental. These are termed "*or* leases."²⁸ Under such provisions it is held that the failure both to drill and to pay rental does not *ipso facto* terminate the lease but that it does furnish justification of a forfeiture by the lessor.²⁹ Another type of instrument provides that, if a well is not drilled within a certain period, the lease shall become null and void "unless" the sum specified as delay rental is paid. This is the so-called "*unless* lease." Some courts hold that such a lease is automatically terminated by a failure to "drill or pay."³⁰ Other decisions go upon the theory that the lessee's default merely gives rise to a ground for forfeiture.³¹ In a third form of lease, the provision requires that the lessee shall "drill or pay" or the lease shall be "null and void."³² Such a lease has been held to terminate automatically upon the lessee's failure to search for oil or to pay rent.³³ In other jurisdictions, this has been adjudged merely a ground for forfeiture.³⁴

Other provisions of the lease may be so phrased that their violation either causes a destruction of the lessee's interest or affords a cause for forfeiture.³⁵ If the duration of the lease is stipulated as being "so

dependent on completion of well within one year: *Texala Oil & Gas Co. v. Caddo Mineral Lands Co.*, 152 La. 549 (1922); Similar situation: *Southern Illinois Gas Co. v. Parsons*, 308 Ill. 139 (1923).

²⁸For a discussion of the distinction between an "*or* lease" and an "*unless* lease," see *Northwestern Oil & Gas Co., v. Branine*, 71 Okla. 107 (1918), 3 A. L. R. 344; and see note in 44 L. R. A. (N. S.) 50.

²⁹*New Domain Oil & Gas Co. v. Gaffney Oil Co.*, 134 Ky. 792 (1909); *Trammel Creek Oil & Gas Co. v. Sarver*, *supra*, n. 15; *Cohn v. Clark*, 48 Okla. 500 (1915), L. R. A. 1916B, 686; *Cherokee Oil & Gas Co. v. Melton*, 67 Okla. 242 (1918); *Jackson v. Twin State Oil Co.*, 95 Okla. 96 (1923).

³⁰"Under the contract, the forfeiture operated automatically * * *." *Bray v. Woodley*, 162 Ark. 186 (1924); *House v. Halton*, 167 Ark. 649 (1925); *Sparks v. Albin*, 195 Ky. 52 (1922); *Frank Oil Co. v. Belleview Oil & Gas Co.*, 29 Okla. 719 (1911), 43 L. R. A. (N. S.) 487; *Mitchell v. Probst*, 52 Okla. 10 (1915); *Eastern Oil Co. v. Smith*, 80 Okla. 207 (1921); *Ireland v. Chatman*, 87 Okla. 223 (1922); *Garfield Oil Co. v. Champlin*, 103 Okla. 209 (1924); *Smith v. Harris*, 252 S. W. (Tex. Civ. App.) 836 (1923).

³¹*Dill v. Fraze*, 169 Ind. 53 (1907); *Risch v. Burch*, 175 Ind. 621 (1911); *Kays v. Little*, 103 Kan. 461 (1918), 1 A. L. R. 674; *Young v. Moncrief*, 117 Kan. 698 (1924); *Stephenson v. Stitz*, — 255 S. W. (Tex. Civ. App.) 812 (1923). See also *Perry v. Acme Oil Co.*, 44 Ind. App. 207 (1909); and *Epperson v. Helbron*, 145 Ark. 566 (1920).

³²For cases dealing with question of when rent is due, see note in 15 A. L. R. 604.

³³*Chi-Okla. Oil & Gas Co. v. Shertzer*, 105 Okla. 111 (1924). See also *Taylor v. Hamilton*, 194 Cal. 768 (1924).

³⁴*McKean Natural Gas Co. v. Wolcott*, 254 Pa. 323 (1916); *Clemenger v. Flesher*, — Tex. Civ. App. — (1916), 185 S. W. 304.

