1964
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CANADIAN SUPERIOR OIL OF CALIFORNIA, LTD. (*Plaintiff*) .. } APPELLANT;

AND

EDWARD KANSTRUP AND SCURRY-RAINBOW OIL LTD. (*Defendants*) } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Mines and minerals—Petroleum and natural gas lease—Ten year term and as long thereafter as oil or gas produced from leased land—Where gas from gas well not sold or used royalty payment to extend lease as if gas being produced—Subsequent amendment of lease providing for pooling to establish spacing unit—Well drilled on pooled lands capped because of lack of market—Royalty paid after expiry of ten year term—Whether lease continued beyond expiration of primary term.*

By a petroleum and natural gas lease, dated July 2, 1948, the respondent K leased the north west quarter of a certain section of land to the appellant. It was provided by cl. 2 that the lease was to be for a term of 10 years and "as long thereafter as oil, gas or other mineral is produced from said land hereunder . . ." It was further provided by cl. 3(b) that where gas from a well producing gas only was not sold or used, the appellant might pay as royalty $100 per well per year and, if it did so, it would be considered that gas was being produced within the meaning of cl. 2. The appellant filed a caveat against the land covered by the lease on July 6, 1948. In 1952 the lessor entered into a royalty trust agreement with Prudential Trust Co. as trustee, under which he assigned to the trustee a percentage of the gross royalty or share of production from any well or wells that might be drilled upon any part of the north west quarter, to be held and distributed by the trustee pursuant to the terms of the agreement.

At all times material since July 2, 1952, the relevant orders and regulations prescribed a spacing unit for a gas well as 640 acres, with power to the Oil and Gas Conservation Board, in a case in which, in its

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

opinion, it was proper to do so, to prescribe a spacing unit of any size or shape or within any boundaries. On July 1, 1954, an area within which the north west quarter was situate was designated by the Board as a gas field. In that field during the months April to June, 1958, the policy of the Board was not to grant a licence for the drilling of a well unless the applicant had the right to produce from an entire spacing unit. In January 1957 the appellant entered into a contract with Trans Canada Pipe Lines Ltd., whereby it dedicated all its gas in this field obtained from the Devonian formation for sale to that company; Trans Canada, however, was not obligated to take any gas until the latter part of 1959.

On November 8, 1957, the lease was amended by the addition to it of cl. 14(A). Under this clause the lessee was given the right to pool or combine the land covered by the lease with other adjoining lands to form a drilling unit, when such pooling or combining was necessary in order to conform with governmental regulations. The clause also provided that drilling operations on, or production of leased substances from any land in the unit should have the same effect in continuing the lease in force and effect as if such operation or production were upon or from the leased land.

In addition to its lease of the north west quarter, the appellant held a petroleum and natural gas lease in respect of the south half of the section from one P, who agreed to the addition of his lease of a clause similar to cl. 14(A). A company controlling the petroleum and natural gas rights in respect of the north east quarter of the same section entered into a pooling and joint operating agreement with the appellant. The latter, on May 1, 1958, obtained a licence to drill a well on legal subdivision 7 of the section, which was not a part of the north west quarter. A well was drilled and completed early in June 1958 as a gas well. There being no market for the gas, the appellant applied to the Board for permission to cap the well and such permission was granted on June 13.

On April 28, 1958, the respondent K had granted to the respondent company an option to acquire a petroleum and natural gas lease in respect of the north west quarter, and on July 7, 1958, the company filed a caveat in respect of its interest under this option. On July 9, 1958, the appellant forwarded to Prudential a cheque for $100, as representing a royalty payment then due on the capped well, pursuant to cl. 3(b) of the lease, for the period June 5, 1958, to June 5, 1959; these moneys were distributed by the trust company on December 20, 1958.

K wrote to the appellant on July 15, 1958, stating that the lease had expired and asking that the caveat filed by the appellant be removed. In November 1958 the respondent company caused notice to be served upon the appellant, pursuant to s. 144 of *The Land Titles Act*, R.S.A. 1955, c. 170, requiring it to remove its caveat or else to commence proceedings in respect of the same. An action was commenced following the receipt by the appellant of that notice. The appellant forwarded a further $100 cheque to Prudential in May 1959 and these funds were distributed by it in November 1960.

