# **1 The Law of Oil and Gas Leases, 2nd Edition § 7.06**

***The Law of Oil and Gas Leases, 2nd Edition* > *Chapter VII THE DRILLING AND RENTAL CLAUSE***

**§ 7.06 Effect of Improper Payment of Rental**

First, what is the effect on the validity of the lease where the bank receives the deposit but fails to credit it to the lessor? In the Texas case of *Hunter v. Gulf Production Company*[[1]](#footnote-2)64 the court held that payment of a rental to a depository bank had the same effect as payment to the lessor and any failure of the bank to pay the money to the lessor, or to give him proper credit on its books, is not properly chargeable to the lessee. The same holding was reached in the Texas case of *Gulf Production Co. v. Perry.*[[2]](#footnote-3)65 See also *Burbridge v. Noe,* a North Dakota case,[[3]](#footnote-4)66 and *Kronmiller v. Hafner,* a South Dakota case.[[4]](#footnote-5)67 These holdings were based on the conclusion that the lease made the depository bank the agent of the lessor to receive such payments, and they state the general rule.

In Oklahoma, there seemed to be a conflict with the ruling that the depository bank is the agent of the lessor to receive payment of rentals.[[5]](#footnote-6)68 However, a later Oklahoma case,[[6]](#footnote-7)69 without reference to the earlier decisions, held an “unless” lease was not forfeited where the bank received the rental in due time but failed to deposit it to the lessor’s credit until after the rental paying date. It would appear, from other decisions[[7]](#footnote-8)70 liberally construing the rental clause, that the *Brazell* case represents the law in Oklahoma today.

In Kansas, there seems to be some doubt about whether the depository bank is the agent of the lessor and whether payment to the bank is good where not credited to the lessor in time. The cases of *Chapple v. Kansas Vitrified Brick Co.,*[[8]](#footnote-9)71 and *Harter v. Edwards*[[9]](#footnote-10)72 seemed to cast some uncertainty on whether Kansas follows the general rule, although the fact situations in those cases were somewhat more complicated than those in the cases where the rule was announced. Again, we should be reminded that rentals should always be paid well in advance of rental paying dates, in order to remedy any difficulties which may arise prior to the critical date.

Another question: What is the effect of the failure of the lessee to make payment of rental where he attempts in good faith to make a timely payment but the failure is due to nondelivery or miscarriage of the mails? In Kansas and Oklahoma it is held that equity will not enforce a cancellation of the lease. In *Kays v. Little,*[[10]](#footnote-11)73 where there was a delay in the mails and the rental remittance reached the depository bank two days late, it was held that the lease could not be cancelled because the delay was not due to the act of the lessee, but to an intervening factor. See also the Kansas cases of *Doornbos v. Warwick,*[[11]](#footnote-12)74 *Gasaway v. Teichgraeber,*[[12]](#footnote-13)75 *Browning v. Weaver,*[[13]](#footnote-14)76 and *Young v. Moncrief.*[[14]](#footnote-15)77

In *Skelly* ***Oil*** *Co. v. Kidd*[[15]](#footnote-16)78 the rental depository named in the lease was Security State Bank of Mabank, Texas. Later the lessor wrote a letter to the lessee, Skelly ***Oil*** Company, requesting that the depository bank be changed to First State Bank of Eustace, Texas, and an instrument was executed for this purpose. However, in the instrument the name of the town was erroneously spelled, that is, Eusta*g*e instead of Eustace. Skelly timely mailed the rental to “Eustage,” but the post office delivered the check to the First State Bank of Carthage, Texas. The Carthage bank returned to Skelly the receipt attached to the check. After the due date the lessors inquired of both the Mabank and Eustace banks if the rental deposit was made and, on being advised that it had not been made in either bank, they executed a lease to Kidd. Kidd filed action for declaratory judgment that Skelly’s lease had terminated. Lessors intervened, alleging estoppel and claiming that Skelly should have made proper payment of the rental immediately after discovering the double error as to banks. Skelly tendered the rental in its answer. The trial court held that the lease had terminated. On appeal, the Court of Civil Appeals reversed the trial court. It held:

“The forfeiture of a valuable leasehold right should be found in the plain provision of the lease and being none in this lease for a second tender of payment, lessors’ plea of estoppel is overruled.”