³⁵Failure to drill well as required; *Haggart v. Wheeler*, 116 Kan. 702 (1924); *Four Brotherhood Oil Co. v. Kelley*, — Tex. Civ. App. — (1921), 235 S. W. 604. Failure to market product; *Buffalo Valley Oil & Gas Co. v. Jones*, 75 Kan. 18

long as oil or gas is produced," or is expressed in similar phraseology, cessation of production puts an end to the lessee's rights.³⁶

In all of these cases, the intention of the lessee to hold or to relinquish the lease is utterly immaterial. He may desire to retain his interests thereunder, he may emphatically deny that any cause for termination of his relation with the lessor exists, and he may strenuously resist any attempt to enforce such a termination; yet the judicial decision of the question of termination or of forfeiture will not be affected by his intention.³⁷ In view of the immateriality of the existence or absence of a purpose to keep or to relinquish the lease, cases dependent upon these situations cannot be said to be cases of abandonment.³⁸

Of course, there may be cases in which there are present the elements of both abandonment and expiration or forfeiture of the lease by its own terms. If the lease is to expire unless the lessee drills a well or pays delay rental within a certain time, and he deliberately fails to do either with the intention of giving up his legal rights, the essential features of abandonment are present.³⁹ The act of abandonment is the failure to drill or to pay rent, and it is done with the necessary intention of relinquishment. The case is equally one of termination either by expiration or by forfeiture.⁴⁰ Likewise, if the duration of the lease is dependent upon continued production of oil or gas, a cessation of production with the intention of surrendering all claims may properly be called a termination by abandonment as well as by expiration of the term.⁴¹ The same would be true of the breach of any of the conditions of the lease made under similar circumstances.⁴²

But the intention must be an intention to relinquish all property in the lease. It is not sufficient that the particular default be intentional, if the lessee's purpose is to hold the lease in spite of the default.⁴³

(1907). Cessation of operations for specified period: *Dittman v. Keller*, 55 Ind. App. 448 (1914); *Pratt v. Hays*, 190 Ky. 20 (1920). Failure to pay taxes within 30 days after notice: *Gulf Production Co. v. Cruse*, — Tex. Civ. App. — (1924), 258 S. W. 211.

³⁶*Union Gas & Oil Co. v. Adkins*, 278 Fed. 854 (1922); *Shenk v. Stahl*, 35 Ind. App. 493 (1905); *Collins v. Mt. Pleasant Oil & Gas Co.*, 85 Kan. 483 (1911) 38 L. R. A. (N. S.) 134; *Caylor v. Bankers Oil Co.*, 110 Kan. 224 (1922); *Warner v. Kulp*, 114 Kan. 118 (1923).

³⁷*Collins v. Mt. Pleasant Oil Co.*, *supra*, n. 36.

³⁸See conclusion of preceding subdivision.

³⁹"An intentional failure to pay as stipulated *** may be treated as an abandonment of the lease." *Shaffer v. Marks*, 241 Fed. 139 (1917).

⁴⁰See *Harris v. Riggs*, *supra*, n. 12.

⁴¹See *Sult v. A. Hochstetter Oil Co.*, *supra*, n. 15; and *Michaels v. Pontius*, 78 Ind. App. 204 (1922). In these cases, intent to abandon may be, and apparently is, "spelled out" from conduct.

⁴²See *Federal Betterment Co. v. Blaes*, 75 Kan. 69 (1907).

⁴³See discussion in preceding subdivision.

Nevertheless, a number of cases speak of the conclusion of the lease by lapse through its own terms or by forfeiture for breach of condition as constituting an abandonment,⁴⁴ even when there is clearly no intentional relinquishment by the lessee.⁴⁵ In other cases, there are suggestions to the same effect.⁴⁶

This confusion of terms is probably due to the fact that, as pointed out, there are situations which may properly be described as constituting either an abandonment or an expiration or forfeiture of the lease. This being true, there is a natural tendency to overlook the absence of the essential element of abandonment—the intention—in these particular cases. It is submitted, however, that the failure to distinguish between the two situations, as hereafter pointed out, leads to undesirable consequences.

III

Another source of confusion is to be found in those cases which present situations coming within the scope of the doctrine of implied covenants in oil and gas leases. In the absence of express stipulations governing the diligence with which the work of exploration, development, operation and protection against drainage is to be carried on upon the leased premises, courts have imposed certain obligations in these respects on the lessee, upon the theory that such obligations are implicit in the relationship created by the lease. These are termed

⁴⁴*Harrell v. Saline Oil & Gas Co.*, 153 Ark. 104 (1922); *Dixon v. McCann*, 87 Okla. 109 (1922).

