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NARROW CONSTRUCTION OF COMMENCEMENT OF DRILLING CLAUSE: *KUYKENDALL v. HELMERICH & PAYNE*

I. INTRODUCTION

Courts have generally held that commencement of drilling operations clauses¹ in oil and gas leases can be satisfied by something less than the actual spudding of the earth with a drill bit. Many courts have held that adequate preparation² with the intent to drill³ will extend a

1. Some courts have made a distinction between commencement of drilling and commencement of drilling *operations* clauses. *But see* *Fast v. Whitney*, 26 Wyo. 433, —, 187 P. 192, 195 (1920) (concluding that there is no reasonable distinction between the two clauses).

2. The following cases illustrate circumstances which have been construed to be adequate commencement of drilling: *Stolz, Wagner & Brown v. Duncan*, 417 F. Supp. 552, 562 (W.D. Okla. 1976) (a diligent and reasonable effort to locate a drilling rig along with ground work preparation); *Champlin v. Sinclair Oil & Gas Co.*, 344 P.2d 268, 271 (Okla. 1959) (lessee is not required to have actual production by the commencement date); *Burgess v. Oklahoma Gas Util. Co.*, 171 Okla. 294, 295, 42 P.2d 240, 240 (1935) (moving materials and erecting a derrick); *Aldridge v. Gypsy Oil Co.*, 132 Okla. 13, 14, 268 P. 1109, 1109-10 (1928) (good faith preparation for drilling); *Smith v. Gypsy Oil Co.*, 130 Okla. 135, 136, 265 P. 647, 647 (1928) (drilling the water well to supply water for drilling oil well); *Cromwell v. Lewis*, 98 Okla. 53, 54, 223 P. 671, 672 (1923) (digging the cellar and moving timbers to the site); *Gonzales v. Cowerd*, 78 Okla. 84, 84, 188 P. 1053, 1054 (1920) (moving lumber and erecting a derrick on the drill site).

For a list of cases outside Oklahoma see 2 W. SUMMERS, THE LAW OF OIL AND GAS § 349 (rev. perm. ed. 1959). *See also* *Crye v. Giles*, 200 So. 155, 156 (La. Ct. App. 1941) (lessee erected a derrick and dug the slush pit); *Robinson v. Gordon Oil Co.*, 258 Mich. 643, —, 242 N.W. 795, 796 (1932) (lessee dug a slush pit and erected a derrick); *Henderson v. Ferrell*, 183 Pa. 547, —, 38 A. 1018, 1018 (1898) (staking the drill site and delivering timbers); *Texas Co. v. Curry*, 229 S.W. 643, 644 (Tex. Civ. App. 1921) (erecting a derrick on the drill site); *Cockrum v. Christy*, 223 S.W. 308, 309 (Tex. Civ. App. 1920); *McCallister v. Texas Co.*, 223 S.W. 859, 861 (Tex. Civ. App. 1920) (hauling derrick timbers to site and providing water supply for drilling); *Guleke v. Humble Oil & Ref. Co.*, 126 S.W.2d 38,41 (Tex. Civ. App. 1939) (lessee moved materials for erecting a derrick and drilling a water well to the drill site); *Edgar v. Bost*, 14 S.W.2d 364, 365 (Tex. Civ. App. 1929) (erecting a derrick on the drill site); *Fleming Oil & Gas Co. v. South Penn Oil Co.*, 37 W. Va. 645, —, 17 S.E. 203, 206 (1893) (moving timbers to drill site and erecting a derrick); *Fast v. Whitney*, 26 Wyo. 443, —, 187 P. 192, 199 (1920) (moving a derrick to the drill site).

3. It is not enough that the lessee has commenced some form of preparation for drilling; he must have done so with the good faith intention of completing the drilling. The general rule is followed in Oklahoma caselaw:

An agreement between the lessor and lessee that the lessee "shall commence to drill a well within the terms of this lease" is complied with where the lessee, or his assign, has, *in good faith*, made the location for the well, moved the machinery upon the premises, erected a derrick and drilled a water well to supply water for the drilling operations before the date of the expiration of the lease, if he, *in good faith*, continues to prosecute drilling operations and completes the well with diligence and dispatch, although the actual drilling of the well does not begin until after the date fixed for the expiration of the lease.

Smith v. Gypsy Oil Co., 130 Okla. 135, 135, 265 P. 647, 647 (1928) (emphasis added).

lease even when the primary term would otherwise have expired.⁴ Courts have also held that the commencement of drilling operations anywhere on a pooled acreage can satisfy the drilling clauses for all the leases in the unit.⁵ In a recent decision, *Kuykendall v. Helmerich & Payne*,⁶ the Oklahoma Appellate Court held that the mere filing of an application to extend an existing spacing unit to include leased property is not sufficient to extend the primary term of that lease, even though drilling is commenced on adjacent land that is eventually pooled with the leased property.

Oil and gas leases are generally strictly construed against the lessee,⁷ however, commencement of drilling operations clauses are liberally construed to effectuate the intent of the parties and to promote development.⁸ The *Kuykendall* decision involved a conflict between these two principles of construction. This Note will focus on this conflict while discussing and evaluating the major theories presented by the defendant, Helmerich & Payne.

II. STATEMENT OF THE CASE

The Kuykendalls owned an undivided one-half interest in the minerals underlying a tract of land in Grady County, Oklahoma. On December 20, 1971, Kuykendall executed an oil and gas lease to Taft Milford for a primary term of five years. The lease could be extended

4. The primary term is the period during which the lessee may keep the lease alive even though there has been no attempt at production; typically the primary term is five or ten years. The lease will normally provide for a secondary term that will keep the lease alive past the primary term and for as long as oil or gas are found in paying quantities. See 8 H. WILLIAMS & C. MEYERS, *MANUAL OF OIL AND GAS TERMS* 570-71 (1982).

5. See *Kunc v. Harper-Turner Oil Co.*, 297 P.2d 371, 375 (Okla. 1956); *Trawick v. Castleberry*, 275 P.2d 292, 294 (Okla. 1953); *McClain v. Harper*, 206 Okla. 437, 439, 244 P.2d 301, 303 (1952).

An Oklahoma statute provides that commencement of drilling on pooled acreage will satisfy commencement of drilling operations clauses in all the leases within the unit:

Operations carried on under and in accordance with the plan of unitization shall be regarded and considered as a fulfillment of and compliance with all of the provisions, covenants, and conditions, expressed or implied, of the several oil and gas mining leases upon lands included within the unit area, or other contracts pertaining to the development thereof, insofar as said leases or other contracts may relate to the common source of supply or portion thereof included in the unit area. Wells drilled or operated on any part of the unit area no matter where located shall for all purposes be regarded as wells drilled on each separately-owned tract within such unit area.