The Oklahoma case of *Oldfield v. Gypsy* ***Oil*** *Co.*[[16]](#footnote-17)79 presented a situation where a lessee forwarded a draft for the rental to the depository bank—Stillwater National Bank. The postal clerk, through inadvertence, delivered the letter and draft to the First National Bank of Stillwater. The latter bank received and deposited the amount to the credit of the lessor. When the lessor inquired of Stillwater National Bank if the rental had been deposited to his credit and received information that it had not been so deposited, he leased the land to others. Then came the lawsuit, and the court held, however, that the first lease was still in effect. It said that the lessee forwarded the “draft addressed to the depository named in the lease fifteen days before payment was due” and that was “no less the expression of a clear intention to continue the life of the lease, than if the draft had been received by the depository named in the lease.” In another case arising in Oklahoma[[17]](#footnote-18)80 the Circuit Court of Appeals held that a lease was not terminated where the lessee mailed a timely payment to the depository bank, which had been closed.

However, in Oklahoma, where the nonpayment of rental was due to the mistake of lessee’s employee, the lease was held to have terminated.[[18]](#footnote-19)81

In Louisiana, the case of *Baker v. Potter,*[[19]](#footnote-20)82 where the rental was sent to the bank by telegraph and due to the fault of the telegraph company it did not reach the bank until after the due date, it was held that the lease died not terminate for nonpayment.[[20]](#footnote-21)83

In the case of *Brunson v. Carter* ***Oil*** *Co.,*[[21]](#footnote-22)84 a case arising in Oklahoma, there had been a change of ownership of the land. The ***oil*** company had been properly notified of the change and wrote a letter to the lessor’s grantee advising that future rentals would be paid to him. Nevertheless, the lessee by mistake paid the original owner instead of his grantee. The court refused to cancel the lease on equitable principles. It is believed that this ruling goes further than that prescribed by the general rule, and its application in other jurisdictions and in the later Oklahoma cases[[22]](#footnote-23)85 where it is said that equitable principles cannot apply to excuse the lessee’s negligence.

In other jurisdictions it has been held that where the failure to pay a rental as required by the lease is not the lessee’s fault the lease ordinarily will not be cancelled; but where it is the lessee’s fault and the lessor does nothing to mislead him, “then cancellation must follow.”[[23]](#footnote-24)86

In *Burlington Resources* ***Oil*** *& Gas Company v. Cox*,[[24]](#footnote-25)87 the lessor under the ***oil*** and gas lease changed in 1996 when the Grows (the original lessor) sold the leasehold acreage to the Coxes (the successor lessor). Neither lessor notified the lessee of the change in ownership. In 1997, the lessee timely mailed the rental check to the original lessor at the address contained in the lease. The post office forwarded the check to the original lessor at their new address and the Grows cashed the check even though they no longer owned the land. In 1998 the lessee timely mailed the rental payment to the Grows at the address contained in the lease. However, the post office returned the check to the lessee because the Grow’s mail forwarding order had expired. It was then that the lessee investigated and discovered that the Coxes had bought the leased property.

The lessee then mailed a letter to the Coxes explaining the situation and requesting that the Coxes sign a ratification and rental division order before the lessee would remit the 1998 rental payment. Thereafter, the Coxes mailed a notice of forfeiture claiming that the lessee had forfeited the lease by failing to timely pay the rental.

The Ohio Court of Appeals held that the lessee did not breach the terms of the lease and that consequently, the lease remained valid. The court noted that while the ***oil*** and gas lease allowed for successor lessors, the lease was silent on notification. “The lease neither imposes a duty upon lessors to notify the lessee about changes in ownership nor imposes a yearly duty upon lessees to investigate ownership.” The appellate court found that the lessee “exercised good faith when it mailed the rental payment to the address in the lease.” The court further found that in light of the confusion caused by the original lessor, the lessee acted reasonably and “exercised good faith when it later requested the Coxes to sign a ratification before it paid them the rental fee.”

In the case of ***Kern*** *v. Clear Creek* ***Oil*** *Co.*,[[25]](#footnote-26)88 the lease provided that a change of ownership would not be binding upon the lessee without written notification of the change. ***Kern*** purchased the property on which the ***oil*** and gas lease was located but did not give written notification of the change in ownership to Clear Creek ***Oil***. There was evidence to the effect that Clear Creek ***Oil*** may have had actual or constructive notice of the change. When Clear Creek ***Oil*** did not pay to ***Kern*** a required annual delay rental, ***Kern*** brought suit and obtained a partial summary judgment from the trial court terminating the lease. The Ohio Court of Appeals reversed the lease termination holding that “written notice was required to make the change in ownership of the land binding on Clear Creek ***Oil***. Thus, having failed to provide such written notice we conclude that the ***Kerns*** were not entitled to termination of the lease and right-of-way or yearly delay rentals.”