⁴⁵In *Beatty-Nickel Oil Co. v. Smethers*, 49 Ind. App. 602 (1911), a condition requiring the drilling of a specified number of wells was violated. Intent to abandon was conclusively absent. The lease was twice assigned, and one of the assignees made preparations to operate the well upon the leased premises, but was forbidden to do so by the lessor, who claimed that the lease was at an end. In *Rawlings v. Armel*, 70 Kan. 778 (1905), the lease provided for payment of rent if wells were not drilled and operated after six months from its date, on penalty of forfeiture. Two dry holes were drilled, but no rent was paid and the machinery, etc. was subsequently removed from the premises. Intention to abandon seems clearly negated by a subsequent sale of the lease. Nevertheless, the court held that the lease was abandoned. It might properly be held that the lease was subject to forfeiture for nonpayment of rent, and the court justifies its decision upon that ground as well. In *New State Oil & Gas Co. v. Dunn*, 75 Okla. 141 (1919), the lease for ten years contained provision for drilling of well in two years. This was not done and court declared this to be an abandonment. Intent to abandon seems clearly negated by the lessee's position that a proper interpretation of the lease would afford it the entire term of ten years in which to drill the well. In *Tucker v. Canfield*, 276 Fed. 385 (1921), the lease for as long as oil and gas found in paying quantities expired upon cessation of production from well on premises. The court calls it abandonment, though intent to abandon seems to have been lacking, since the lessee sought to excuse his delay.

⁴⁶See *Union Gas & Oil Co. v. Adkins*, *supra*, n. 36; *Buffalo Valley Oil & Gas Co. v. Jones*, *supra*, n. 35; *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652 (1923); *Burnett v. Summerour*, — Tex. Civ. App. — (1921), 228 S. W. 1013; *Four Brotherhood Oil Co. v. Kelley*, *supra*, n. 35.

the implied covenants of the lease.⁴⁷ Failure to comply with such obligations does not, of course, depend upon an intention to give up the lease. In most cases of this type, no such intention is present. The lessee simply fails, for a length of time deemed unreasonable by the court, to drill an exploratory well, or to develop the land after the discovery of oil or gas, or to operate producing wells, or to protect the underlying deposits from drainage by wells on adjoining land. This nonaction occurs because the lessee conceives that he will make more profit out of the lease in that way. He does not intend to give up the lease; he intends to use it in the way which will be most profitable to him.

If, because of the breach of these implied covenants, the lessor is permitted to terminate the lease,⁴⁸ it is not proper to term the situation an abandonment by the lessee. The absence of the element of intentional relinquishment prevents it from falling under that category. "There must be an intention to abandon as well as an actual abandonment of the property * * *."⁴⁹ Defaults in drilling the exploratory well,⁵⁰ in developing the lease after the exploratory well is drilled,⁵¹ in operating producing wells,⁵² or in protecting the land against drainage⁵³ do not, unaccompanied by an intention to give up all rights under the lease, amount to an abandonment, although they may constitute a breach of the implied covenants.⁵⁴

The distinction between termination of the lease by abandonment and by forfeiture for breach of the implied covenants has, unfortunately, not always been kept in mind. As in cases of the type discussed in the preceding subdivision, there may be instances wherein the acts which constitute a breach of the implied covenants, if done with the requisite intention, amount also to an abandonment. This seems to have been the situation in an early Pennsylvania decision in which the lease, after seven years delay in development, was said to be

⁴⁷The writer has dealt at length with these obligations in a recent book. See Merrill, *Covenants Implied in Oil and Gas Leases*.

⁴⁸Not all jurisdictions permit forfeiture of the lease for breach of the implied covenants. See Merrill, *Covenants Implied in Oil and Gas Leases*, Secs.98-100.

⁴⁹*McMillin v. Titus*, 222 Pa. 500 (1909).

⁵⁰*Stitz v. National Producing & Refining Co.* — Tex. Civ. App. — (1923), 247 S. W. 657; *Phillips v. Hamilton*, 17 Wyo. 54 (1908).