OKLA. STAT. tit. 52, § 287.9 (1981).

6. 54 OKLA. B.J. 26 (Jan. 8, 1983).

7. See *infra* text accompanying notes 37-55.

8. See *infra* text accompanying notes 51-55.

indefinitely if drilling was commenced before the expiration date.⁹

On November 12, 1976, Helmerich & Payne, apparently anticipating the acquisition of the Kuykendall lease from Milford, filed an application with the Oklahoma Corporation Commission requesting that its well spacing unit,¹⁰ already covering adjacent property, be enlarged to include the Kuykendall acreage.¹¹ On November 17, approximately one month before the primary term was to expire, Milford assigned his lease to Helmerich & Payne. Helmerich & Payne commenced drilling a well (McClure No. 1) on December 3, on acreage adjoining the Kuykendall tract. On December 9 the trial examiner recommended that the Corporation Commission approve the spacing extension.¹² On December 21, one day after the primary term of the Kuykendall lease expired, the Corporation Commission followed the trial examiner's recommendation and issued an order extending Helmerich & Payne's 640 acre spacing unit to include the Kuykendall acreage.¹³ On March 30, 1977, Helmerich & Payne asked the Commission to issue a nunc pro tunc¹⁴ order that would make the Commission's December 21st pooling order effective December 9, 1976, thus preventing the expiration of the lease.¹⁵ The nunc pro tunc order was approved and issued on May 4, 1977. Kuykendall, however, appealed the order to the Oklahoma Court of Appeals which declared the order null and void on April 17, 1979.¹⁶

After the court of appeals voided the nunc pro tunc order, Kuykendall made a demand on Helmerich & Payne to release the lease. Helmerich & Payne refused and filed a quiet title action which was later dismissed.¹⁷ Kuykendall then filed an action in the district court against Helmerich & Payne seeking to (1) quiet his mineral interest title; (2) force an accounting for his share of the unit well production; (3) recover damages resulting from Helmerich & Payne's willful failure

9. 54 OKLA. B.J. at 26-27. While C.H. and G.G. Kuykendall jointly executed the lease to Taft Milford, hereinafter Kuykendall will appear in the masculine-singular.

10. Well spacing regulates the number and location of wells over a given reservoir, reducing the waste caused by drilling more wells than are necessary to drain the reservoir. For a complete review of well spacing regulations in Oklahoma see OKLA. STAT. tit. 52, § 87.1 (1981).

11. 54 OKLA. B.J. at 26.

12. *Id.*

13. *Id.*

14. Nunc pro tunc is "[a] phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done." BLACK'S LAW DICTIONARY 964 (5th ed. 1979).

15. 54 OKLA. B.J. at 26.

16. *Id.*

17. *Id.*

to release the lease; and (4) recover punitive damages.¹⁸ Helmerich & Payne filed an answer claiming that its failure to release the lease was in good faith. In addition, Helmerich & Payne cross-petitioned for a judgment that, due to the completion of McClure No. 1, the original lease had been extended beyond the primary term.¹⁹ The trial court found in favor of Helmerich & Payne, finding that a well had been commenced within the terms of the lease.²⁰ Kuykendall appealed the decision and the Oklahoma Court of Appeals reversed, holding that the primary term was not extended, and remanded the case to determine Kuykendall's damages.²¹ Justice Bacon dissented, noting the "gross imbalance of equities" against Helmerich & Payne.²²

III. OIL AND GAS LAW PRIOR TO *KUYKENDALL*

A. *Evolution of the Commencement Clause*

A commencement of drilling clause is incorporated in an oil and gas lease to assure the lessor that the land will be developed.²³ The clause was originally used because oil was thought to flow like water under the ground²⁴ and haste was required in developing a mineral interest, since the oil would otherwise escape. Although this migratory conceptualization of oil and gas finds few adherents today,²⁵ it had a substantial influence on the evolution of early oil and gas law.²⁶ Today commencement of drilling clauses are designed to protect the alienabil-

18. *Id.*

19. *Id.*

20. *Id.* at 27.

21. *Id.* at 29.

22. *Id.*

23. A commencement of drilling lease is "[a] lease under the terms of which the commencement of a well during the primary term will suffice to keep such lease alive into the secondary term while such drilling operations are prosecuted with reasonable diligence." 8 H. WILLIAMS & C. MEYERS, *supra* note 4, at 109-10.

24. See W. SUMMERS, A TREATISE ON THE LAW OF OIL AND GAS § 103 (1927) (oil and gas was thought to be capable of migration to other tracts without interference); see also Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391 (1935) (oil was thought to be more like animals than minerals in that it had the power and tendency to escape) *Id.* at 395 (quoting *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. 235, —, 18 A. 724, 725 (1889)).

25. See Moses, *What Constitutes Commencement of Operations Under an Oil, Gas and Mineral Lease*, 16 TUL. L. REV. 572, 573-74 (1942).

26. Much of oil and gas law is based on the principle that oil and gas are migratory. The laws were drafted to protect the lessor since he had a great deal to lose if the land was not properly developed; all of his oil could escape to an adjoining tract. For further discussion of the migratory nature of oil and its influence on current law see Moses, *supra* note 25, at 573-75; W. SUMMERS, *supra* note 24, § 103. *But cf.* Hardwicke, *supra* note 24, at 393-95 (defending the common law theory of oil and gas law as logical and necessary).

ity of land and provide a faster return of royalties to the lessor. A commencement clause also protects land from drainage by neighboring wells.

B. *Pooling and Unitization*

Traditionally, the commencement of drilling clause has been satisfied when drilling was commenced on pooled acreage.²⁷ Pooling is the joining of small tracts of land to form a common drilling unit under applicable spacing rules.²⁸ Pooling serves two purposes: it prevents physical and economic waste associated with the drilling of unnecessary wells,²⁹ and it protects the landowner from losses due to drainage.³⁰ Unitization refers to the banding together of landowners for the joint operation of an entire oil and gas reservoir.³¹ The purpose of unitization is to obtain oil and gas from the reservoir without regard to individual drilling units or boundary lines. The benefits derived from unitization depend on the stage of production. Before the development of a reservoir, unitization allows the strategic placement of wells for maximum efficiency. During primary production,³² unitization facilitates the use of pressure maintenance³³ and gas cycling³⁴ techniques. When the primary production methods gradually fail to produce oil in paying quantities,³⁵ unitization is necessary before secondary recovery techniques³⁶ can be used.