In *Danko Holdings, L.P. v. Exco Res. (PA), LLC*,[[26]](#footnote-27)88.1 the lessor’s successor sought a declaratory judgment that a lease had expired by its own terms due to failure to pay delay rentals to extend the primary term. The lessee’s successor asserted that because the delay rental payment had been made to the initial lessor and because no one in the lessee’s chain of title had been furnished with proper notice of a change in ownership, the payment to the initial lessor was effective to extend the lease. The United States District Court for the Middle District of Pennsylvania, in a case of first impression, agreed holding the payment to the initial lessor was sufficient to extend the lease by its own terms since the “change of ownership” notice provisions had not been satisfied.

In Texas, the state and federal courts have refused to go as far as have the courts in other states in applying equity to continue leases in force where rental payments were not made in accordance with the terms of the lease. Here again we see the application of the “determinable fee” principle applied to Texas ***oil*** and gas leases. In *Appling v. Morrison*[[27]](#footnote-28)89 a check for rental was mailed in ample time to be delivered on or before the due date, but due to a miscarriage of the mails it did not reach the depository bank in time. The court held that “as a matter of law said rental not having been paid on or before the due date, said lease is forfeited by the force of its own terms.”

For example, in Kentucky a different rule prevails from that in Texas as to failure to pay a lease rental until after the due date.

In the case of *Ledford v. Atkins*,[[28]](#footnote-29)90 an assignment of a lease provided for the payment of delay rentals before a certain date, and further provided that failure to make these payments on or before that date would void the assignment. It developed that the managing partner of the assignee partnership was seriously ill when the rental was due and it was not paid until seven days later, and then in an amount which was incorrect, but subsequently corrected. The assignor refused to accept the rental, claiming that the lease had terminated. The court refused to cancel the lease, saying:

“The question now before us is, did the trial court commit error in refusing to forfeit the lease? We believe not. Appellants contend, and it is true, that time is normally the essence of these contracts and the courts are prone to forfeit them when the time condition is not promptly met. Especially has this been true in Texas and some few other states which seem to recognize no exception to the rule. However, we believe the better rule, and the one generally followed by the majority of states, is to make allowances for extraordinary circumstances and not to order a forfeiture where the only failure has been a short delay in making payment. Especially when the forfeiture would result in the loss of a substantial investment on the part of the lessee and unjustly enrich the lessor. This rule is recognized in 5 A.L.R. 2d, pp. 994 and 995.”

In *TSB Exco, Inc. v. E. N. Smith, III Energy Corp*.,[[29]](#footnote-30)91 the original lease between the plaintiff and the landowner contained two pertinent provisions—a standard delay rental clause providing that the payment of delay rentals could be “made by check or draft of Lessee” and a typewritten rider providing for “payment” to lessor of additional consideration to extend the lease. The Texas Court of Appeals, in reversing the trial court, held that the timely payment by check in the correct amount was sufficient to extend the lease term because the typewritten rider did not specify that the lease extension payments could not be made by check. When construed as a whole, the lease authorized this manner of payment for extending the lease.

In *Gillespie v. Bobo*,[[30]](#footnote-31)92 a rental check was sent to an incorrect address and was not delivered in time. The court held that the lease terminated, holding that the lease was not “forfeited,” as equity was not involved, and further saying:

“Equity does not undertake to dispense with compliance with what is made a condition precedent to the acquisition of a right.”

*See also* the Texas cases of *Texas Company v. Davis,*[[31]](#footnote-32)93 *Caruthers v. Leonard,*[[32]](#footnote-33)94 *Empire Gas & Fuel Co. v. Saunders,*[[33]](#footnote-34)95 and *W. T. Waggoner Estate v. Sigler* ***Oil*** *Company.*[[34]](#footnote-35)96

In a later Texas case,[[35]](#footnote-36)97 the state Supreme Court had before it a case where the lessor received the lessee’s check for rental on the day the rental was due. The lessee had earlier arranged with the bank for payment of the check whenever it would be presented, but through mistake of the bank payment of the check was refused when it was later in fact presented. The court held that the lease had not terminated, but called particular attention to the rule in Texas that equitable considerations may not be considered unless the case be an exceptional one. The court said: “But it does not become necessary in this case to resort to equitable considerations and reasoning to conclude with certainty that the Baker lease did not terminate. This for the reason that the rentals in dispute were paid by the timely delivery and acceptance of a check which was in fact good, and accordingly the lease was effectively continued in force.”