⁵¹*Gillespie v. Ohio Oil Co.* 260 Ill. 169 (1913); *Advance Oil Co. v. Hunt*, 66 Ind. App. 228 (1917); *Cadillac Oil & Gas Co. v. Harrison*, *supra*, n. 9; *Trammel Creek Oil & Gas Co. v. Sarver*, *supra*, n. 15; *Blackwell Oil & Gas Co. v. Whited*, *supra*, n. 8; *Pierce v. Texas Pacific Coal & Oil Co.*, — Tex. Civ. App. — (1920), 225 S. W. 193.

⁵²*Strange v. Hicks*, *supra*, n. 15; *Wisconsin-Texas Oil Co. v. Clutter*, *supra*, n. 15.

⁵³*O'Neil v. Sun Co.*, 58 Tex. Civ. App. 167 (1909).

⁵⁴See Merrill, *Covenants Implied in Oil and Gas Leases*.

terminated by abandonment.⁵⁵ There was no direct evidence of an intention to abandon, but the delay, unexplained, occurred under circumstances which justified an inference of such an intention.⁵⁶ Certain language in the opinion, however, indicates a view that intentional relinquishment is not necessary to the abandonment of an oil and gas lease provided there has been delay in exploration or development. The court says:

“A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate, and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned.”

The language quoted seems to constitute the fountain head from which have flowed these decisions which confuse abandonment with an enforced termination of the lease for failure to comply with obligations implied by the law.⁵⁷

The extent to which this confusion extends may be illustrated by an examination of several typical cases. In *Steelsmith v. Gartlan*,⁵⁸ lack of intention to abandon is clearly apparent, for the lessee signified his wish to retain the lease, pending the outcome of exploration upon adjoining lands. The West Virginia Supreme Court of Appeals quoted with evident approval the extract from *Venture Oil Co. v. Fretts* which is quoted above and held the lease lost by abandonment. In view of the absence of intention to relinquish the lease, it seems clear that the court was really enforcing a forfeiture for breach of the implied covenant for development. The opinion recognizes that the same result could have been reached upon that theory⁵⁹ and it is submitted that such theory is the only one upon which the case can be sustained.

In *Parish Fork Oil Co. v. Bridgewater Gas Co.*,⁶⁰ it was held that the lessee's failure for eighteen months to operate a well or do further drilling constituted abandonment. Various circumstances negated

⁵⁵*Venture Oil Co. v. Fretts*, 152 Pa. 451 (1893).

⁵⁶See authorities cited in note 23, *supra*.

⁵⁷See *Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. 839 (1898); *Steelsmith v. Gartlan*, 45 W. Va. 27 (1898); *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583 (1902), 59 L. R. A. 566.

⁵⁸See note 57, *supra*.

⁵⁹“Nor can there be a different conclusion if it is held that the lease, being for the purpose of operating for oil and gas, is subject to the implied precedent condition * * * that the lessee shall diligently prosecute the search and operation * * *.” *Steelsmith v. Gartlan*, *supra*, n. 57.

⁶⁰*Parish Fork Oil Co. v. Bridgewater Gas Co.*, *supra*, n. 57.

the existence of any intention to give up the lease.⁶¹ The court by its language definitely showed that it considered the question of intention immaterial:

"It is by no means conclusive of the question of abandonment that the lessees insisted that their lease was not forfeited, that there were some circumstances which rendered it inconvenient for them to continue the work of exploration, and that Cox made some effort to have the defective title of Swisher perfected. All this is consistent with the intention to continue the work of exploration, but it is equally consistent with the intention merely to endeavor to hold onto the lease without doing any work under it,—a thing which the policy of the law does not permit unless the right to do so is absolutely fixed and secured by the terms of the contract; and even then it is not always permitted."

At another point the court spoke of the lessees as "simply trying to hold the lease without doing anything under it, * * *." But, as we have seen,⁶² an intention to hold the lease without working the premises does not constitute an intention to abandon all property in it. The court appears plainly to have been enforcing a forfeiture of the lease for a breach of the implied covenants for operation and for development, though calling the result an abandonment.

