# **COMMENT: EXCUSE OF DRILLING OBLIGATIONS IN CALIFORNIA OIL AND GAS LEASES WILLIAM R. BIEL**

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**Author:** WILLIAM R. BIEL

**Text**

**[\*344]**The modern ***oil*** and gas lease contains a primary term for years and an habendum or "thereafter" clause by virtue of which the interest of the lessee has a potentially perpetual duration. [[1]](#footnote-2)1The lessee's interest will terminate under the habendum clause if the lessee either fails to perform his obligations during the primary term or fails to 'produce" [[2]](#footnote-3)2***oil*** or gas at or after the expiration of the primary term. The purpose of this comment is to discuss the manner in which the drilling obligations may be excused during the primary term of ***oil*** and gas leases in California.

**[\*345]**During the primary term the duties of the lessee in regard to drilling operations are contained in the drilling and development clauses of the lease. [[3]](#footnote-4)3In general, the California lease provides that the lessee must commence the drilling of a test well within a specified period of time and must continue operations with due diligence until ***oil*** or gas is discovered. In addition, it provides that the lessee must develop the field by placing into production a prescribed number of wells.

Even if these obligations were not expressly stated in the lease, under *Hartman Ranch Co. v. Associated* ***Oil*** *Co.,* [[4]](#footnote-5)4 they would be implied. In this case the court held that where express covenants do not cover all phases of a lessee's obligations in regards to exploration, development, and production, covenants will be implied to cover all the rights and duties of the parties. The implied covenants that have been recognized by the California courts are: [[5]](#footnote-6)5(1) the obligation to drill an exploratory well; (2) the obligation to drill additional wells or to develop additional zones; (3) the obligation to operate wells and market their product diligently and properly if ***oil*** and gas is found in paying quantities; and, (4) the obligation to protect the leased premises from drainage by wells on adjoining lands.

Not only does the standard California lease expressly cover all of these obligations on the part of the lessee, but it also specifically provides, "No implied covenant shall be read into this lease requiring lessee to drill or continue drilling on said land, or fixing the measure of diligence therefore." [[6]](#footnote-7)6This clause specifically prevents the implication of any covenant inconsistent with the express duties of the lessee and denies any effect to any new implied covenants that are developed by the courts. [[7]](#footnote-8)7

The most frequently used, and generally the only effective remedy, where there is an unexcused breach by the lessee of his drilling obligations is the termination of his interest. Equity will not decree specific performance of a covenant to drill, [[8]](#footnote-9)8and an action for damages is usually inadequate because of the difficulty in proof. [[9]](#footnote-10)9

**[\*346]**Depending on the language of the particular lease, the lessee's default may cause an automatic termination of his estate by the operation of a special limitation [[10]](#footnote-11)10or may result in the lessor electing to exercise a right of re-entry for the breach of a covenant whether express or implied, which is made operative as a condition subsequent by the general forfeiture clause of the lease. [[11]](#footnote-12)11

If the lessee fails to perform the obligations of the lease diligently, may the lessor declare a forfeiture notwithstanding the absence of forfeiture provisions within the lease? The court in *Acme* ***Oil*** *and Mining Co. v. Williams*[[12]](#footnote-13)12held:

The sole consideration usually moving the lessor in extending ***oil*** leases is . . . the royalties the lessor would receive from proper and continuous pumping of ***oil***, after it had been developed in paying quantities. These leases are only valuable on development. . . . [t]here is always an implied covenant that diligence will be used toward such production. . . . It is not necessary that technical words should be inserted in such a lease in order to raise the condition. If a reasonable and fair interpretation of its terms shows, that it is made to depend on doing of something essential to its object and purpose, the law implies the condition to attain the end.

However, it is extremely doubtful whether most courts will imply a condition resulting in termination of a lessee's estate because of the unsettling effect it will have on the title to ***oil*** and gas lands.

The purpose of the foregoing discussion has been to indicate briefly the obligations imposed on a lessee by the drilling and development clauses of the standard California lease and the effect upon his estate if these drilling obligations have not been performed or excused. The methods by which the lessee may excuse his obligations will next be discussed.

*Delay Rental Provisions*

The lessor's immediate interest in granting a lease is to obtain a monetary remuneration from the leased premises at the earliest possible date, whereas the lessee's interest lies in delaying until it is economically advantageous **[\*347]**to operate the lease. The delay rental provision resulted as a compromise of these conflicting interests. It allows the lessee to delay costly drilling operations during the primary term of the lease until they become economically advantageous, by paying a stipulated sum for this privilege. [[13]](#footnote-14)13

However, the payment of delay rentals may not excuse drilling obligations completely. Of interest is the Texas case of *Texas Co. v. Ramsower*, [[14]](#footnote-15)14holding that acceptance of delay rentals with knowledge of existing substantial drainage does not excuse the lessee from performing the covenant to offset in order to protect the lessor from drainage. Since the only purpose of these rentals is to allow the lessee to delay drilling until it is economically advantageous, it would seem that the lessee should be required to protect the status quo by preventing drainage. However, in many jurisdictions the rule is otherwise. [[15]](#footnote-16)15This question does not present a problem in California for the standard California lease expressly provides that the payment of delay rentals does not excuse the duty to offset. [[16]](#footnote-17)16

The two major forms of the delay rental provision are the "drill or pay" provision, usually referred to as the "or" type, and the "unless" provision. In the modern versions of both the "or" and the "unless" leases, the lessee may keep the lease in force if he commences the drilling of a well within a stated time. In *Wilcox v. West,* [[17]](#footnote-18)17 it was held that the well need not be "spudded-in"; rather it is sufficient if operations to commence drilling have been started. Thus, drilling operations were commenced where the lessor took physical possession, posted notices against trespassing, completed a road, moved derrick timbers on to the property, and procured the necessary permits and licenses.