In *Gloyd v. Midwest Refining Company*,[[36]](#footnote-37)98 the lessee mailed the delay rentals to the lessor in sufficient time to reach him in the normal course of the mail, but the letter was lost and never delivered to the lessor. After the due date for payment, the lessee tendered a duplicate check which the lessor refused. In holding that the lease, covering land located in New Mexico, had not terminated the court said: “When the lessee in an ‘unless’ lease in good faith manifests his intention to continue the lease by undertaking to pay such rental through a method and means customarily used in such transactions in ample time for the payment to reach the lessor or the agreed depository on or before the due date, but due to accident or mistake such payment fails to reach the lessor in time, the lease is not, because of such failure, automatically terminated. This is true, because the acts of the lessee manifest an intention not to terminate the lease.”

In *Canadian Fina* ***Oil*** *Ltd. v. Paschke,*[[37]](#footnote-38)99 the lease was executed on the afternoon of October 12, 1953. Delay rentals of $320 were payable annually under a clause which provided that “if operations for the drilling of a well are not commenced on the said lands within one (1) year from the date hereof, this lease shall thereupon terminate and be at an end unless the lessee shall have paid or tendered” the rental due. On October 12, 1955, the plaintiff deposited in the post office at Calgary a registered postpaid letter addressed to the Bank of Nova Scotia at Stettler, Alberta, containing a check for $320 payable to the defendant. The check contained a memorandum that it was for “Rental on Petroleum and Natural Gas Lease *… for the period October 12, 1955 to October 11th 1956.”* The court held that the period of one year from October 12, 1955 expired at midnight on October 11, 1955, and the payment on October 12, 1955 was too late. It also held that the notation made on the check established that the lessee so understood it.

In the Canadian case of *Langlois v. Canadian Superior* ***Oil*** *Co. of Cal. Ltd.,*[[38]](#footnote-39)100 title to certain lands, covered by an ***oil*** and gas lease, passed under the lessor’s will to his widow, who then conveyed to others. The lessee requested the new owners to execute a change of depository and this instrument was executed and forwarded to the lessee on October 5, 1954. In the meantime, the lessee, on October 1, 1954, forwarded the rental, which was due October 12, 1954, to the depository previously named, and to the credit of the widow. The court held that the failure to pay the proper parties prior to October 12, 1954 resulted in the termination of the lease.

In *Hutchinson v. Scheeberger,*[[39]](#footnote-40)101 the action was for forfeiture of an ***oil*** and gas lease based on improper payment of rental and also failure to produce within the primary term. The lease contained the usual rental clause, with a provision for termination in the event the rental was not paid on or before the date provided therefor. The rental payments were all “several days tardy” but they were accepted and cashed by a lessor as provided in the lease. The last possible rental was not paid, but drilling was commenced thereafter and lessors acquiesced. The primary term expired on December 9, 1957, but lessee had discovered ***oil*** at a shallow depth prior to that date and was drilling to test a deeper horizon. Then, according to “accepted practice,” as the court said, the well was shut down until the next spring. Then lessee began to pump ***oil*** from the first sand discovered, and the court held that the lease was thus continued in force.

In *Wagner v. Mounger,*[[40]](#footnote-41)102 the Supreme Court of Mississippi held:

(1) The tender by delay rentals due under an ***oil*** and gas lease by a stranger to the lease is not “payment” where the lease provided that payment of delay rentals was to be made by the lessee.

(2) Although the lease designated the depository bank as agent of the lessee to receive delay rentals, it was an agent of “limited authority” and “did not have the authority to waive a valuable right of the lessor.”

(3) Where the lessee of an undivided fifteen-sixteenth interest in the land conducted drilling operations thereon such operations did not perpetuate the lease on the remaining one-sixteenth interest where the lessee of that interest had no knowledge of such operations and did not participate therein.

In *Willan v. Farrar,*[[41]](#footnote-42)103 the lessee, Willan, owned an ***oil*** and gas lease in which the terminal date was on June 15, 1961. A “top lease,” which became vested in Hemisphere ***Oil*** Company, was executed by the same lessors in April 1961, and it was to take effect upon the expiration of the Willan lease. On June 13, 1961 Willan secured from the lessor an agreement extending his lease to June 25, 1961. He gave lessor a check for the consideration but the bank on which it was drawn advised that it would not cash the check for lack of funds. Nevertheless, Willan brought this action to quiet title to the lease. The court held that the plaintiff’s lease automatically terminated on its expiration date, and Hemisphere’s lease thereupon came into force and effect. The court distinguished this case from one where a lessor accepts a rental after it is due, as in such case the lease is held by “estoppel.” But when the term expired on the Willan lease the Hemisphere lease became effective and superior to the former lease. Also the payment by plaintiff to Willan was not a valid tender since the bank would not honor the check tendered.