In *Bay State Petroleum Co. v. Penn Lubricating Co.*,⁶³ it was expressly found that the lessee did not intend to abandon the premises, yet the court held that the lease came to an end by abandonment upon the failure of the lessee to continue the search for oil or gas. An early case in the Federal Courts, arising in West Virginia, shows the same confusion between abandonment and judicial termination of the lease as a remedy for the breach of an implied covenant.⁶⁴ The same comment is applicable to decisions of the Supreme Court of Texas⁶⁵ and of the Appellate Division of the Supreme Court of New York.⁶⁶

⁶¹The lessees contended that no further work on their part was necessary to hold the lease; steps were taken by them to secure further drilling; the lessees asked the correction of a defect in the lessor's title to part of the land; and in various negotiations between the lessor and the lessees, the latter uniformly contended that the lease was in full force and effect.

⁶²See easements cited in note 18, *supra*.

⁶³*Bay State Petroleum Co. v. Penn Lubricating Co.*, 121 Ky. 637 (1905). See also *Hails v. Johnson*, 204 Ky. 94 (1924).

⁶⁴*Elk Fork Oil & Gas Co. v. Jennings*, *supra*, n. 57, affirmed *sub nom.* *Foster v. Elk Fork Oil & Gas Co.*, 90 Fed. (W. Va.) 718 (1898). See also *Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co.*, 126 Fed. 623 (1903).

⁶⁵*Grubb v. McAfee*, *supra*, n. 15. The case may be upheld upon the theory that long delay in development raised a presumption of intention to abandon which was not rebutted by any evidence offered in behalf of the lessee. The court's opinion, however, seems to go further and to hold that the failure to develop constituted abandonment "as matter of law."

⁶⁶*Conkling v. Krandsky*, 127 App. Div. (N. Y.) 761 (1908).

So far has this lack of discrimination prevailed that it has been declared that there is no real difference between abandonment of an oil and gas lease and forfeiture thereof for breach of an implied covenant,⁶⁷ while several cases specifically state that such a breach constitutes an abandonment by the lessee, for example:⁶⁸

"* * * if it was the duty of appellee to drill a protection well and it refused to do this, its refusal would constitute an abandonment of the contract. * * *"⁶⁹

"If after drilling a well in which there is oil or gas the lessee goes away and leaves it for an unreasonable length of time without an effort to further develop the lease or market the oil, it will amount to an abandonment of the lease unless the lease is kept in force by the payment of rentals or in some other way * * *"⁷⁰

"* * * 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."⁷¹

"When a lessee undertakes to develop oil or gas land on a royalty or rental basis and the contract does not specify the number of wells to be drilled, there is an implied obligation that he will fully develop the land with reasonable diligence, and a failure to do so amounts to an abandonment of the lease."⁷²

In spite of these declarations, it must be apparent that there is a real and important difference between the abandonment of a lease and forfeiture thereof for breach of an implied covenant. For the former to exist, it is necessary that the lessee intend to relinquish all his rights under the lease, and that he act in pursuance of this intention. In the case of forfeiture, intention to give up the lease does not exist; the law permits the lessor to terminate the relationship against the will of the lessee because of the latter's failure to fulfill the obligations which the law imposes upon him. It is believed that the authorities heretofore cited, as well as the general rules of law governing the doctrine of abandonment, sustain this distinction.

⁶⁷ "That the rights of the lessee may be lost by abandonment is evident. This is practically the same thing as a breach of the implied covenant on the part of the lessee to use diligence in sinking a well." *Hall v. McClesky, supra*, n. 13.

⁶⁸ See, in addition to the cases from which extracts are quoted, *Harris v. Michael, supra*, n. 19.

⁶⁹ *Blair v. Clear Creek Oil & Gas Co.*, 148 Ark. 301 (1921), 19 A. L. R. 430.

⁷⁰ *Monarch Oil & Gas Co. v. Hunt*, 193 Ky. 201 (1921). Intent to abandon was nonexistent, as the lessee took the position that it "was only waiting for an opportunity to market its oil," and was not required to engage in further development until a market was secured.

⁷¹ *Aye v. Philadelphia Co.*, *supra*, n. 19.