The trial judge held that the lease of July 2, 1948, had expired and was of no force and effect; this decision was affirmed on appeal by a unanimous judgment of the Appellate Division. A further appeal was brought to this Court.

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*Held:* The appeal should be dismissed.

Clause 14(A) did not have the effect of enabling the appellant to treat a capped gas well anywhere on the unit as being equivalent to one located on the north west quarter, but, even if it did, payment of the $100 royalty after the primary term had expired was not effective to continue the term of the lease thereafter. At the time the primary term came to an end, no oil, gas or any other mineral was being produced from any part of the unit, nor was there any gas which could be considered as being produced as a result of the operation of cl. 3(b). That clause did not impose upon the appellant any obligation to pay a $100 royalty in respect of a non-producing gas well. The appellant had a choice to pay or not to pay and the clause only became operative "if such payment is made". If the appellant sought to continue the lease in operation after the primary term, by the combined operation of cl. 3(b) and cl. 2, then it was essential that it should have paid the royalty before the primary term expired.

The appellant's argument, based on cl. 14, that compliance with statutory provisions requiring it to cap the well should not constitute a cause for termination of the lease failed. The failure of the appellant to produce gas within the primary term, so as to extend that term, was not caused because of the need to comply with any statute or regulation, but was caused solely by the fact that there was no market or use for it.

The argument based upon cl. 18 also failed because, while the clause postponed certain obligations on the part of the appellant, in certain events, it did not purport to modify the provisions of the *habendum* clause. That clause imposed no obligation upon the appellant to produce oil, gas or other mineral from the leased land. It only provided that the primary term could be extended if oil, gas or other mineral was produced. If none of those substances were produced within the primary term, the lease terminated at the expiration of that term.

Similarly, the appellant could not derive any assistance from cl. 15, which provided that breach by the appellant of any obligation under the lease "shall not work a forfeiture or termination of this lease nor because for cancellation or reversion hereof . . . save as herein expressly provided". There was no question of any breach by the appellant of any obligation under the lease.

The position of the respondent K was not affected by his acceptance of a portion of the two royalty payments made by the appellant after the primary term had expired. No question arose as to election or waiver of forfeiture. The lease contained within itself a provision which operated automatically to terminate it upon the expiration of the primary term.

*Shell Oil Co. of Canada v. Gibbard,* [1961] S.C.R. 725; *Shell Oil Co. v. Gunderson,* [1960] S.C.R. 424, distinguished; *East Crest Oil Co. v. Strohschein* (1951-52), 4 W.W.R. (N.S.) 553, referred to.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], affirming a judgment of Kirby J. Appeal dismissed.

[1] (1964), 47 W.W.R. 129, 43 D.L.R. (2d) 261.

*G. H. Steer, Q.C.*, and *T. Mayson*, for the plaintiff, appellant.

*J. H. Laycraft, Q.C.*, and *D. O. Sabey*, for the defendant, respondent, Scurry-Rainbow Oil Ltd.

*W. B. Gill*, for the defendant, respondent, Kanstrup.

The judgment of the Court was delivered by

MARTLAND J.:—By a petroleum and natural gas lease, dated July 2, 1948, the respondent Kanstrup leased to the appellant (whose name at that time was Rio Bravo Oil Company, Limited) the North West Quarter of Section 9, Township 39, Range 22, West of the Fourth Meridian, in the Province of Alberta, hereinafter referred to as "the North West Quarter".

The relevant provisions of that lease are as follows:

1. Lessor in consideration of Two Hundred Forty dollars ($240.00) of lawful money of Canada, the receipt of which is acknowledged by Lessor and the convenants and agreements hereinafter contained, has granted, demised, leased and let and by these presents does grant, demise, lease and let exclusively unto Lessee for the purpose and with the exclusive right of drilling wells, operating for and producing therefrom oil, gas, casinghead gas, casinghead gasoline and related hydrocarbons including the right to pull any and all casing with rights of way and easements for passage over and upon and across said land, and for laying pipe lines, telephone, telegraph and power lines, tanks, powerhouses, stations, gasoline plants, ponds, roadways and fixtures and structures for producing, saving, treating and caring for such products and housing and boarding employees and any and all other rights and privileges necessary, incident to or convenient for the economical operation on said land for the production of oil, gas, casinghead gas, casinghead gasoline and related hydrocarbons and erection of structures thereon to produce, save, treat and take care of said products, all that certain tract of land described as:

The North West Quarter of Section Nine (9) Township Thirty Nine (39) Range Twenty Two (22) West of the Fourth Meridian

as described in Certificate of Title Number 177 H 121 and subject to the reservations, exceptions and conditions contained in the existing Certificate of Title. For the purpose of determining the amount of any money payment hereunder, said land shall be considered to comprise 160 acres even though it actually comprises more or less.