**[\*348]** *The "Or" Lease*

In the "or" lease, the lessee covenants either to commence drilling or to pay a delay rental annually during the primary term. Breach of this provision provides the lessor with two alternative remedies. He can either declare a forfeiture by exercising his right of re-entry for breach of the covenant, which is expressly made operative as a condition subsequent, or he can sue the lessee for the rentals as they accrue under the delay rental clause. [[18]](#footnote-19)18

If the lessor elects to declare a forfeiture of the lease he must give the lessee notice to enable him to rectify the default. [[19]](#footnote-20)19Thereafter, the lessee has a specified time within which he must either pay the rental or commence drilling.

Since the lessor at his option may sue the lessee for accrued delay rentals, the lessee may become burdened with costly payments for land which is unsuitable for further petroleum development. To obviate this hardship lessees began to insert provisions in the lease by which they could escape unaccrued delay rentals by surrendering their estates. [[20]](#footnote-21)20The surrender clause normally provides that the lessee, at his election, may surrender the premises and remove all fixtures and machinery other than casing from the property and all other personal property he has placed thereon. [[21]](#footnote-22)21A few courts invalidate these provisions because of a lack of alleged mutuality of obligation. It is claimed that the ability of the lessee to surrender the leasehold makes the contract illusory. However, most courts consider that the initial consideration given for the execution **[\*349]**of the lease serves as consideration for all phases of the lease, thereby validating the surrender provisions. [[22]](#footnote-23)22

Early conflict as to whether the surrender clause in the "or" lease was, invalid because of a lack of mutuality and a desire on the part of lessees not to be bound to either drill or pay rentals led to the creation of the "unless" lease. [[23]](#footnote-24)23

*The "Unless" Lease*

The typical "unless" lease provides that if the lessee fails to drill or pay the delay rentals the lease terminates automatically by the operation of a special limitation. Lessees, by employing the "unless" lease, successfully circumvented any potential liability for accruing delay rentals on an unproductive leasehold. Although the automatic termination operates for their benefit in the case of an unproductive leasehold, the same lease becomes a detriment when it covers the potentially productive leasehold.

Historically, the termination of an estate by a special limitation was not treated as a forfeiture, and equitable doctrines applicable to forfeitures were considered irrelevant. [[24]](#footnote-25)24Thus, notwithstanding the difficulties or impediments encountered by a lessee in commencing drilling operations or his innocence in failing to make full and timely payments, many courts hold that the lease terminates. [[25]](#footnote-26)25Other courts, when faced with the conceptualistic difficulty of avoiding the operation of a special limitation, have resorted to the use of estoppel or have construed the "unless" provision as a condition subsequent, requiring notice by the lessee in order **[\*350]**to forfeit the lessee's interest. [[26]](#footnote-27)26The threat of instant termination of his estate for the innocent failure to correctly pay delay rentals looms menacingly against the lessee. Thus, an ***oil*** company operating in an area burdened by the employment of the "unless" lease is forced to retain a sizable staff to furnish rental opinions covering their leasehold interests.

The detrimental aspect of the "unless" lease in California is well illustrated by the decision in *Richfield* ***Oil*** *Co. v. Bloomfield* [[27]](#footnote-28)27where an inarticulate attempt to require notice prior to termination of an "unless" lease failed to prevent the loss of the estate. The court, hamstrung by tradition, held that the provision of the lease requiring the lessor to give notice of default for breach of any terms of the lease had no effect upon the standard "unless" clause because the lease had terminated by the operation of the special limitation before the notice clause in a subsequent portion of the lease became operative.

The fifth circuit [[28]](#footnote-29)28recently gave effect to an "unless" lease which provided:

If lessee shall in good faith and with reasonable diligence attempt to pay any rental, but shall fail to pay or incorrectly pay some portion thereof, this lease shall not terminate unless lessee, within thirty (30) days after written notice of its error or failure, shall fail to rectify the same.

This hybrid lease, like the "unless" lease, neither obligates the lessee to commence drilling nor to pay the delay rental but in addition to the provisions ordinarily found in an "unless" lease, provides that, if the lessee in good faith attempts to pay rentals and fails, he must be given notice of the defect before his lease can be terminated. Perhaps a long awaited result has at last been reached in obtaining judicial approval for a method of avoiding the harsh effects of the operation of a special limitation. The value of this hybrid lease may be lessened, however, because practically, the lessee may compel litigation of the question of whether the lessee attempted to pay in "good faith." However, it does not appear that the absence of a "good faith" provision in the *Woolley* case would **[\*351]**have led the court to a different result. Probably the presence of this provision made it easier for the court in *Woolley* to accept a major shift in attitude concerning the traditional theory of a special limitation. Once this break has been made, this provision has served its purpose.