Several later cases from Texas and Louisiana dealt with other circumstances connected with the payment of rentals.

In *Lawrence v. J. M. Huber Corp.,*[[42]](#footnote-43)104 the action was instituted by the ***oil*** and gas lessee, Huber, to recover a delay rental alleged to have been paid lessor, Lawrence, under duress. The rental was due on September 10, 1959. On July 24, 1959 the lessee commenced the drilling of a well and continued such drilling until October 13, 1959, when the well was plugged and abandoned. On September 8, 1959, while the drilling was in progress, the appellant notified the lessee that if the delay rentals were not paid on or before September 10, 1959 the lease would terminate if the well being drilled was not productive or the lease acreage would be reduced if the well should produce. The issue was whether the payment of the rental by Huber was voluntary, or paid under duress. The court said that where “the party making the demand has, or is supposed to have, the power to injure the business or property interests of the one on whom the demand is made, without resort to the courts to enforce the demand” and threatens injury if the demand is not met, the threat amounts to duress.

In *Nelson Bunker Hunt Trust Estate v. Jarmon,*[[43]](#footnote-44)105 a lease had been executed in favor of one Jarmon, who then transferred undivided interestes therein to various persons. The lease was dated September 15, 1956. The first delay rental, due September 15, 1957, was properly paid. The issue arose as to the payment of the second rental. The check mailed to the bank was unpaid because of insufficient funds, and the court held that the lease terminated. Also, there could be no estoppel because the lessee knew the check would not be honored.

In *Corley v. Olympic Petroleum Corp.,*[[44]](#footnote-45)106 the facts were that the lease provided that payment of rentals could be made by “the check or draft of Lessee mailed or delivered to the parties entitled thereto or to said bank on or before the date of payment. …” The lessee mailed a check for rentals, properly drawn, to the depository bank seven days before the due date and in the regular course of mails it should have been received by the bank four days before the due date. It was never received by the bank. The lessor relied upon the case of *Appling v. Morrison,* supra, but the court held that there is a distinction between the rental clauses in the instant case and that of the *Appling* case, in that in *Appling* there was no provision for payment by mailing. The lessee had complied with the rental obligation when it delivered a rental check to the postal service in ample time for delivery to the lessor before the rental payment date.

In *Johnson v. Smallenberger,*[[45]](#footnote-46)107 a suit was filed to cancel an “unless” lease. It was admitted that the lessee had not commenced a well or tendered the delay rental until several months after the rental was due. The lease had been made a part of a drilling unit and a well was later commenced on the unit. The lessee asserted that the rental had been tendered just as soon as it learned of its “mistake,” and further that the lessor was estopped because he saw the well commenced later, watched its progress and failed to notify lessee of the nonpayment. The court held that the lease came to an end immediately upon nonpayment of the rental when it was due; and that there could be no estoppel because there was no duty on the part of the lessor to notify the lessee of such nonpayment.

In *Rushing v. Griffin,*[[46]](#footnote-47)108 the lessors brought an action against the lessees for cancellation of an ***oil*** and gas lease for failure properly to pay rental. The lease was adjudged to have terminated, and the court awarded attorney fees to plaintiffs. The court held:

(1) Where a married man is the lessor and the deposit is made to the credit of the lessor and his wife, this is not a compliance with the terms of the contract requiring that the deposit be made to the lessor’s credit, and the lease is terminated.

(2) Even though there are considerations of equity to be applied where erroneous payments are made by mistake, such a rule is not applicable in this case because the lessor gave the lessees ample opportunity to correct the mistake before asserting forfeiture.