2. Subject to the other provisions herein contained, this lease shall be for a term of 10 Years from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land hereunder, or as long thereafter as Lessee shall conduct drilling, mining or re-working operations thereon as hereinafter provided and during the production of oil, gas or other mineral resulting therefrom.

3. The royalties reserved by Lessor are:

* * *

(*b*) On gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market

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value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a well producing gas only is not sold or used, Lessee may pay as royalty $100.00 per well per year, and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof;

* * *

6. If operations for drilling are not commenced on said land on or before one year from the date hereof, the lease shall then terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor or for deposit to Lessor's credit in the Royal Bank of Canada at Alix, Alberta which bank and its successors are Lessor's agents and authorized to deduct its service charge, if any, from deposits hereunder and shall continue as such agents and depository for any and all sums payable under the lease regardless of changes in ownership of said land, of the oil and gas thereunder, or of rentals to accrue hereunder, the sum of $160.00 Dollars ($160.00) which shall be known and operate as delay rental and shall cover the privilege of deferring the commencement of drilling operations for a period of one (1) year. In like manner and upon like payments or tenders annually, the commencement of drilling operations may be further deferred for successive periods of one (1) year each during the primary term. . . .

* * *

14. Compliance with any now or hereafter existing law enacted by the Parliament of Canada or Legislature of the Province of Alberta or any other lawmaking body, or with orders, judgments, decrees, rules, regulations made or promulgated by the Parliament of Canada or Legislature of the Province of Alberta, or any other law-making body, boards, commissions or committees purporting to be made under the authority of any such law, shall not constitute a violation of any of the terms of this lease or be considered a breach of any clause, obligation, covenant, undertaking, condition or stipulation contained herein, nor shall it be or constitute a cause for the termination, forfeiture, revision or revesting of any estate or interest herein and hereby created and set out, nor shall any such compliance confer any right of entry or become the basis of any action for damages or suit for the forfeiture or cancellation hereof; and while any such purport to be in force and effect they shall, when complied with by Lessee or its assigns, to the extent of such compliance operate as modifications of the terms and conditions of this lease where inconsistent therewith.

15. The breach by Lessee of any obligation hereunder shall not work a forfeiture or termination of this lease nor be cause for cancellation or reversion hereof in whole or in part save as herein expressly provided. If the obligation should require the drilling of a well or wells, Lessee shall have sixty (60) days after the receipt of written notice by Lessee from Lessor specifically stating the breach alleged by Lessor within which to begin operations for the drilling of any such well or wells; and the only penalty for failure so to do shall be the termination of this lease save as to forty (40) acres for each well being worked on or producing oil or gas to be selected by Lessee so that each forty (40) acre tract will embrace one such well.

* * *

18. All obligations under this lease requiring Lessee to commence or continue drilling or to operate on or produce oil or gas from the demised

premises shall be suspended while, but only so long as, Lessee is prevented from complying with such obligations, in part or in whole by strikes, lockouts, acts of God, federal, provincial or municipal laws or agencies, unavoidable accidents, delays in transportation, inability to obtain necessary materials in open market, inadequate facilities for the transportation of materials or for the disposition of production, or other matters beyond the reasonable control of Lessee whether similar to the matters herein specifically enumerated or not, or while legal action contesting Lessor's title to said land or Lessee's right in said premises by virtue hereof shall be pending final adjudication in a court assuming jurisdiction thereof, or while oil produced in or adjacent to said area is seventy-five cents per barrel or less at the well, or when there is no available market for the same at the well, notwithstanding anything herein to the contrary. Time consumed in cleaning, repairing, deepening, or improving any producing well or its necessary appurtenances shall not be deemed or considered as an interruption of the covenant requiring continuous operation. Lessee need not perform any requirement hereunder the performance of which would violate any reasonable conservation and/or curtailment program or plan of orderly development to which Lessee may voluntarily or by order of any governmental agency subscribe or observe. This agreement contains the entire understanding of the parties and no implied covenants of any nature (except covenants of title and quiet enjoyment ordiarily implied in a grant), shall be read into this lease.