The only substantive difference between the hybrid "unless" lease and the "or" lease with a surrender provision is the requirement in the latter that the lessee give notice in order to terminate the lease. In practice, there is no immediate difference. Whether the hybrid "unless" lease or the "or" lease is employed, control is still vested in the lessee. It is doubtful whether the lessor would relinquish any of the immediate cash bonus for the employment of the "unless" lease in preference to the "or" lease.

Generally, once drilling has been commenced, the delay rental provision is no longer effective except in the "dry-hole" [[29]](#footnote-30)29clause. The lessee's obligations within the development clause then become operative.

*Acceptance of Royalties by the Lessor Following Default by the Lessee Under the Development Clause*

Once the initial well has been drilled and the existence of ***oil*** in paying quantities has been established, the development clause of the lease provides that the lessee must maintain continuous drilling operations in order to keep the lease in effect. He can allow no more than a stated interval between the successful or unsuccessful completion of one well and the commencement of another well until the prescribed number of wells have been completed. [[30]](#footnote-31)30In California, this obligation is usually expressly provided for in the lease, but in the absence of an express provision, an implied obligation to proceed with reasonable diligence in drilling as many wells as are necessary to properly develop the premises is recognized. Moreover, in the event the lessee is in breach of this obligation whether express or implied, the remedy of either forfeiture or damages is available to the lessor.

The measure of damages for breach of obligations within the development clause is generally the value of the royalty that would have been paid on the ***oil*** produced if the additional wells had been properly drilled. [[31]](#footnote-32)31However, this may allow for a potential double recovery by the lessor because the ***oil*** for which he has been compensated is still available **[\*352]**for future recovery. To obviate this double recovery, the Texas court, in *Texas Pacific Coal and* ***Oil*** *Co. v. Barker*, [[32]](#footnote-33)32suggested that the lessee might be able to obtain equitable relief after the tract was fully developed. This would enable the lessee to take, free of the lessor's royalty, that amount of ***oil*** and gas on which the lessor had already been paid royalties by way of damages. The relief suggested by the Texas court being equitable in nature, the lessee committing a willful breach probably would not be protected.

Lessees have sought to excuse defaults under the development clause by arguing that the lessor waived their breach by accepting royalties.

In traditional landlord-tenant law, it is generally held that acceptance of rent by a lessor with knowledge of the breach of a single obligation is an affirmation by him that the lease is still in effect. Therefore, the lessor is estopped thereafter from setting up a breach and demanding a forfeiture. However, acceptance of rent after breach of a continuing obligation does not result in waiver. [[33]](#footnote-34)33Where the obligation is continuing in nature, acceptance of rent after the original breach waives past but not future breaches. Immediately following the acceptance of rent, the lessee, thereafter, is instantaneously in breach of the original obligation.

This theory of waiver with its distinction between a single and a continuing obligation has been carried over into ***oil*** and gas law. In ***Kern*** *Sunset* ***Oil*** *Co. v. Good Roads* ***Oil*** *Co.,* [[34]](#footnote-35)34 the lessor had accepted royalties from existing wells after the lessee had breached his duty to drill and place in production a definite number of wells within a specified period of time. In a suit by the lessor to quiet title the court held that since the wells were to have been completed within a specified period of time the breach was of a single obligation and, therefore, acceptance of royalties after that time waived the default. In addition, the court held that the waiver was not merely as to the time of performance but a waiver of the entire obligation to drill the remainder of the wells. On the other hand, *Extension* ***Oil*** *Co. v. Richfield* ***Oil*** *Co.* [[35]](#footnote-36)35involved a lease which required continuous drilling until a definite number of wells were completed although no time limit was specified within which all the wells had to be completed. The court held the lessee's obligation was continuing because no time limit was specified for completion of the entire development. Therefore, acceptance of royalties did not prevent the lessor from declaring a forfeiture because it did not waive the subsequent breaches.

**[\*353]**The development clause in the standard California lease does not specify a definite time for completion of all of the wells. Therefore, it creates a continuing obligation and acceptance of royalties by the lessor while the lessee is in default will not waive his right to forfeit the lease.

Following the theory of these cases, die duty to drill offset wells to prevent drainage would be considered a continuing obligation, and acceptance of royalties from present wells would not prevent the lessor from seeking relief where the covenant has been breached. The opposite result would obtain where the lessor accepted royalties following the breach of a covenant prohibiting assignments.