IV. ANALYSIS OF THE *KUYKENDALL* DECISION

The Oklahoma Court of Appeals held that Helmerich & Payne's commencement of a well on an adjacent spacing unit, along with the

27. See *supra* note 5.

28. See 8 H. WILLIAMS & C. MEYERS, *supra* note 4, at 554-55.

29. See *infra* note 96 and accompanying text.

30. Drainage is the loss of oil or gas to other mineral interest owners operating adjacent wells. See 8 H. WILLIAMS & C. MEYERS, *supra* note 4, at 202-03.

31. See *id.* at 800-01.

32. Primary production is "[p]roduction from a reservoir by primary sources of energy, that is, from natural energy in the reservoir when it is in an early stage of production, with little loss of pressure and with most wells still flowing." *Id.* at 569-70.

33. Pressure maintenance is instituted when water, gas or other fluids are pumped into the reservoir in order to maintain pressure. See *id.* at 567.

34. Gas cycling is a method used to maintain pressure in the reservoir by returning compressed residue gas to the well. See *id.* at 163-64.

35. The well will eventually reach a point where it costs more to pump the remaining oil to the surface than the oil is worth. See *id.* at 580-81.

36. There are numerous types of secondary recovery methods, one example being the injection of water into one end of the reservoir in order to force the remaining oil out of the wells at the other end. See *id.* at 681-82.

pending application to extend the spacing unit, did not constitute a commencement of drilling for the purpose of extending the Kuykendall lease. According to the court, on December 20, 1976, the date the primary term of the Kuykendall lease was to expire, the spacing application was merely pending, therefore the Kuykendall land was not technically pooled within the terms of the lease.

A. *Judicial Construction of Oil and Gas Leases*

The drilling clause in the Kuykendall lease provided that "If the lessee shall commence to drill a well . . . on acreage pooled therewith, the lessee shall have the right to drill such well to completion. . . ." ³⁷ Referring to the drilling clause, the appellate court held that when language is clear and unambiguous, there is nothing to construe;³⁸ and since Helmerich & Payne did not commence a well on "acreage pooled therewith," the lease should not have been extended.³⁹ Contrary to the court's opinion, it is arguable that the term "commencement" is ambiguous, requiring judicial interpretation. For a court to hold that "commencement" is clearly defined, is to contradict a long line of cases that have stated otherwise.⁴⁰

The court further implied that even if the drilling clause was ambiguous, Helmerich & Payne should not have prevailed because oil and gas leases should be strictly construed against the lessee.⁴¹ Construing oil and gas leases against the lessee is a long-standing practice dating back to the time when oil was thought to flow beneath the earth like a river.⁴² The rule originated in part because courts were concerned that following the normal rule of contracts, which generally construes leases against the lessor, would allow the lessee to delay while the oil escaped to an adjoining tract.⁴³ Although the practice of construing an oil and

37. 54 OKLA. B.J. at 27.

38. *Id.* (citing *Dilworth v. Fortier*, 405 P.2d 38, 50 (Okla. 1964). If the contract clearly shows the intentions of the parties then there is no need to apply technical rules of construction. If the intent of the parties is unambiguous then it must be carried out even though the results may be harsh.)

39. *Id.*

40. *See, e.g.*, *Smith v. Gypsy Oil Co.*, 130 Okla. 135, 136, 265 P. 647, 648 (1928) (a proper disposition as to whether the erection of an oil derrick constitutes commencement of drilling necessarily involves a construction of the commencement clause in the lease).

41. 54 OKLA. B.J. at 27 (citing *Beatty v. Baxter*, 208 Okla. 686, 688, 258 P.2d 626, 628 (1953)).

42. Oil and gas "are supposed to percolate restlessly about under the surface of the earth, even as the birds fly from field to field and the beasts roam from forest to forest. . . ." *Medina Oil Dev. Co. v. Murphy*, 233 S.W. 333, 335 (Tex. Civ. App. 1921).

43. *See Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 817, 108 P. 545, 548 (1910).

gas lease against a lessee is still good law,⁴⁴ it is usually not the single rule of construction upon which courts rely. Other factors influencing the construction of a lease include the lessor's potential losses due to drainage, the effect such a construction will have on promoting development, and the good faith intentions and expectations of the parties to the lease.

1. Drainage

Some courts justify the construction of an oil and gas lease against a lessee for the practical reason that it is generally the lessee that solicits and drafts the lease and therefore it should be the drafting-lessee that bears the burden of ambiguity due to poor drafting.⁴⁵ The majority of Oklahoma courts, however, state that the primary reason for such a construction is to prevent drainage.⁴⁶ Drainage is the migration of oil or gas toward a producing well located on adjacent lands. Drainage is caused by the reduction in pressure that occurs when wells are bottomed in the reservoir.⁴⁷ The *Kuykendall* court cited *Beatty v. Baxter*⁴⁸ as authority for a strict interpretation against the lessee. *Beatty* held that the construction of an oil and gas lease "is governed by different rules of construction from those applicable to other contracts, being construed most strongly against the lessee and in favor of the lessor. *The reason therefor [sic] springs from the danger of loss of oil and gas by drainage.*"⁴⁹

Drainage is usually a legitimate concern when construing a commencement of drilling clause. To conclude that the lease in *Kuykendall* should have been strictly construed against Helmerich & Payne because of possible loss through drainage is not logical, however, since *Kuykendall* was under no threat of losing oil and gas to other mineral interest owners operating adjacent wells, and the one day delay in obtaining the spacing order had no effect whatsoever on the completion

44. "An oil and gas lease is governed by different rules of construction from those applicable to other contracts, being construed most strongly against the lessee and in favor of the lessor." *Simon v. Foster*, 373 P.2d 28, 30 (Okla. 1962).

45. See *Prowant v. Sealy*, 77 Okla. 244, 252, 187 P. 235, 243 (1920) (construction based on fact that lessee prepared the lease).

46. See, e.g., *Beatty v. Baxter*, 208 Okla. 686, 688, 258 P.2d 626, 628 (1953); *Frank Oil Co. v. Belleview Gas & Oil Co.*, 29 Okla. 719, 732, 119 P. 260, 265 (1911); *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 817, 108 P. 545, 548 (1910).

47. See 8 H. WILLIAMS & C. MEYERS, *supra* note 4, at 202-03.

48. 208 Okla. 686, 258 P.2d 626 (1953).

49. *Id.* at 688, 258 P.2d at 628 (emphasis added).

date of McClure No. 1.⁵⁰

2. Promoting Development

Many states have recognized that a mechanical construction of oil and gas leases against the lessee could have an adverse effect on promoting development.⁵¹ The rule of construction has therefore been limited to cases where it promotes the development intended by the parties. Thus, in *Simons v. McDaniel*⁵² the Oklahoma Supreme Court stated:

Frequently this court has construed oil and gas mining leases strictissimi juris as against the lessee and liberally in favor of [the] lessor. *But this has always been to the end of promoting development as contemplated by the parties.*

. . . .