A caveat in respect of the lease was registered by the appellant against the title of the respondent Kanstrup to the North West Quarter on July 6, 1948.

On March 19, 1952, the respondent Kanstrup entered into a royalty trust agreement with Prudential Trust Company Limited as trustee, under which he assigned to the trustee the 12½ per cent gross royalty or share of production from any well or wells that might be drilled upon any part of the North West Quarter, to be held and distributed by the trustee pursuant to the terms of the agreement.

At all times material since July 2, 1952, the relevant orders and regulations have prescribed a spacing unit for a gas well as 640 acres, with power to the Oil and Gas Conservation Board, in a case in which, in its opinion, it was proper so to do, to prescribe a spacing unit of any size or shape or within any boundaries.

On July 1, 1954, an area in the province within which the North West Quarter was situate was designated by the Board as "the Nevis Field", which was recognized in the oil and gas industry as being a gas field. In that field, during the months April to June, 1958, the policy of the Board was not to grant a licence for the drilling of a well unless the applicant had the right to produce from an entire spacing unit.

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On January 18, 1957, the appellant entered into a contract with Trans Canada Pipe Lines Limited, whereby it dedicated all its gas in the Nevis Field obtained from the Devonian formation for sale to that company. Trans Canada Pipe Lines Limited was not obligated to commence taking delivery of gas from that field from the appellant until the latter part of the year 1959.

On November 8, 1957, the lease was amended by the addition to it of cl. 14(A). The amendment was effected by a letter from the appellant to the respondent Kanstrup, which read as follows:

> On the 2nd day of July, A.D. 1948, you, as Lessor, entered into a Petroleum & Natural Gas Lease with Rio Bravo Oil Company, Limited (now Canadian Superior Oil of California, Ltd), as Lessee, covering the North West Quarter (NW/4) of Section Nine (9), Township Thirty-nine (39), Range Twenty-two (22), West of the Fourth (4th) Meridian, reserving unto the Canadian Pacific Railway Company all coal, and containing One Hundred and Sixty (160) acres more or less.
>
> As this land is included in the Nevis gas area we would like to amend the subject Petroleum & Natural Gas Lease by the addition thereto of a new clause, which will be clause 14(A) and will be entitled, "POOLING DUE TO REGULATION". The subject clause reads as follows:
>
> 14(A). *POOLING DUE TO REGULATION*
>
> The Lessee is hereby given the right and power at any time and from time to time to pool or combine the said lands, or any portion thereof, with other lands adjoining the said lands, but so that any one such pool or unit (herein referred to as a "Unit") shall not exceed one drilling unit as hereinbefore defined, when such pooling or combining is necessary in order to conform with any regulations or orders of the Government of the Province of Alberta, or any other authoritative body, which are now or may hereafter be in force in relation thereto. In the event of such pooling or combining, the Lessor shall, in lieu of the royalties elsewhere herein specified, receive on production of leased substances from the said unit, only such portion of the royalties stipulated herein as the area of the said lands placed in the unit bears to the total area of lands in such unit. Drilling operations on, or production of leased substances from any land included in such unit shall have the same effect in continuing this Lease in force and effect during the term hereby granted, or any extension thereof, as to all the said lands, as if such operation or production were upon or from the said lands, or some portion thereof.
>
> The purpose of this clause is to provide, as the clause indicates, for pooling due to regulation and such is necessary in this particular area because of the fact that the spacing unit for a gas well is Six Hundred and Forty (640) acres and the Nevis area appears to be purely a gas area with very little possibility of oil being found. We desire to pool this quarter section with the remainder of the lands in Section Nine (9) for the purpose of forming a Six Hundred and Forty (640) acre spacing unit with the object of drilling a well in the section. Our geological information indicates that Legal Subdivision Seven (7) of the said Section

Nine (9) is the best possible location on the said Section, and in consideration of you agreeing to the within amendment we will pay you the sum of One Hundred ($100.00) Dollars.