This distinction between single and continuing obligations creates a major problem in a case where a lessor conveys drilling rights to a lessee who, as part of the consideration, agrees to maintain existing wells on a leased tract. According to *Prairie* ***Oil*** *Co. v. Carleton,* [[36]](#footnote-37)36 the obligation to commence drilling within a stated period of time and the obligation to pay a delay rental within the "or" lease are single rather than continuing obligations. Therefore, it would appear that the lessor by accepting royalties from existing wells would be considered to have waived the breach of the delay rental clause and would be prevented from terminating the lease for the entire period of the delay rental. It is interesting to note that this result does not follow if the parties employ the "unless" lease because under this lease the lessee neither covenants to drill nor to pay a delay rental. He merely agrees that in the event he does not elect either of these alternatives the lease shall terminate. There being no obligation involved, there obviously can be no breach and therefore there is nothing to be waived. The lease simply ends by the operation of the special limitation.

It is apparent that the doctrine of waiver can cause a substantial problem to the unwary lessor. Therefore, if a lessor has sufficient bargaining power it would be advisable for him to provide in the lease that his acceptance of royalties after default by the lessee does not constitute a waiver of the lessee's breach. [[37]](#footnote-38)37Since the waiver is based on the theory that the lessor has treated the lessee's interest as still existing, such an assumption could no longer be made were the lease to state otherwise. [[38]](#footnote-39)38

*Renner v. Huntington-Hawthorne* ***Oil*** *and Gas Co.* [[39]](#footnote-40)39 demonstrates another serious problem created by the lessor's acceptance of royalties **[\*354]**after a default by the lessee. There, the lease provided for a term of twenty years and for so long thereafter as ***oil*** was produced in paying quantities as defined in the lease. On the date of the expiration of the primary term production had fallen below the stipulated quantity, but the lessee remained in possession and continued to produce, and the lessor accepted royalties from ***oil*** produced subsequent to the expiration of the primary term. The court correctly held that the "so long thereafter" phrase in the habendum clause created a determinable fee interest in a profit a prendre and that the lessee's estate had terminated at the expiration of the primary term upon the happening of the named event, that is, production falling below the stipulated sum. [[40]](#footnote-41)40However, the court went on to hold that although the lease had terminated, the lessee remained in possession as a tenant from month to month because the lessor's acceptance of monthly royalties on ***oil*** produced subsequent to the expiration of the lease created a periodic tenancy. [[41]](#footnote-42)41Once such a tenancy is created, it is deemed to be renewed each month by the acceptance of rent, unless one of the parties gives written notice of his intention to terminate the lease. [[42]](#footnote-43)42

It must be recognized that the *Renner* doctrine only applies when the lease terminates at the expiration of the primary term and the lessor continues to accept royalties. Clearly, the holdover doctrine could have no application if termination occurred within the habendum period because during this period the lessee's interest is a determinable fee, and the statutory holdover doctrine is expressly limited to leasehold estates.

The question that immediately arises is whether the holdover doctrine should ever be applied to ***oil*** and gas leases. In *Dabney v. Edwards*, [[43]](#footnote-44)43it was held that the interest created by a lease which provides for a term of indefinite duration dependent upon the production of ***oil*** and gas is a freehold estate consisting of a determinable fee in a profit a prendre. It would seem that the holdover doctrine, which only applies to estates for years, has no application to the "determinable fee" created by the ***oil*** and gas lease. Perhaps the basis of the *Renner* decision is that the primary term for years will not merge into the determinable fee established **[\*355]**by the habendum clause if the parties do not intend that such merger occur. However, the normal lease manifests no such indication. Moreover, the *Dabney* case expressly held that upon execution of the lease, the lessee obtains a determinable fee in a profit a prendre.

There is no logical support for the application of the holdover doctrine to an ***oil*** and gas lease. It must be recognized that this is merely an imperfect fit in the overlay of traditional real property concepts upon ***oil*** and gas jurisprudence.

It could be argued that the allowance of additional time within which the lessee may maintain his interest in the lease was not contemplated by the parties. However, the status of a lessee who continues to operate a lease that has terminated is that of a good faith trespasser. [[44]](#footnote-45)44Therefore, the lessor has the power to create the periodic tenancy by accepting the tendered royalty.

An additional problem is presented by the periodic tenancy theory which was not before the court in the *Renner* decision. A periodic tenancy created when the lessee continues to pay rent is presumed to be under the same terms as the original lease. If during the periodic tenancy created by the holdover doctrine the lessee raises production up to the standard required by the lease, it is arguable that under the terms of the "thereafter" clause he would reacquire a determinable fee. Once production in paying quantities is obtained, notice by the lessor to terminate the estate would no longer be effective. The lease thereafter could only be terminated if production fell below the required amount.

If the above argument is accepted, the *Renner* decision provides a method, through acceptance of royalties by the lessor, whereby the lessee may have additional time for drilling operations which may enable him to obtain a permanent interest in the lease. [[45]](#footnote-46)45

By analogy the *Renner* decision could be used to argue that payment of delay rentals in advance at the expiration of the primary term also creates a holdover tenancy. Thus, it would be possible for a non-producing lessee to obtain a full year's extension of the primary term because of the lessor's inadvertent acceptance of an officiously tendered delay rental. However, since delay rentals are more closely analagous to the concept of rent as used in orthodox landlord-tenant law than are royalty payments, it would appear that the application of the holdover doctrine to the latter would require its application to the former.