Herein the lessee has, by his actions, evidenced a desire to develop, and no court has been more favorable to the interests of a lessee who seeks to perform his covenants.⁵³

One could argue that construing the lease against Helmerich & Payne hindered, rather than promoted development. Lessees in Helmerich & Payne's position, who have evidenced a desire to develop the land by actually drilling on an existing spacing unit and making timely application to extend the existing unit to include a leased acreage, are powerless to pursue such development without final approval being issued by the Corporation Commission. Helmerich & Payne was forced to recognize Kuykendall's operating interest in the well, though Kuykendall did not share in its expense.⁵⁴ Had Helmerich & Payne realized the disproportionate risks it faced in attempting to develop the Kuykendall lease by extending its existing unit, it might have abandoned the attempt, thus causing further delays in the development of

50. Leases are to be strictly applied against the lessee to prevent delays in drilling that cause loss of oil and gas through drainage to neighboring wells. Helmerich & Payne commenced drilling (McClure No. 1) on December 3, 1976, and completed the well on May 23, 1977. 54 OKLA. B.J. at 26. None of the delay could be attributed to the Corporation Commission's consideration and approval of the spacing application. *Id.* at 28.

51. Williams states, "The policy of strict construction in favor of the lessor may be reasonable where designed to encourage development of the premises, but this policy should not be followed in situations where development will be discouraged." 3 H. WILLIAMS, OIL AND GAS LAW § 628, at 376-77 (1980).

52. 154 Okla. 168, 7 P.2d 419 (1932).

53. *Id.* at 171, 7 P.2d at 421 (emphasis added) (citations omitted).

54. Helmerich & Payne pointed out that had it known the lease was going to terminate, it could have entered into an agreement with Kuykendall to share in the risks involved with drilling McClure No. 1. 54 OKLA. B.J. at 28.

the Kuykendall acreage. It is important to note that at the time Helmerich & Payne filed the application with the Corporation Commission, Kuykendall was probably delighted at the prospect of obtaining a royalty interest in McClure No. 1.⁵⁵

The court implied that Helmerich & Payne could have preserved its lease by drilling directly on the Kuykendall land. According to the court, "The location of the well was merely approved by the commission. No law, rule or regulation prevented Helmerich & Payne from seeking permission to drill on the Kuykendall land instead of someone else's in Section 7."⁵⁶ While this may be true, the best location for a well in terms of development had already been determined by the Corporation Commission. It is questionable whether forcing Helmerich & Payne to drill directly on the Kuykendall land would have promoted the efficient development of the reservoir.⁵⁷

3. Good Faith

The good faith intention to complete the development of a well is an important implied condition of any lease containing a commencement clause.⁵⁸ The *Kuykendall* court overlooked this condition when it relied on *Graves v. Nichlos*,⁵⁹ a case that strictly construed a "pay rent or commence drilling" clause.⁶⁰ In that case, Graves leased property to Nichlos with the restriction that until a well was commenced, Nichlos would pay fifty dollars a month. Nichlos did not drill a test well and ceased paying the rent after nine months.⁶¹ The court ruled that Nichlos must pay the fifty dollars a month for the term of the lease, which was determined to be one year. The lease was construed against the lessee because it was evident that Nichlos had made no attempt and had no intention of commencing an oil well.⁶² The results were equitable because Nichlos was forced to pay rent for the remainder of the term, which was plainly the intention of the parties when the lease was executed. *Kuykendall* should be distinguished from *Graves* because Helmerich & Payne did act with the good faith intention of complying

55. *Id.*

56. *Id.* The court's opinion stated that Kuykendall was to receive a 3/16 royalty interest. *Id.* at 26.

57. See *infra* text accompanying notes 110-12.

58. See *supra* note 3.

59. 151 Okla. 27, 1 P.2d 708 (1931).

60. 54 OKLA. B.J. at 27.

61. 151 Okla. at 28, 1 P.2d at 709.

62. *Id.* at 29, 1 P.2d at 710.

with the terms of the lease, as evidenced by its commencement and eventual completion of McClure No. 1 with a view toward pooling that well with the Kuykendall interest.

The *Kuykendall* court also contended that holding in favor of Helmerich & Payne would expose lessors to a large number of potential abuses. The court speculated that "[a]n ingenious lessee could always think of some application to file with the corporation commission in an effort to 'toll,' as it were, the running of a lease term."⁶³ The court's presumption ignores the long standing requirement that for an application to effectively toll the expiration of the lease, it must be filed in good faith.⁶⁴ The lessee must have both the good faith intent of promoting the development intended by the parties and the good faith belief that the application will be approved. Merely filing an application with the Corporation Commission to toll the running of a lease would be an act of bad faith and the lessee would thereby fail to satisfy the terms of the lease.

B. *Helmerich & Payne's Contentions*

1. Relation Back

The doctrine of relation back is a legal fiction whereby an act performed at one time is considered to have been done at some antecedent period.⁶⁵ Helmerich & Payne asked the court to apply the relation back doctrine and make the spacing order effective as of November 12, 1976, the day the application was filed.⁶⁶ If the order extending the spacing unit was effective on the day it was filed then a well, *viz.* McClure No. 1, was commenced on acreage pooled with Kuykendall's land, the lease requirements were met, and the lease should have been extended beyond the primary term and Helmerich & Payne's interest continued. There are no cases, however, that have applied the relation back doctrine to situations involving the pendency of a spacing application, and the *Kuykendall* court expressly refused to establish a precedent. The court held that "the legal fiction is justified by neither law, logic nor fairness."⁶⁷

63. 54 OKLA. B.J. at 27.

64. *See supra* note 3.

65. BLACK'S LAW DICTIONARY 1158 (5th ed. 1979).

66. 54 OKLA. B.J. at 27.

67. *Id.*

2. Substantial Compliance

Even if the Kuykendall land was not technically pooled until the spacing application was approved, it is arguable that Helmerich & Payne was entitled to an extension of the lease term under the theory that it substantially complied with the requirements of the lease. The doctrine of substantial compliance has generally been used when the failure to perform is a mere technical, nonmaterial variance to the terms of a contract and when that failure will not result in a detriment to the other party.⁶⁸ Applying the doctrine of substantial compliance in *Kuykendall* raises two questions: (1) whether the rule applies to oil and gas leases and (2) whether Helmerich & Payne did substantially comply with the terms of the lease.