We would greatly appreciate your kind consideration of this matter and if the amendment to the subject Lease is agreeable to you, would you be kind enough to signify your agreement by signing this letter at the place indicated at the lower left-hand corner of this page, retaining one copy for your records and returning the remaining copies to us and the Lease will be deemed to be amended accordingly.

The respondent Kanstrup signed this letter, acknowledging and agreeing to the amendment of the lease.

In addition to its lease of the North West Quarter, the appellant held a petroleum and natural gas lease in respect of the South Half of Section 9, Township 39, Range 22, West of the Fourth Meridian, from one Peterson, who agreed to the addition to his lease of a clause similar to cl. 14(A), which has been cited above. The petroleum and natural gas rights in respect of the North East Quarter of the same section were controlled by Trans Empire Oils Ltd., which company, on March 7, 1958, entered into a pooling and joint operating agreement with the appellant.

On May 1, 1958, the appellant obtained a licence to drill a well on Legal Subdivision Seven of Section 9, which is not a part of the North West Quarter. A well was drilled on that legal subdivision and completed early in June, 1958, as a gas well. Almost immediately thereafter, on June 9, the appellant applied to the Board for permission to cap the well because of there being no market for the gas. Approval was granted by the Board on June 13.

On April 28, 1958, the respondent Kanstrup had granted to the respondent Scurry-Rainbow Oil Limited an option to acquire a petroleum and natural gas lease in respect of the North West Quarter, this lease being what is described in the industry as a "top lease". This option was open for acceptance within a period of one-half year from its date, or on or before, but not after, a date 30 days from the date of receipt of notice by the optionee from the optionor of the termination, cancellation or expiration of the existing petroleum and natural gas lease affecting the North West Quarter. Under its terms the respondent company could acquire a petroleum and natural gas lease in respect of the North West Quarter for a term of 10 years.

On July 7, 1958, the respondent company filed a caveat against the title of the respondent Kanstrup to the North West Quarter in respect of its interest under this option.

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On July 9, 1958, the appellant forwarded to Prudential Trust Company Limited a letter with a cheque for $100, as representing a royalty payment then due on the capped well on Legal Subdivision Seven, pursuant to cl. 3(*b*) of the lease, for the period June 5, 1958, to June 5, 1959. These moneys were distributed by the trust company on December 20, 1958.

On July 15, 1958, the respondent Kanstrup wrote to the appellant, stating that the lease had expired and asking that the caveat filed by the appellant be removed.

On or about November 28, 1958, the respondent company caused notice to be served upon the appellant, pursuant to s. 144 of *The Land Titles Act*, R.S.A. 1955, c. 170, requiring it to remove its caveat or else to commence proceedings in respect of the same. The present action was commenced following the receipt by the appellant of that notice.

On or about May 26, 1959, the appellant forwarded a further $100 cheque to the Prudential Trust Company Limited. These funds were distributed by it on November 20, 1960, after this action had been commenced.

The question in issue is as to whether the lease of the North West Quarter, by the respondent Kanstrup to the appellant, expired at the expiration of the primary term of 10 years provided for in cl. 2 of the lease, or whether it continued beyond that period either as a result of the operation of other clauses in the lease or as a result of the election by the respondent Kanstrup to waive the operation of cl. 2.

The appellant's first contention is that the lease was continued in force by the combined operation of cls. 14(A), 3(*b*) and 2 of the lease. The argument is that the well drilled by the appellant on Legal Subdivision Seven, by virtue of cl. 14(A), was a well within the meaning of the latter portion of cl. 3(*b*), which reads:

> where gas from a well producing gas only is not sold or used, Lessee may pay as royalty $100.00 per well per year, and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof;

The appellant then submits that the payment of a royalty of $100 per year in respect of the capped well on Legal Subdivision Seven would place the appellant in the same position as if gas were being produced within the meaning of cl. 2 of the lease, and so continue it in operation beyond the primary term.

The respondents contend that cl. 14(A) never became applicable in the circumstances of this case, because pooling never became necessary in order to comply with any governmental order or regulation, and in support of this submission they rely upon the decision of this Court in *Shell Oil Co. of Canada v. Gibbard*[1].