**[\*356]** *The Force Majeure Clause*

Thus far we have discussed the delay rental provision as a method of excusing obligations within the drilling clause and the acceptance of royalties as a method of excusing obligations within the development clause. Now we come to the force majeure clause which can excuse obligations throughout the lease. [[46]](#footnote-47)46This clause is designed to excuse performance when it is rendered impossible or impractical by circumstances beyond the reasonable control of the lessee. [[47]](#footnote-48)47The court in *Pacific Vegetable* ***Oil*** *Corp. v. C. S. T., Ltd.*, [[48]](#footnote-49)48a non-***oil*** and gas case, stated:

"Force majeure" or the Latin "vis major" is not necessarily limited to the equivalent of an act of God. The test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care.

In California there have been several cases involving the application of the force majeure clause in order to excuse drilling and development where the failure to drill was allegedly due to existing zone regulations. In *Stockburger v. Dolan*, [[49]](#footnote-50)49the lessor brought an action for delay rentals under an "or" lease. The lessee sought rescission of the lease and restitution of the initial consideration claiming that a zoning ordinance which prohibited ***oil*** drilling existed at the time the lease was executed. The court held that the zoning regulation did not make the lease illegal and that the lessee's liability for delay rentals would depend upon whether the lessee had agreed to seek a reclassification of the property.

The recent case of *Baldwin v. Kubetz*, [[50]](#footnote-51)50goes much further than the *Stockburger* case. The lessee argued that since zoning regulations prohibited drilling he was excused from performing by the force majeure clause. The court found no merit in this argument, for the county zoning ordinance provided an exception permitting drilling where it appears probable that there is ***oil*** under the land. Further, citing the doctrine of **[\*357]** *Acme* ***Oil*** *and Mining Co. v. Williams*, [[51]](#footnote-52)51the court held that there is an implied covenant of diligent exploration and operation, and inherent in this implied obligation is the duty to do such incidental or subsidiary acts as may be reasonably necessary to accomplish the major purpose of the lease, such as, procuring, a drilling permit through an easily obtained zoning exception. Forfeiture was allowed for failure to perform the implied covenant after timely notice of default. Whether the standard lease provision negating implied covenants to drill [[52]](#footnote-53)52should require a different result is questionable. Once the court implies this duty, it is apparent that the lessee does not come within the force majeure clause because the interference could have been "prevented by the exercise of prudence, diligence, and care." [[53]](#footnote-54)53

These cases illustrate the reluctance of the courts to allow a lessee who is not developing the premises to hold the lease for speculative purposes unless such holding is in strict compliance with the contract.

*Conclusion*

Litigation involving the lessee's duties under the drilling and development clauses in the primary term of the ***oil*** and gas lease demonstrates a serious conflict between two strong policies. Since the lessor's primary purpose in granting an ***oil*** and gas lease is to obtain a financial return from his property, lessees will not be permitted to fail in developing the property and yet hold it for speculative or other purposes unless such holding is in strict compliance with the contract. The effectuation of this policy is illustrated by the cases establishing implied covenants, and implied conditions, and those which strictly construe the force majeure clause against the lessee. On the other hand, there is the policy against permitting the unjust termination of the lessee's estate. The strength of this policy is amply demonstrated by the willingness of the courts to transport orthodox property notions in the form of the waiver and holdover doctrines. Further examples are to be found in the cases granting equitable relief against the operation of a special limitation when the lessee defaults in payments under an "unless" lease.