In his treatise on oil and gas, Summers states that the substantial compliance doctrine should apply to oil and gas leases.⁶⁹ But the *Kuykendall* court stated that substantial compliance did not apply and that it had never been used in this type of situations.⁷⁰ However, the Supreme Court of Oklahoma arguably did apply the principle of substantial compliance in a situation very similar to *Kuykendall* when it decided *Petroleum Reserve Corp. v. Dierksen*⁷¹ in 1981.

68. See *Cookson v. Western Oil Fields, Inc.*, 465 F.2d 460 (10th Cir. 1972). In *Cookson*, the court stated the rule for substantial compliance: "When all of the grievances are considered, separately and together, they present no more than technical variances from the letter of the contract, and courts will not deny enforcement in the face of a showing of substantial performance and in the absence of a detriment." *Id.* at 462; see also *Baer Bros. Land & Cattle Co. v. Reed*, 197 F.2d 569 (10th Cir. 1952). In *Baer* the court stated that variances from the contract that are only technical in nature will not deny the enforcement of a contract if the plaintiff has substantially performed and the other party has not been injured. *Id.* at 573.

69. 4 W. SUMMERS, *THE LAW OF OIL AND GAS* § 684, at 166 (1962). Summers also states, however, that when the time for commencement of drilling is expressly stated in the lease it should be considered of the essence and substantial compliance will not be an excuse. *Id.* For other cases holding time to be of the essence in a commencement lease see *Niles v. Meade*, 189 Ky. 243, —, 224 S.W. 854, 857 (1920) (problems encountered in moving a drilling rig to the drill site did not excuse the failure to commence drilling on time); *Jackson v. Anglin*, 252 S.W. 1085, 1087 (Tex. Civ. App. 1923) (drilling with a derrick that is too small to complete the well is not a commencement of drilling); *Rock Creek Oil Corp. v. Wolfe*, 35 S.W.2d 1072, 1074 (Tex. Civ. App. 1930) (lessee lost tools in the well which caused the delay).

70. 54 OKLA. B.J. at 27. The court stated:

While the "substantial compliance" doctrine has been applied in a situation or two, it has never been invoked, so far as we can find, in any situation remotely resembling that [which] we have here—a failure to commence drilling because of a pending application for pooling. We are convinced that here there was not in fact a substantial compliance with the lease terms.

Id. But see *Cookson v. Western Oil Fields, Inc.* 465 F.2d 460 (10th Cir. 1972). The *Cookson* court stated that the doctrine of substantial performance applies fully to oil and gas leases and operates to bar recovery for insubstantial or formal breaches. *Id.* at 462.

71. 623 P.2d 602 (Okla. 1981).

The Petroleum Reserve Corporation leased land from Dierksen for oil exploration. The primary term of the Dierksen lease was for three years, provided that drilling was commenced within one year. If the drilling requirement was not met, the lease would be forfeited unless delay rentals were paid.⁷² The lease also provided that the "[l]essee shall file written unit designations in the county in which the leased premises are located."⁷³ Petroleum Reserve attempted to satisfy the commencement of drilling clause by pooling the land and drilling on neighboring property, however, it failed to file the required unit designation.⁷⁴ When Petroleum Reserve failed to make a delay rental payment on the one year anniversary date, Dierksen claimed the lease had terminated because the land had not been formally pooled under the unit designation clause in the lease. The court weighed the equities surrounding the facts and circumstances of the case and ruled that the commencement of drilling clause had been satisfied and the lease, by its terms, was extended past the primary term. The court acknowledged that an express condition in the lease had been breached, concluding:

The lease language does require filing of unit designation Although we view such a requirement as notice to concerned parties that the land in question has been included in a specific unit for oil and gas production, there was no evidence that lessors relied to their detriment on the lack of such a notice, the filing of a written unit designation in the County. We find that failure to meet that requirement under the facts and circumstances of this case cannot serve to forfeit the lease.⁷⁵

The facts in *Kuykendall* indicate that Helmerich & Payne did indeed substantially comply with the lease. Helmerich & Payne came within hours of technically satisfying the terms of the lease by acquiring a pooling order that would have brought the Kuykendall lease within the existing spacing unit on which it had already commenced drilling the McClure No. 1 well. The spacing application filed with the Corporation Commission was approved by the trial examiner on December 9, 1976, prior to the expiration of the primary term. All that remained was for the Commission to approve the application.

The one day delay in obtaining the spacing order in no way in-

72. *Id.* at 604.

73. *Id.*

74. The lease was entered into on April 26, 1975, and the well was commenced in October of the same year. *Id.*

75. *Id.*

jured Kuykendall. Kuykendall's intention upon entering into the lease was to determine whether there was oil or gas under the land capable of being produced in paying quantities. The delay in obtaining the Commission's formal approval did not affect Kuykendall's intention because the well which ultimately determined the existence of a reservoir was commenced long before the application was approved.⁷⁶ Since Kuykendall was not injured and since Helmerich & Payne substantially performed, to declare a forfeiture would be to totally disregard the "gross imbalance of equities."⁷⁷

3. Estoppel

Helmerich & Payne also raised an estoppel defense based on Kuykendall's delay in declaring a forfeiture. In order to apply this defense two requirements must be met: (1) the lessor must have a legal duty to notify the lessee of the forfeiture, and (2) the lessee must have been harmed by the lessor's delay in declaring a forfeiture.⁷⁸

The appellate court denied the estoppel defense, basing its denial on the fact that under the terms of the lease Kuykendall did not have a duty to notify Helmerich & Payne of its forfeiture.⁷⁹ On this issue the court is supported by a long line of cases which state that estoppel by silence will be denied unless notice was required in the lease.⁸⁰ The usual rationale is that a lease terminates automatically when a limitation provision of the habendum clause is not met.⁸¹ A strict application

76. 54 OKLA. B.J. at 26. Helmerich & Payne was not awaiting formal approval of the application to commence drilling. In fact, Helmerich & Payne had begun drilling before the application was approved, so the final completion date of the well was not affected by the delay. Kuykendall's motive for executing the lease was to determine whether his land possessed valuable oil deposits; the well was ultimately drilled, so Kuykendall received the benefit of his bargain.

77. *Id.* at 29. The substantial performance by Helmerich & Payne and the absence of detriment to Kuykendall were factors considered in Justice Bacon's dissent. *Id.* Justice Bacon's dissent also stated, "To hold as the majority holds is to ignore the gross imbalance of equities of appellant and appellee." *Id.*

78. *See id.* at 28; 3 H. WILLIAMS *supra* note 51 § 604.7, at 84.1.

79. 54 OKLA. B.J. at 28.