In *Miller v. Kellerman,*[[47]](#footnote-48)109 the lease, executed by Miller, covered 78 acres. It was dated May 5, 1956 and had a primary term of three years. It also provided for payment of a delay rental of $3,900 on or before May 5, 1957 and a delay rental of $7,800 on or before May 5, 1958. A delay rental of $3,900 was paid on April 20, 1957 for the period of May 5, 1957 to May 5, 1958. The lease contained a “Pugh Clause,” providing that where a portion of a lease should be pooled by the Louisiana Department of Conservation that would not be sufficient to continue in force the portion not included in the unit, and such portion should be continued only by compliance with the terms of the lease. Production was obtained on premises adjacent to the lease on May 28, 1958 and half of the leased acreage was force pooled in June 1958. Lessee, on April 23, 1958 paid a rental of $3,900 instead of $7,800 for the period May 5, 1958 to May 5, 1959, and the check was cashed by lessor. Cancellation of the lease was sought and the court cancelled the lease for failure to properly pay delay rentals. It held that the lease terminated on May 5, 1958 because, as the court said: “As of that date there was no production from the lease or a well unitized with it and it is clear that defendants are not entitled to retain any acreage of the lease.” The court also held that the erroneous payment of the rental of $3,900 for the period May 5, 1958 to May 5, 1959, instead of $7,800 as required by the lease, was fatal to the continuance of the lease even though the $3,900 was accepted by the lessor and not returned to the lessee until some five years later. It bluntly said: “The failure of the lessee to drill or pay a stipulated sum of money ipso facto terminates the lease.” It held further, however, that the lessee might recover the sums paid the unit operator for the drilling of the unit well.

The Louisiana case of *Schnitt v. Woods,*[[48]](#footnote-49)110 was an action for cancellation of an ***oil*** and gas lease for failure to drill or pay rentals in accordance with the terms of the lease. The lease was dated March 19, 1956, and the primary term was five years, “and as long thereafter as ***oil***, gas or other mineral is produced from said land *or land with which said land is pooled hereunder.”*

At the time of the execution of the lease the lessors’ property was unitized by order of the State Conservation Commission, effective February 2, 1953. Two and one-half months after the lease was executed, and on June 4, 1956, the Conservation Commissioner issued an order assigning an equity percentage to all of lessors’ property. The assignment was retroactive to a date prior to the execution of the lease. Thereafter the lessee paid all base and overriding royalties accruing under the equity percentages, and his share of the operating costs. The trial court rendered judgment rejecting the plaintiffs’ prayer for cancellation and the appellate court affirmed. It held that the drilling and production from a unitized area constitutes an exercise of the mineral rights throughout the entire tract and operates as a substitute for drilling obligations of a lease included in the unit. The lessee complied with his obligation by paying the royalties, base and overriding, provided in the lease.

In *Griggs v. Parsons Leasing, Inc.*,[[49]](#footnote-50)111 the ***oil*** and gas lease recited that it was “made and entered into on this the 1st day of December, 1992,” although the lease was not actually executed by the parties until February 16, 1993. On February 10, 1994, the lessee mailed a delay rental payment to extend the lease for an additional year. In determining whether the initial delay rental was due on or before December 1, 1993 (the end of the primary lease term) or February 15, 1994 (the last day of the year measured from the execution of the lease) the Supreme Court of Alabama held that “the due date for the delay rental was on or before December 1, 1993.”

A second issue considered by the Alabama Supreme Court was whether the lessee’s failure to make a timely delay rental payment automatically terminated the lease or whether, pursuant to the notice-and-demand requirements contained in the lease, the lessee was entitled to written notice of default for failure to pay sums due and entitled to 45 days to cure the default. In noting that this is an issue of first impression in Alabama, the Court acknowledged that “it is a well-settled principle of ***oil*** and gas law that a lease will terminate automatically upon the lessee’s failure to make timely payment of delay rentals, without the necessity of notice by the lessor and a demand for payment.” The Supreme Court held that since a timely rental was a condition precedent to an extension of the primary lease term and because the lessee failed to satisfy the condition precedent, the lease automatically terminated without the necessity of notice by the lessor.

In *Beaudoin v. JB Mineral Services, L.L.C.*,[[50]](#footnote-51)111.1 a supplemental agreement signed along with the lease provided that the lease would terminate 120 business days from the date of signature unless the lessee paid or tendered a supplemental bonus payment before the termination date. The agreement expressly provided that “[i]f such sum is not timely paid or tendered, then said lease shall terminate and be of no further force or effect as of the Termination Date.” The lessee sent to the lessor a lease, supplemental agreement, and sight draft in the amount of $165,600. The lessor signed the lease and supplemental agreement on July 20, 2009 and presented the sight draft to its bank for payment on July 30, 2009. Payment of the sight draft required further authorization from the lessee, which was not given. After the 120-day termination period had passed, the lessor notified the lessee that the lease had terminated for failure to pay the supplemental bonus. The lessee contended that the lease was still in existence because the agreement did not require payment actually be made by the Termination Date, “but merely required that payment be *tendered*, by cash, check, or draft, by that date.” Thus, the lessee argued that the tender of the $165,600 sight draft in July 2009 constituted tender of a draft for the amount of the supplemental bonus payment within the contractual period and continued the lease, even if payment of the draft was not due until after the Termination Date.