In considering the appellant's first contention, I am prepared to agree with the view expressed in the Appellate Division[2] that that case is distinguishable in that in the present case the letter from the appellant to the respondent Kanstrup, containing the terms of cl. 14(A), showed that the appellant intended the clause to be construed as providing for pooling, to enable the appellant to establish a 640 acre spacing unit, to enable it to obtain a licence from the Board to drill a well on the section of which the North West Quarter was a part.

It should be noted, however, that, whereas in *Shell Oil Co. of Canada v. Gibbard, supra,* and also in the case of *Shell Oil Co. v. Gunderson*[3], cl. 9 of the leases in question in those cases was a part of the lease when the lease was executed, in the present case cl. 14(A) (which is identical in its wording with cl. 9 of the leases under consideration in those two cases) was subsequently added to the lease at the appellant's request. That being so, I think it is necessary first to consider the effect of the lease as it stood before it was amended and then to consider how far its provisions were altered by the addition of the new clause.

Prior to the addition of cl. 14(A), the respondent Kanstrup had obligated himself, under cl. 2 of the lease, to a term of 10 years and as long thereafter as oil, gas or other mineral was produced from "the said land hereunder"; *i.e.,* from the North West Quarter. Clause 3(*b*) further provided that, where gas from a well producing gas only was not sold or used, the appellant might pay as royalty $100 per well per year and, if he did so, it would be considered that gas was being produced within the meaning of cl. 2. It is obvious that the only kind of well to which cl. 3(*b*) could apply was a non-producing gas well on the North West Quarter.

The object of cl. 14(A) was, as the appellant's letter stated, "for the purpose of forming a Six Hundred and Forty

[1] [1961] S.C.R. 725. [2] (1964), 47 W.W.R. 129, 43 D.L.R. (2d) 261.
[3] [1960] S.C.R. 424.

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(640) acre spacing unit with the object of drilling a well in the section."

Clause 14(A) stipulated that the pool or unit should not exceed one *drilling* unit (a term which was not defined in the lease) and gave the right and power to pool in order to conform with governmental regulations or orders. The appellant acquired, by this clause, the power to pool the North West Quarter with the balance of the section, so as to be able to establish to the Board the existence of a proper spacing unit, in order that it might obtain the necessary licence to drill a gas well on the section. The appellant did obtain the necessary drilling licence on the basis of its control of the section and the clause, therefore, fulfilled its purpose.

The effect of pooling is defined in the clause and it is twofold:

1. The royalty payable "on production of leased substances" is varied so as to give to the lessor only a fraction of the royalty which he would have been entitled to receive had there been a producing well drilled on his own land and no pooling. The numerator of that fraction was the number of acres in the North West Quarter and the denominator was the total area of the drilling unit.

2. "Drilling operations on, or production of leased substances from" any land in the unit is to have the same effect in continuing the lease in force and effect as if such operation or production were upon or from the North West Quarter.

It is the second of these consequences which is of interest here. In so far as drilling operations are concerned, they were completed within the primary term. They had the effect of fulfilling the drilling obligation of the appellant contained in cl. 6 of the lease. There was, however, no production of any of the leased substances, within the primary term, from any part of the 640 acre drilling unit. It is only drilling operations on or production of leased substances from any land other than the North West Quarter which, under the terms of cl. 14(A), would be effective to continue the lease on the North West Quarter in force. The wording of that clause does not extend beyond the effect which it gives to operations of that kind. It does not say that a non-producing gas well, not on the North West Quarter, is to be equivalent to a non-producing gas well on the North West

Quarter, so as to entitle the appellant to rely upon the latter portion of cl. 3(*b*), nor can any such provision be implied in a clause which limits the right to pool to a situation in which pooling is necessary in order to comply with governmental orders and regulations.