80. *But see* Eggleston v. McCasland, 98 F. Supp. 693 (E.D. Okla. 1951). In Eggleston the lessor waited while the lessee expended large sums of money developing the land, knowing the lessee was not aware of the lessor's intentions to have the lease forfeited. The basis for forfeiture was a clause in the contract which stated that oil must be produced on the land to continue the lease past the primary term. The court said the lease was continued because "[p]laintiffs have been fully aware of the defendant's intentions to expend . . . and yet they have never indicated to the defendants that they considered this lease to have terminated." *Id.* at 696.

81. The general rule in Oklahoma is that a forfeiture of an oil and gas lease depends on the facts and circumstances surrounding the case and whether the forfeiture will advance or hinder justice. There also appears, however, to be a long line of cases stating that a failure to comply with the express terms of a lease is not a forfeiture but an automatic termination. The cases

of the traditional rule that notice is not required would allow a lessor who intends to enforce a forfeiture clause to stand by while the lessee spends great sums of money to develop the land; such a showing of bad faith should not be encouraged by the court. Logic and fairness dictate that an exception to the no notice rule should be made when only one of the parties is aware of the termination. Oklahoma recognized this exception in *Strange v. Hicks*.⁸² In *Strange* the lease provided that the primary term of two years would be extended "as long thereafter as oil or gas or either of them is produced from said land. . . ."⁸³ The lessee failed to produce oil or gas after the primary term because he was unable to find a market. The lessee diligently drilled other wells in the field with the intention of creating sufficient production to warrant a pipeline. Knowing the lease had terminated because of the lessee's failure to produce within the express terms of the lease, the lessor nevertheless stood by and allowed the lessee to further develop the field. The court held that the lessor's failure to notify the lessee of the forfeiture constituted bad faith and consequently refused to recognize the forfeiture:

We do not believe that the plaintiffs come into court with clean hands. By acquiescing in the acts of the lessees in the development of this field and making no claim that the lease was forfeited but by every act of theirs indicating the lease was in full force and effect, they obtained an advantage which they sought to capitalize at the expense of the lessees.⁸⁴

Kuykendall knew that Helmerich & Payne had applied for a pooling order and had commenced drilling on the adjacent land.⁸⁵ Instead of informing them of his intention to deny the extension of the lease, Kuykendall remained silent and allowed Helmerich & Payne to con-

following the automatic termination theory include *Ellison v. Skelly Oil Co.*, 206 Okla. 496, 498, 244 P.2d 832, 835 (1951) (termination of an oil and gas lease for nonpayment of rent is not a forfeiture but a termination of the lease in accordance with the terms of the contract); *Williams v. Ware*, 167 Okla. 626, 629, 31 P.2d 567, 570 (1934) (failure to pay rental or drill automatically terminated the lease); *Newman v. Klingel*, 133 Okla. 286, 288, 272 P. 401, 403 (1928) (failure to drill or pay rentals made the lease forfeitable at lessor's option); *McKinlay v. Feagins*, 82 Okla. 193, 194, 198 P. 997, 998 (1921) (failure to commence drilling or pay rent by the date stipulated). The fact that the lease terminated automatically is also the reason behind not allowing a laches defense. "Since termination of a lease by operation of the limitation provision of the habendum clause is automatic, the lessor's delay in bringing suit appears [to be] immaterial. Any defense that the lessor has waived his right to assert termination of the lease would seem inapplicable." 3 H. WILLIAMS, *supra* note 51 § 604.7, at 84.3.

82. 78 Okla. 1, 188 P. 347 (1920).

83. *Id.* at 2, 188 P. at 348.

84. *Id.* at 4, 188 P. at 351.

85. 54 OKLA. B.J. at 27.

tinue drilling. By remaining silent, Kuykendall was arguably attempting to obtain the benefit of royalties realized from McClure No. 1 without sharing in the risk or expenses of drilling the well. Thus, Kuykendall obtained an advantage which he sought to capitalize at the expense of Helmerich & Payne.⁸⁶ The fact remains, however, that even though Kuykendall may not have acted in good faith, Helmerich & Payne had ample reason to know that the lease might be terminated. Helmerich & Payne filed the spacing application with the Corporation Commission to satisfy the pooling requirement in the lease; it should have anticipated that a problem would result if approval of the application came after the primary term expiration date.

Helmerich & Payne claimed that had it known of Kuykendall's intent to forfeit the lease it could have attempted to obtain a ratification of the lease, obtain some equitable apportionment of the risk of drilling the well, forced a pooling⁸⁷ or would have at least observed greater caution in disseminating information about the well.⁸⁸ In short, Helmerich & Payne asserted that because Kuykendall remained silent, it failed to take these preventative measures and as a consequence suffered grave injury. This argument is, however, without merit for nothing prevented Helmerich & Payne from exercising these options before the lease expired. Perhaps Helmerich & Payne was also "lying behind the log,"⁸⁹ hoping that Kuykendall would not notice its technical breach of the lease. Eventually, Helmerich & Payne's anxiety forced it to ask the Commission to issue an order nunc pro tunc.⁹⁰ Where both parties had the same knowledge about the facts and circumstances, as in this case, the court was correct in refusing to apply the equitable doctrine of estoppel.

4. Force Majeure

A force majeure clause in an oil and gas lease provides that the

86. Cf. 78 Okla. at 4, 188 P. at 351 (court found lessors attempting to obtain advantage at lessee's expense).

87. Forced pooling is "[t]he bringing together, as required by law or a valid order or regulation, of separately owned . . . small tracts sufficient for the granting of a well permit under applicable spacing rules." 8 H. WILLIAMS & C. MEYERS *supra* note 4, at 125.

88. 54 OKLA. B.J. at 28.

89. Helmerich & Payne declared Kuykendall was the one "lying behind the log" because Kuykendall had knowledge of the situation and never offered to help pay for the costs of drilling McClure No. 1. *Id.*

90. The Corporation Commission issued the spacing order on December 21, 1976, but Helmerich & Payne did not ask the Commission to issue an order nunc pro tunc until March 30, 1977, more than three months later. *Id.* at 26.

lessee's performance shall be excused if that failure is due to specified causes.⁹¹ A clause in the Kuykendall lease provided that the lease would not be terminated for failure to comply with its terms "if compliance is prevented by . . . [any] Law, Order, Rule or Regulation."⁹² Helmerich & Payne claimed that it was precluded from fulfilling the requirements of the lease because of governmental delays in issuing the spacing permit which were beyond its control. The court, however, ruled that the force majeure clause did not apply to this situation since Helmerich & Payne was not required by any law, order, rule or regulation to locate its well on land which would require Commission approval for validation of the lease.⁹³ The court noted that Helmerich & Payne could have drilled on any site; it voluntarily chose not to drill on the Kuykendall land. The court may have overlooked that within an existing spacing unit, it is the Corporation Commission that determines the location of the well site.⁹⁴ If the Kuykendall lease was to be pooled in the existing unit, Helmerich & Payne would not have been free to drill anywhere on the Kuykendall land. Nevertheless, Helmerich & Payne possibly could have withdrawn the pending application and commenced drilling on the Kuykendall property.⁹⁵ Based on the Corporation Commission's approval of the McClure No. 1 well site, it may be assumed, however, that to have drilled on the Kuykendall land would not have resulted in the most efficient development of the reser-

91. 8 H. WILLIAMS & C. MEYERS *supra* note 4, at 283-84.