The Supreme Court of North Dakota found that “[p]ayment or tender of the sum requires more than tender of a draft which by its terms was not payable until a future date” after the Termination Date and which was admittedly not funded by such date. The court said that, carried to its logical extreme, the lessee’s argument “would allow a lessee to submit a draft which was not payable until weeks, months, or even years after the termination date.” The court held that these provisions of the parties’ agreement constituted an “unless” clause and that since the lessee failed to timely pay or tender the required sum, the lease automatically terminated on the Termination Date.

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1. 64220 S.W. 163 (Tex. Civ. App. 1920). [↑](#footnote-ref-2)
2. 6551 S.W.2d 1107 (Tex. Civ. App. 1932), *err. ref.; see also* Standard ***Oil*** Co. of Texas v. Clark, 133 F. Supp. 346 (E.D. Tex. 1955). [↑](#footnote-ref-3)
3. 6669 N.W.2d 286 (N.D. 1955).

   In Borth v. Gulf ***Oil*** Exploration & Prod. Co., 313 N.W.2d 706 (N.D. 1981), 74 O.&G.R. 60, the court canceled an ***oil*** and gas lease as to only twenty acres of land of an eighty-acre lease by application of equitable maxims, where the lessee only paid delay rentals on sixty acres of the lease, and the lessor originally failed to object to the insufficient payment. [↑](#footnote-ref-4)
4. 6775 S.D. 439, 67 N.W.2d 353 (1954). [↑](#footnote-ref-5)
5. 68*See* Kolachny v. Galbreath, 1910 OK 229, 26 Okla. 772, 110 P. 902 (1910); Mitchell v. Probst, 1915 OK 828, 52 Okla. 10, 152 P. 597 (1915); Eastern ***Oil*** Co. v. Smith, 1920 OK 354, 80 Okla. 207, 195 P. 773 (1920). [↑](#footnote-ref-6)
6. 69Brazell v. Soucek, 1928 OK 238, 130 Okla. 204, 266 P. 442 (1928). [↑](#footnote-ref-7)
7. 70Superior ***Oil*** Co. v. Jackson, 1952 OK 336, 207 Okla. 437, 250 P.2d 23, 27 (1952); Ellison v. Skelly ***Oil*** Co., 1951 OK 122, 206 Okla. 496, 244 P.2d 832 (1951); New England ***Oil*** & Pipe Line Co. v. Rogers, 1931 OK 692, 154 Okla. 285, 7 P.2d 638 (1932). These cases recognize the rule in the Brazell case, and announce the broad principle that where the failure to make payment of rental to the lessor in proper time is not the fault of the lessee the lease ordinarily will not be terminated. [↑](#footnote-ref-8)
8. 7170 Kan. 723, 79 P. 666 (1905). [↑](#footnote-ref-9)
9. 72108 Kan. 346, 195 P. 607 (1921). [↑](#footnote-ref-10)
10. 73103 Kan. 461, 175 P. 149, 1 A.L.R. 675 (1918).