However, even if cl. 14(A) did have the effect of enabling the appellant to treat a capped gas well anywhere on the unit as being equivalent to one located on the North West Quarter, I agree with the learned trial judge that payment of the $100 royalty after the primary term had expired was not effective to continue the term of the lease thereafter. At the time the primary term came to an end, no oil, gas or any other mineral was being produced from any part of the unit, nor was there any gas which could be considered as being produced as a result of the operation of cl. 3(*b*). That clause did not impose upon the appellant any obligation to pay a $100 royalty in respect of a non-producing gas well. The appellant had a choice to pay or not to pay and the clause only became operative "if such payment is made." If the appellant sought to continue the lease in operation after the primary term, by the combined operation of cl. 3(*b*) and cl. 2, then it was essential that it should have paid the royalty before the primary term expired. The appellant was aware that gas would not be produced within the primary term some time before the primary term expired. The well on Legal Subdivision Seven had been capped by it in the early part of June 1958, and it was the appellant which sought for and obtained a Board order for the closing of that well.

The next argument raised by the appellant is based upon cl. 14 of the lease. It is contended that, as the appellant was precluded by law from blowing gas from its well into the air, and as it was bound by a Board order to keep the well capped, compliance with these legal requirements should not, under this clause, constitute a cause for the termination of the lease.

In my opinion, the error in this argument is that the cause for the termination of the lease was the failure by the appellant to produce gas from the well within the primary term, and not the need to comply with any laws, orders or regulations. Production of gas was not taken from the well because of the economic fact that the appellant had no market for it at the time the primary term expired.

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When cl. 2 of the lease refers to oil, gas or other mineral "produced" from the said land, read in the context of the whole of the lease, this means produced for sale or use, and not produced to be blown into the air. The order for the capping of the well was made by the Board at the appellant's own request and that request was made because of the absence of a market for gas produced from the well.

The position was, therefore, that the failure of the appellant to produce gas within the primary term, so as to extend that term, was not caused because of the need to comply with any statute or regulation, but was caused solely by the fact that there was no market or use for it.

The appellant also relies upon cl. 18, the *force majeure* provision, which states, *inter alia,* that all obligations under the lease requiring it to commence or continue drilling or to operate on or produce oil or gas from the demised premises should be suspended "when there is no available market for the same at the well." I will assume, for the purposes of this argument, that "the same" relates back to the words "oil or gas" at the beginning of the clause, and is not limited by the reference to "oil" which immediately precedes the words above quoted. The answer to this argument is that, while the clause postpones obligations, in certain events, it does not purport to modify the provisions of the *habendum* clause. That clause imposed no obligation upon the appellant to produce oil, gas or other mineral from the North West Quarter. It only provided that the primary term could be extended if oil, gas or other mineral was produced. If none of those substances were produced within the primary term, the lease terminated at the expiration of that term.

For the same reasons I do not think that the appellant derives any assistance from cl. 15, which provides that breach by the appellant of any obligation under the lease shall not work a forfeiture or termination of the lease or be cause for cancellation or reversion thereof, save as expressly provided. There is here no question of any breach by the appellant of any obligation under the lease. The lease provided for a specified primary term and for its continuance thereafter in certain events. The fact that those events did not occur does not constitute any breach on the part of the appellant of any of its obligations under the lease.

Finally there is the question as to whether the receipt by the respondent Kanstrup of a portion of the two $100 payments made by the appellant after the primary term had expired affects his legal position. The appellant contends that Kanstrup elected to continue the lease by accepting these payments, which he received from Prudential Trust Company Limited, and that he cannot contend that the lease terminated because the payment was not made prior to the expiration of the primary term.

As already noted, the distribution by the trust company of the first payment was not made until December 20, 1958. Prior to that Kanstrup had already written to the appellant on July 15 contending that the lease had expired and asking for the removal of the appellant's caveat.

In my opinion no question arises in this case as to election or waiver of forfeiture by the respondent Kanstrup. This lease contained within itself a provision which operated automatically to terminate it upon the expiration of the primary term. Thereafter there were no steps required to be taken by Kanstrup in order to bring it to an end. There was no election for him to make. There was no obligation on the part of the appellant to make any royalty payment in respect of the capped well, even assuming that cl. 3(*b*) was applicable to it. There was no default on the part of the appellant in not paying that money before the primary term had expired. There was, therefore, no forfeiture to relieve against.

In connection with this aspect of the case, I agree with the views expressed by Frank Ford J.A. in *East Crest Oil Co. Ltd. v. Strohschein*[1].

In my opinion the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

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[1](1951-52), 4 W.W.R. (N.S.) 553 at 558.