92. 54 OKLA. B.J. at 28. The lease does not make it clear whether the parties intended to make the force majeure clause applicable to voluntary acts done in good faith by the lessee. To avoid this problem in the future, it is suggested that lease language should make clear the intentions of the parties. California leases generally contain provisions allowing the lessee to develop the land and not be penalized for any resulting delay. A sample clause from a California lease reads:

Notwithstanding anything to the contrary herein provided, if any of Lessee's obligations hereunder conflicts with or violates the provisions of any reasonable conservation program or plan of orderly development, whether now or hereafter developed, to which Lessee may voluntarily subscribe, or of any conservation program or plan which is now or may hereafter be prescribed by any order of any governmental agency, or of any schedule of production recommended by any such agency or committee of oil producers, in accordance with any applicable law, Lessee shall not be obligated to perform such obligation.

4 H. WILLIAMS, OIL AND GAS LAW § 683.1 n.43 (1980).

93. 54 OKLA. B.J. at 28.

94. "The order establishing such spacing or drilling units shall set forth. . . (4) the location of the permitted well on each such spacing or drilling unit." OKLA. STAT. tit. 52, § 87.1(c) (Supp. 1982).

95. It would be necessary to withdraw the pending application because Oklahoma law states that "[t]he drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such well is hereby prohibited." OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1982).

voir. To have commenced drilling on the Kuykendall land may have resulted in waste, and waste should not be encouraged by the courts.⁹⁶ The appellate court also stated that Helmerich & Payne started too late to expand its working interest within the section.⁹⁷ The court then implied that the delay was caused by Helmerich & Payne's untimely filing of the application rather than the time it took the Commission to process it. It is difficult to see what more Helmerich & Payne could have done to get the required spacing order. The application was made on November 12, 1976, five days *before* Helmerich & Payne purchased the lease from Taft Milford⁹⁸ and 39 days before the lease was to expire.⁹⁹ Helmerich & Payne could reasonably have believed the application would be approved before the deadline.¹⁰⁰ Indeed, it was approved only hours after the December 20 termination date.

Arguably, if a lessee, in good faith, is prevented from fulfilling the terms of the lease by delays caused by the Corporation Commission or another regulatory body, then the force majeure clause should apply. The key to this argument is good faith. If Helmerich & Payne applied for a pooling application merely to extend the primary term of the lease then obviously the clause should not apply. Helmerich & Payne did not, however, file the application merely to extend the lease, but did so in furtherance of good business practices with a genuine intent to produce oil and gas on the pooled land.

5. Due Process

When Taft Milford assigned the lease to Helmerich & Payne it was subject to a pending spacing application.¹⁰¹ Oklahoma law provides that unless special approval is granted by the Commission, no well can be drilled into any common source of supply which is subject

96. Waste would be committed in two ways: (1) economic waste would result from the costs involved with drilling the unnecessary well on the Kuykendall land, *see* 8 H. WILLIAMS & C. MEYERS, *supra* note 4, at 228; (2) physical waste would result from the loss of oil at the drilling site, *see id.* at 546.

97. 54 OKLA. B.J. at 28.

98. Helmerich & Payne purchased the lease from Taft Milford on November 17, 1976. *Id.* at 26.

99. The lease was to expire on December 20, 1976. *Id.*

100. The only time requirement is that the application will not be reviewed by the commission until 15 days after it is filed. This allows the Commission time to notify interested parties. OKLA. STAT. tit. 52, § 87.1(a) (Supp. 1982). The 15 day requirement was satisfied since Helmerich & Payne filed the application about a month before the lease was to expire. 54 OKLA. B.J. at 26.

101. The spacing application was filed on November 12, 1976. OKLA. B.J. at 27. Taft Milford assigned the lease to Helmerich & Payne on November 17, 1976. *Id.* at 26.

to a pending spacing application.¹⁰² Helmerich & Payne claimed that since it could not satisfy the lease by drilling directly on the Kuykendall land due to the pending application, it was thereby denied a property right without due process of law.

The due process argument failed for two reasons. First, the statute allows for exceptions by special approval of the Commission, and second, the lease was not forfeited, but rather terminated automatically upon Helmerich & Payne's failure to commence drilling within the specified time. The applicable statute dictates that a well cannot be commenced at a location "other than that approved by a special order of the Commission."¹⁰³ Since Helmerich & Payne did not elect to apply for an exception and present its case for drilling directly on the Kuykendall land, it is difficult to see how it was deprived of due process.

Additionally, the lease was not forfeited, but instead terminated automatically.¹⁰⁴ A forfeiture is a remedy employed by the courts to extinguish the life of a lease otherwise in force.¹⁰⁵ A termination, on the other hand, occurs at the expiration of the lease by its own terms.¹⁰⁶ The court did not rule the lease was forfeited, thereby denying an existing right in Helmerich & Payne, rather, it merely refused to *extend* the lease past the expiration date. The court was correct when it stated, "[Helmerich & Payne] has been afforded not only substantive due process but, at every stage of the proceedings, procedural due process."¹⁰⁷

V. OKLAHOMA LAW AFTER *KUYKENDALL*

Although the *Kuykendall* court generally applied current Oklahoma law, its decision will have a substantial effect on Oklahoma law because of the limitations it places on the definition of commencement of drilling in mineral leases. The court's strict construction represents a reversal of the trend to liberally interpret the commencement of drilling clause to effectuate the intent of the parties and thereby promote development.

The *Kuykendall* decision establishes a limit on how far the courts

102. OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1982).

103. *Id.*

104. 54 OKLA. B.J. at 26.

105. 8 H. WILLIAMS & C. MEYERS, *supra* note 4, at 286.

106. *Id.*

107. 54 OKLA. B.J. at 27.

are willing to go in construing what constitutes commencement of drilling. The court apparently felt that the traditionally liberal interpretation given to commencement of drilling clauses should not extend to pooling applications. Although a pooling agreement will satisfy the commencement or drilling clause for all the leases in a particular unit, the court was not willing to extend that privilege to leases that were not pooled by the expiration date stated in the lease.¹⁰⁸ In effect, the court was saying, "We will go this far but no farther." The apparent inequities to Helmerich & Payne notwithstanding, to include an application for spacing within the scope of commencement of drilling was to require the appellate court to reach too far.