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1. 1 Blake, *The* ***Oil*** *and Gas Lease*, 13 SO. CAL. L. REV. 393 (1940); Hightower, *The* ***Oil*** *and Gas Lease in California*, 3 U.C.L.A. L. REV. 424 (1956). [↑](#footnote-ref-2)
2. 2 Maxwell, ***Oil*** *and Gas Lessee's Rights on Failure to Obtain Production During the Primary Term or to Maintain Production Thereafter*, 3 ROCKY MT. MINERAL L. INST. 133 (1957). The term "production" means production in paying quantities. In the evolution of ***oil*** and gas leases, production in paying quantities has taken on different meanings. When used in the development provisions of the lease, the term means a reasonable expected profit on the entire sum including drilling costs. Renner v. Huntington-Hawthorne ***Oil*** and Gas Co., 39 Cal.2d 93, 244 P.2d 895 (1952). When used in the extension clause of the ***oil*** lease habendum, it means a return in excess of operating costs, even though drilling and equipment costs may never be repaid and the entire operation may ultimately result in a loss. Transport ***Oil*** Co. v. Exeter ***Oil*** Co., 84 Cal. App.2d 616, 181 P.2d 129 (1948). See ***OIL*** ACE FORM 86-R (1958), [7 SUMMERS, ***OIL*** AND GAS § 1133.1 (Supp. 1959)], wherein determination of paying quantities during the primary term is left to the lessee's discretion. Perhaps this will be construed as a reasonable discretion, and the *Renner* and *Transport* ***Oil*** tests will still be applicable. [↑](#footnote-ref-3)
3. 3 See 7 SUMMERS, ***OIL*** AND GAS § 1133.1 (2d ed. 1938). [↑](#footnote-ref-4)
4. 4 10 Cal.2d 232, 73 P.2d 1163 (1937). [↑](#footnote-ref-5)
5. 5 MERRILL, COVENANTS IMPLIED IN ***OIL*** AND GAS LEASES (2d ed. 1940); Hightower, *The* ***Oil*** *and Gas Lease in California*, 3 U.C.L.A. L. REV. 424, 447 (1956). [↑](#footnote-ref-6)
6. 6 See Clause 5, ***OIL*** ACE FORM 86-R (1958) [7 SUMMERS, ***OIL*** AND GAS § 1131-1 (Supp. 1959)]. [↑](#footnote-ref-7)
7. 7 It is doubtful whether this clause will be effective as to abrogate the implied covenant to refrain from depletory acts. See Seed, *The Implied Covenant in* ***Oil*** *and Gas Leases to Refrain from Depletory Acts*, 3 U.C.L.A. L. REV. 508 (1956). [↑](#footnote-ref-8)
8. 8 SUMMERS, ***OIL*** AND GAS § 533 (2d ed. 1938). [↑](#footnote-ref-9)
9. 9 Maxwell, *Damages for Breach of Express and Implied Drilling Covenants*, 5 ROCKY MT. MINERAL L. INST.     (1959). [↑](#footnote-ref-10)
10. 10 Ware v. Stafford, 148 Cal. App.2d 840, 307 P.2d 950 (1957); Caswell v. Gardner, 12 Cal. App.2d 597, 55 P.2d 1222 (1936). [↑](#footnote-ref-11)
11. 11 Hartman Ranch Co. v. Associated ***Oil*** Co., 10 Cal.2d 232, 73 P.2d 1163 (1937); Taylor v. Hamilton, 194 Cal. 768, 230 Pac. 656 (1924). The lessee's failure to perform his obligations may be considered to result in abandonment. However, abandonment cannot be inferred. It must be shown that the non-user is coupled with an intent to relinquish all rights to the premises. Swigert v. Stafford, 85 Cal. App.2d 469, 193 P.2d 106 (1948); Hall v. Augur, 82 Cal. App. 594, 256 Pac. 232 (1927). An ***oil*** and gas lessee has been held liable in damages for breach of the covenant to protect against drainage when such occurred between the time of the lessee's acts of abandonment and lessor's termination of the lease. Mitchell v. Union Drilling and Petroleum Co., 1 Cal.2d 56, 32 P.2d 1069 (1934). This indicates that mere abandonment by the lessee does not exonerate him from the burdens of the lease. [↑](#footnote-ref-12)
12. 12 140 Cal. 681, 74 Pac. 296 (1903). [↑](#footnote-ref-13)
13. 13 McElroy, *"Unless" vs. "Or": An Appraisal*, 6 BAYLOR L. REV. 415 (1954); Williams, *The Delay Rental and Related Clauses of* ***Oil*** *and Gas Leases*, 38 MINN. L. REV. 97 (1954); Williams, *Primary Term and Delay Rental Provisions*, SOUTHWESTERN LEGAL FOUNDATION, SECOND ANNUAL INSTITUTE ON ***OIL*** AND GAS LAW n93 (1953). [↑](#footnote-ref-14)
14. 14 7 S.W.2d 872 (Tex. Comm. App. 1928); See also, Blair v. Clear Creek ***Oil*** and Gas Co., 148 Ark. 301, 230 S.W. 286 (1921). [↑](#footnote-ref-15)
15. 15 Orr v. Comar ***Oil*** Co., 46 F.2d 59 (10th Cir. 1930); Carter ***Oil*** Co. v. Samuels, 181 Okla. 218, 73 P.2d 453 (1937); Carper v. United Fuel Gas Co., 78 W. Va. 433, 89 S.E. 12 (1916). [↑](#footnote-ref-16)
16. 16 See Clause 5, ***OIL*** ACE FORM 86-R (1958) [7 SUMMERS, ***OIL*** AND GAS 1133-1 (Supp. 1959)]. In the leading case of Brewster v. Lanyon Zinc Co., 140 Fed. 801 (8th Cir. 1905), it was held that there is no obligation to drill an offset well unless it will be sufficiently productive to render the lessee a reasonable return on the cost of drilling, equipping, and operating the well. This decision was specifically adopted in Hartman Ranch Co. v. Associated ***Oil*** and Gas Co., 10 Cal.2d 232, 73 P.2d 1163 (1937). *Cf*. R.R. Bush ***Oil*** Co. v. Beverly-Lincoln Land Co., 69 Cal. App.2d 246, 158 P.2d 754 (1945). [↑](#footnote-ref-17)
17. 17 45 Cal. App.2d 267, 114 P.2d 39 (1941). [↑](#footnote-ref-18)
18. 18 Allen v. Narver, 178 Cal. 202, 172 Pac. 980 (1918). The leading case is Galey v. Kellerman, 123 Pa. 491, 16 A. 474 (1889). See 2 SUMMERS, ***OIL*** AND GAS, § 233 (2d ed. 1938). [↑](#footnote-ref-19)
19. 19 Calhoma ***Oil*** Corp. v. Conniff, 207 Cal. 648, 279 Pac. 771 (1929). However, it has been held that the notice of default is waived if the lessee contests the lessor's quiet title action contending that he is not in default under the lease, Williams v. Edge, 192 Cal. 254, 219 Pac. 747 (1923). Where notice of default has been served and the time to remedy the default has expired, no additional notice declaring that the lease is forfeited is necessary as a preliminary to litigation. In any case, the filing of a complaint and service of summons would constitute a sufficient election to declare a forfeiture. Reserve ***Oil*** and Gas Co. v. Metzenbaum, 84 Cal. App.2d 769, 191 P.2d 796 (1948). [↑](#footnote-ref-20)