⁷² *Chapman v. Ellis*, 254 S. W. (Tex. Civ. App.) 615 (1924).

IV

Without doubt it is pertinent to ask: What is the profit of all this discussion? "What's in a name?" If correct results are reached, why quibble over the terms to be applied to the process of reasoning from which they come? It seems to the writer that the indiscriminate use of the term abandonment to apply to each of the three situations which have been discussed produces consequences which are undesirable. Some of the more important of these warrant a brief consideration.

The legal consequences which flow from characterizing a given situation as abandonment or as something else are often quite distinct. Thus, if the breach of an agreement to drill a well or to pay delay rental be regarded merely as giving rise to a ground of forfeiture of the lease, equity may relieve the lessee from his liability to that penalty, upon proper showing.⁷³ On the other hand, an "abandonment" operates immediately to divest the lessee of his rights under the lease.⁷⁴ There is therefore, it would seem, no basis for judicial relief against its effects. Hence, the lessee's position is much less favorable when conduct of this sort is called "abandonment," than if it be deemed merely a cause for the assertion of a forfeiture by the landowner, and his rights may vary upon exactly similar states of fact, depending upon which tag the court places upon the particular case.

In some states, forfeiture of the lease is not regarded as a proper remedy for the breach of an implied covenant.⁷⁵ The lessor in such jurisdictions is remitted to the remedy of recovery of damages for such a breach. But, if the facts which constitute a breach of the implied covenants are also looked upon as amounting to an abandonment by the lessee which terminate his rights under the lease, the lessor gets the same practical result that he would obtain in a jurisdiction which regards forfeiture as a proper remedy for a breach of covenant. The relief available to him may thus depend upon whether or not his counsel is astute enough to assert the existence of an abandonment⁷⁶ when the lessee has been remiss in drilling or in operating wells. Here, again, the label which is judicially affixed to the case at bar may have much to do with the actual rights of the parties.

⁷³Kays v. Little, *supra*, n. 31; McKean Natural Gas Co. v. Wolcott, *supra*, n. 34; Shaffer v. Marks, *supra*, n. 39.; Brunson v. Carter Oil Co., 263 Fed. (Okla.) 935 (1919).

⁷⁴See Harris v. Riggs, *supra*, n. 12; Venture Oil Co. v. Fretts, *supra*, n. 55; Wisconsin-Texas Oil Co. v. Clutter, *supra*, n. 15.

⁷⁵See Merrill, Covenants Implied in Oil and Gas Leases, Sec. 98, and cases there cited.

⁷⁶See Grubb v. McAfee, *supra*, n. 15; Chapman v. Ellis, *supra*, n. 72.

It is to be remembered, also, that describing implied covenant situations as cases of abandonment tends to hinder the proper development of the former doctrine. Precedents labeled "abandonment" may easily be cast aside as inapplicable by counsel and by judges who realize that the case under their consideration contains no hint of intentional relinquishment of his rights by the lessee. Makers of digests and other aids to the practitioner may likewise accept the label at its face value in marshalling the authorities into the proper pigeonholes. Hence the accurate solution of problems arising under the doctrine of implied covenants may be imperiled by the failure to discover and present what are often the most significant decisions upon the particular situation involved.

Of course, in these days, we justly condemn that way of thinking which attributes to legal conceptions, kept rigidly distinct each from the other and mechanically applied, a virtue in and of themselves;⁷⁷ but such a slurring over of the lines between distinct doctrines as we find in the situations under discussion cannot be other than harmful. Its effect is to hinder the logical and consistent development of the rules, principles and standards peculiar to each doctrine and thus to curtail that certainty and predicability which is one of the chief merits of justice administered according to law.⁷⁸ It is to be hoped that, as time goes on, the tendency to confuse cases of these three classes will be overcome and that the term abandonment will be reserved for situations which involve an intentional relinquishment of his rights by the lessee.

⁷⁷See Roscoe Pound, "Justice According to Law," 13 *Col. L. Rev.* 696, 709.

⁷⁸See Roscoe Pound, "The Theory of Judicial Decision," 36 *Har. L. Rev.* 802, 817 ff.