It is difficult to comprehend why the Oklahoma courts should liberally interpret the commencement of drilling clause to effectuate the intention of the parties and then apply a strict construction to an application of pooling such as that filed by Helmerich & Payne. Judging by their actions, the parties intended to capitalize on the production of minerals and it should therefore follow that the commencement of drilling clause should be interpreted to promote that development. It is indeed the policy of the state of Oklahoma to liberally construe oil and gas leases in an effort to promote development.¹⁰⁹

Pooling is essential for the efficient development of an oil and gas

108. See OKLA. STAT. tit. 52, § 287.9 (1981). For an application of this statute see generally *Whitaker v. Texaco*, 283 F.2d 169, 175 (10th Cir. 1960) (concluding that the drilling of Hency No. 1 on land that was pooled with a portion of the leased land operated to act with the same effect as commencing drilling on the leased land in question within the primary term). *But see Simpson v. Stanolind Oil & Gas Co.*, 210 F.2d 640 (10th Cir. 1954). The court stated in regard to OKLA. STAT. tit. 52, § 87.1 (1951):

The primary purpose of the Oklahoma statute is to prevent waste and effect conservation of oil and gas. The objects and purposes of the statute have no relation to the termination of oil and gas leases or to the continuation of such leases beyond the primary term by the drilling of wells and the production of oil and gas therefrom. The statute was not designed to deal with or affect the right of the lessor under an oil and gas lease to cancel it for nondevelopment, nor the right of the lessee to extend the lease beyond the primary term by the drilling of a well and the production of oil and gas therefrom.

210 F.2d at 642. See also *Gilmer Oil Co. v. Corporation Comm'n*, 177 Okla. 505, 506, 61 P.2d 22, 24 (1936) (the primary intent of the Oklahoma statutes regulating oil and gas production is for the conservation of oil and gas).

109. Oklahoma has long held that leases are to be construed to promote development. This principle has been applied in a number of different circumstances. See *Marland Oil Co. v. Hubbard*, 168 Okla. 518, 519, 34 P.2d 278, 279 (1934) (damage for oil, salt, water and refuse running from leased land on to another); *Berton v. Coss*, 139 Okla. 42, 46, 280 P. 1093, 1096 (1929) (failure to develop in a reasonable time when there was no express development clause in the contract); *Chi-Okla. Oil & Gas Co. v. Shertzer*, 105 Okla. 111, 115, 231 P. 877, 880 (1924) (construing a pay renewal money or commence drilling clause); *Garfield Oil Co. v. Champlin*, 78 Okla. 91, 92, 189 P. 514, 515 (1920) (construing a pay or commence drilling clause); *Curtis v. Harris*, 76 Okla. 226, 226, 184 P. 574, 575 (1919) (construing a pay or commence drilling clause); *New State Oil & Gas Co. v. Dunn*, 75 Okla. 141, 142, 182 P. 514, 515 (1919) (construing a complete a well or pay rental

reservoir. Unnecessary drilling is wasteful because of the high cost of drilling additional wells and the loss from dissipation of otherwise producible hydrocarbons.¹¹⁰ These lost hydrocarbons and increased production costs would eventually lead to higher prices for the consumer. Other Lessees faced with decisions similar to those faced by Helmerich & Payne will now be forced to commence drilling on the leased land or in the alternative, to assume the risk that the application will not be approved in time.¹¹¹ The court is hardly promoting the development of mineral interests by forcing the lessee to make decisions that go against sound business practices.¹¹²

VI. CONCLUSION

The appellate court's decision not only ignores the gross imbalance of equities between Helmerich & Payne and Kuykendall, it also creates needless hardship and uncertainty for both lessees and lessors. Lessees will be forced to gamble on whether the Corporation Commission will approve their pending spacing applications before their leases expire.¹¹³ Lessors may lose potential royalty income if their lessees are reluctant to develop the land by the formation or extension of a spacing unit during the last few months of the primary term.

A policy of promoting development would have best been served had the court held that Helmerich & Payne's commencement of McClure No. 1, combined with its filing of an application to extend the spacing unit, satisfied the commencement of drilling clause in the Kuykendall lease. The effect of such a holding would have been to encourage Oklahoma lessees to aggressively develop the state's minerals, to the benefit of lessees and lessors alike. After *Kuykendall*, however, the lessee's interest and investment is contingent on the approval of the Corporation Commission.¹¹⁴

clause); *Paraffine Oil Co. v. Cruce*, 63 Okla. 95, 98, 162 P. 716, 718-19 (1916) (construing a condition precedent that one well must be proved productive before additional wells are drilled).

110. See OKLA. STAT. tit. 52, § 87.1 (Supp. 1982).

111. It is conceivable that a contested pooling application could be in court for a long period of time. The lessee would then have to decide whether to wait until the court renders a decision or to proceed with the drilling of an unnecessary well just to satisfy the commencement of drilling clause in the lease.

112. Forcing lessees in Helmerich & Payne's position to commence drilling on the leased land instead of pooling would tend to promote the development of the land, but it would not be an efficient development. It would be more practical to assume the rule means to promote the efficient development of land.

113. See *supra* notes 97-100 and accompanying text.

114. If the Corporation Commission does not ultimately approve the application then the lease will terminate and revert back to the lessor.

Helmerich & Payne filed its pooling application with the good faith intention of commencing a well on pooled acreage and thus attempted to satisfy its obligation to develop under the lease. On the other hand, Kuykendall obtained more than he bargained for, a royalty interest in a producing well, undiminished by the lease interest theretofore held by Helmerich & Payne. It is the opinion of this author, based on the imbalance of equities, that the Oklahoma Court of Appeals reached an unnecessarily harsh decision.¹¹⁵ The appellate court has apparently departed from the long line of Oklahoma cases that liberally interpret commencement of drilling clauses to promote development in this state. Some outer limit must exist beyond which a court is justified in finding that commencement has not begun, but the appellate court was in error in drawing the line in this instance.

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115. To avoid the harsh results of this decision there are several things lessees in Helmerich & Payne's position can do to improve their chances of extending the lease beyond the primary term: 1) be sure the force majeure clause in the lease allows the lessee to develop the land, complying voluntarily with any reasonable conservation program and yet insulates the lessee from any consequences resulting from delay, *see supra* note 92; 2) approach the lessor and obtain a written agreement to extend the primary term before the filing of the spacing application; and 3) apply for a drilling permit and begin preparing the leased land for drilling with the intention of completing the well if the application to extend the spacing unit is denied or abandoning the well if the application is approved.