20. 20 Elsinore ***Oil*** Co. v. Signal ***Oil*** and Gas Co., 3 Cal. App.2d 570, 40 P.2d 523 (1935). [↑](#footnote-ref-21)
21. 21 Brookshire ***Oil*** Co. v. Casmalia Ranch ***Oil*** and Development Co., 156 Cal. 211, 103 Pac. 927 (1909); Johnson v. Hinkel, 29 Cal. App. 78, 154 Pac. 487 (1915). The surrender clause usually permits not only a complete but a partial surrender. Where a partial surrender is incorporated in the lease, it is not uncommon to include a clause prohibiting the lessor from drilling on the land quitclaimed within a specified distance of the boundary line of the leased lands retained or within a specified distance of any well upon land not surrendered. Hightower, *The* ***Oil*** *and Gas Lease in California*, 3 U.C.L.A. L. REV. 424 (1956). [↑](#footnote-ref-22)
22. 22 The cash bonus supports each and every provision of the lease in California, Bell v. Rio Grande ***Oil*** Co., 23 Cal. App.2d 736, 73 P.2d 662 (1937); Clark v. Elsinore ***Oil*** Co., 138 Cal. App. 6, 31 P.2d 476 (1934). As to other jurisdictions, see 2 SUMMERS, ***OIL*** AND GAS, §§ 235-236 (2d ed. 1938). [↑](#footnote-ref-23)
23. 23 Williams, *The Delay Rental and Related Clauses of* ***Oil*** *and Gas Leases*, 38 MINN. L. REV. 97 (1954). [↑](#footnote-ref-24)
24. 24 Summers, *Equitable Relief from Termination of* ***Oil*** *and Gas Leases for Failure of the Lessee to Meet the Requirements of the Drilling and Delay Rental Clause*, SOUTHWESTERN LEGAL FOUNDATION, FIFTH ANNUAL INST, ON ***OIL*** AND GAS LAW AND TAXATION 1 (1954). [↑](#footnote-ref-25)
25. 25 Payment was inadvertently made at the First National Bank of Magnolia, Arkansas instead of at the First National Bank of El Dorado, Arkansas. Lessors were credited at the Magnolia bank. Held: lease terminated, Vaughan v. Doss, 219 Ark. 963, 245 S.W.2d 826 (1952). The lease was held to have terminated when an improper amount was paid on time and at the proper bank in Atlantic Refining Co. v. Shell ***Oil*** Co., 217 La. 576, 46 So.2d 907 (1950). For an extensive discussion of the problems see Summers, *Equitable Relief from Termination of* ***Oil*** *and Gas Leases for Failure of the Lessee to meet the Requirements of the Drilling and Delay Rental Clause*, SOUTHWESTERN LEGAL FOUNDATION, FIFTH ANNUAL INST, ON ***OIL*** AND GAS LAW AND TAXATION 1 (1954). [↑](#footnote-ref-26)
26. 26 Humble ***Oil*** and Refining Co. v. Harrison, 146 Tex. 216, 205 S.W.2d 355 (1947), noted 26 TEXAS L. REV. 826 (1948). See Summers, *Equitable Relief from Termination of* ***Oil*** *and Gas Leases for Failure of the Lessee to meet the Requirements of the Drilling and Delay Rental Clauses*, SOUTHWESTERN LEGAL FOUNDATION, FIFTH ANNUAL INST, ON ***OIL*** AND GAS LAW AND TAXATION 1 (1954); Williams, *Primary Term and Delay Rental Provisions*, SOUTHWESTERN LEGAL FOUNDATION, SECOND ANNUAL INST, ON ***OIL*** AND GAS LAW AND TAXATION n93 (1951). [↑](#footnote-ref-27)
27. 27 103 Cal. App.2d 589, 229 P.2d 838 (1951); see 3 SUMMERS, ***OIL*** AND GAS § 469 (2d ed. 1938). [↑](#footnote-ref-28)
28. 28 Woolley v. Standard ***Oil*** Co. of Texas, 230 F.2d 97 (5th Cir. 1956), *affirming* Standard ***Oil*** Co. of Texas v. Clark, 133 F. Supp. 346 (N.D. Tex. 1955), noted 8 BAYLOR L. REV. 217 (1957). [↑](#footnote-ref-29)
29. 29 See Clause 7, ***OIL*** ACE FORM 86-R (1958) [7 SUMMERS, ***OIL*** AND GAS § 1133.1 (Supp. 1959)]. [↑](#footnote-ref-30)
30. 30 Concerning the question of when a well has been completed, see Siemon v. Lyon, 51 Cal. App.2d 350, 124 P.2d 893 (1942). For a discussion of this case, see Hightower, *The* ***Oil*** *and Gas Lease in California*, 3 U.C.L.A. L. REV. 424, 438 (1956). [↑](#footnote-ref-31)
31. 31 Hartman Ranch Co. v. Associated ***Oil*** Co., 10 Cal.2d 232, 73 P.2d 1163 (1937); R. R. Bush ***Oil*** Co. v. Beverly-Lincoln Etc. Co., 69 Cal. App.2d 246, 158 P.2d 754 (1945). See 3 SUMMERS, ***OIL*** AND GAS 435 (2d ed. 1938). [↑](#footnote-ref-32)
32. 32 117 Tex. 418, 6 S.W.2d 1031 (1928). [↑](#footnote-ref-33)
33. 33 The distinction between a single and continuing obligation is discussed in McGlynn v. Moore, 25 Cal. 384 (1864). [↑](#footnote-ref-34)
34. 34 214 Cal. 435, 6 P.2d 71 (1931); Title Ins. & Trust Co. v. Hisey, 95 F.2d 555 (9th Cir. 1938). [↑](#footnote-ref-35)
35. 35 52 Cal. App.2d 105, 125 P.2d 895 (1942). [↑](#footnote-ref-36)
36. 36 91 Cal. App.2d 555, 205 P.2d 81 (1949). [↑](#footnote-ref-37)
37. 37 Vintaloro v. Pappas, 310 Ill. 115; 141 N.E. 377 (1924); Miller v. Prescott, 163 Mass. 12, 39 N.E. 409 (1895). [↑](#footnote-ref-38)
38. 38 1 TIFFANY, REAL PROPERTY § 207 (3d ed. 1939). [↑](#footnote-ref-39)
39. 39 39 Cal.2d 93, 244 P.2d 895 (1952); see discussion of this case in 4 U.C.L.A. L. REV. 485, 487 (1957). [↑](#footnote-ref-40)
40. 40 No provision was contained in the lease for extending drilling operations after the primary term. The methods of extending the primary term by drilling operations are beyond the scope of this comment. For a discussion of the problems created by improper drafting see Maxwell, ***Oil*** *and Gas Lessee's Rights on Failure to Obtain Production During the Primary Term or to Maintain Production Thereafter, 3* ROCKY MT. MINERAL L. INST. 133, 154 (1957). [↑](#footnote-ref-41)
41. 41 CAL. CIV. CODE § 1945, "If a lessee of real property remains in possession thereof after the expiration of hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when rent is payable monthly, nor in any case one year." [↑](#footnote-ref-42)
42. 42 CAL. CIV. CODE § 1946. [↑](#footnote-ref-43)
43. 43 5 Cal.2d 1, 53 P.2d 962 (1935). [↑](#footnote-ref-44)
44. 44 Williams & Meyers, *Adverse Possession in* ***Oil*** *and Gas Leases*, 29 ROCKY MT. L. REV. 1,23 (1957). [↑](#footnote-ref-45)
45. 45 See note 40 *supra*. [↑](#footnote-ref-46)
46. 46See Clause 13, ***OIL*** ACE FORM 86-R (1958) [7 SUMMERS, ***OIL*** AND GAS § 1133.1 (Supp. 1959)]:

    "The obligations of Lessee hereunder shall be suspended while Lessee is prevented from complying therewith, in whole or in part, by strikes, lockouts, action of the elements, accidents, laws, rules and regulations of any federal, state, municipal or other governmental agency, acts or requests of any governmental officer or agent purporting to act under authority, exhaustion, unavailability, or delays in delivery of necessary materials and equipment, or other matters or conditions beyond the control of the Lessee, whether or not similar to the matters or conditions herein specifically enumerated." [↑](#footnote-ref-47)
47. 47 Sheinberg, *The Force Majeure Clause: A Tool for Mitigating the Effect of the Determinable Fee Concept of the Modern* ***Oil*** *and Gas Lease*, 6 U.C.L.A. L. REV. 269 (1959). [↑](#footnote-ref-48)
48. 48 29 Cal.2d 228, 238, 174 P.2d 441, 447 (1946). [↑](#footnote-ref-49)
49. 49 14 Cal.2d 313, 94 P.2d 33 (1939). [↑](#footnote-ref-50)
50. 50 148 Cal. App.2d 937, 307 P.2d 1005 (1957). [↑](#footnote-ref-51)
51. 51 140 Cal. 681, 74 Pac. 296 (1903). [↑](#footnote-ref-52)
52. 52 See Clause 5, ***OIL*** ACE FORM 86-R (1958) [7 SUMMERS, ***OIL*** AND GAS § 1133.1 (Supp. 1959)]. [↑](#footnote-ref-53)
53. 53 See note 48 *supra* and accompanying text. [↑](#footnote-ref-54)