    *See also* Ballard v. Miller, 87 N.M. 86, 529 P.2d 752 (N.M. Sup. Ct. 1974), 49 O.&G.R. 449 (rental lost in mail). [↑](#footnote-ref-11)
11. 74104 Kan. 102, 177 P. 527 (1919). [↑](#footnote-ref-12)
12. 75107 Kan. 340, 191 P. 282 (1920). [↑](#footnote-ref-13)
13. 76158 Kan. 255, 146 P.2d 390, 5 A.L.R.2d 985 (1944). [↑](#footnote-ref-14)
14. 77117 Kan. 698, 232 P. 871 (1925). [↑](#footnote-ref-15)
15. 78417 S.W.2d 186 (Tex. Civ. App. 1967), *err. ref., n.r.e.* [↑](#footnote-ref-16)
16. 791926 OK 461, 123 Okla. 293, 253 P. 298 (1926). [↑](#footnote-ref-17)
17. 80Twyford v. Whitchurch, 132 F.2d 819 (10th Cir. 1942). [↑](#footnote-ref-18)
18. 81Phillips Petroleum Co. v. Curtis, 85 F. Supp. 399 (E.D. Okla.), *aff’d*, 182 F.2d 122 (10th Cir. 1950). [↑](#footnote-ref-19)
19. 82223 La. 274, 65 So. 2d 598 (1952). [↑](#footnote-ref-20)
20. 83*See also* Gulf Refining Co. v. Bagby, 200 La. 258, 7 So. 2d 903 (1942); Richard v. Tarpon ***Oil*** Co., 269 So. 2d 261 (La. Ct. App. 1972), 43 O.&G.R. 510*, cert. denied,* 271 So. 2d 262, 43 O.&G.R. 519. [↑](#footnote-ref-21)
21. 84259 F. 656, 263 F. 935 (E.D. Okla. 1919). [↑](#footnote-ref-22)
22. 85Ellison v. Skelly ***Oil*** Co., 1951 OK 122, 206 Okla. 496, 244 P.2d 832 (1951); New England ***Oil*** & Pipe Line Co. v. Rogers, 1931 OK 692, 154 Okla. 285, 7 P.2d 638 (1931); Twyford v. Whitchurch, 132 F.2d 819 (10th Cir. 1942); Phillips Petroleum Co. v. Curtis, 85 F. Supp. 399 (E.D. Okla), *aff’d*, 182 F.2d 122 (10th Cir. 1950). [↑](#footnote-ref-23)
23. 86Vaughan v. Doss, 219 Ark. 963, 245 S.W.2d 826 (1952); Browning v. Weaver, 158 Kan. 255, 146 P.2d 390, 5 A.L.R.2d 985 (1944); National Ref. Co. v. Wagner, 169 F.2d 43 (10th Cir. 1948); Hill v. Stanolind ***Oil*** & Gas Co., 119 Colo. 477, 205 P.2d 643 (1949); Morton v. Sutcliffe, 175 Kan. 699, 266 P.2d 734 (1954); 5 A.L.R.2d 993 and cases there cited. [↑](#footnote-ref-24)
24. 87133 Ohio App. 3d 543, 729 N.E.2d 398 (Ohio Ct. App. 1999). [↑](#footnote-ref-25)
25. 88149 Ohio App. 3d 560, 2002 Ohio 5438, 778 N.E.2d 115 (Ohio Ct. App. 2002). [↑](#footnote-ref-26)
26. 88.157 F. Supp. 3d 389 (M.D. Pa. 2014). [↑](#footnote-ref-27)
27. 89227 S.W. 708 (Tex. Civ. App. 1921).

    *Compare* Kincaid v. Gulf ***Oil*** Corp., 675 S.W.2d 250 (Tex. Civ. App. 1984, *err. ref. n.r.e.*). [↑](#footnote-ref-28)
28. 90413 S.W.2d 68 (Ky. Ct. App. 1967). [↑](#footnote-ref-29)
29. 91818 S.W.2d 417 (Tex. Ct. App. 1991), 118 ***Oil*** & Gas Rep. 571. [↑](#footnote-ref-30)
30. 92271 F. 641 (5th Cir. 1921). [↑](#footnote-ref-31)
31. 93113 Tex. 321, 254 S.W. 304, *reh’g denied*, 113 Tex. 336, 255 S.W. 601 (1923). [↑](#footnote-ref-32)
32. 94254 S.W. 779 (Tex. Comm. App. 1923). [↑](#footnote-ref-33)
33. 9522 F.2d 733 (5th Cir 1927), *cert. denied*, 278 U.S. 581, 49 S. Ct. 184, 73 L. Ed. 518 (1929). [↑](#footnote-ref-34)
34. 96118 Tex. 509, 19 S.W.2d 27 (1929). [↑](#footnote-ref-35)
35. 97Hamilton v. Baker, 147 Tex. 240, 214 S.W.2d 460 (1948). [↑](#footnote-ref-36)
36. 9862 F.2d 483 (10th Cir. 1933). [↑](#footnote-ref-37)
37. 9919 W.W.R. (N.S.) 184, 6 O.&G.R. 407 (1956). [↑](#footnote-ref-38)
38. 100Manitoba Queen’s Bench & Court of Appeal, 23 W.W.R. (N.S.) 401, 8 O.&G.R. 517 (1957). [↑](#footnote-ref-39)
39. 101374 S.W.2d 483 (Ky. Ct. App. 1964). [↑](#footnote-ref-40)
40. 102253 Miss. 83, 175 So. 2d 145 (1965). [↑](#footnote-ref-41)
41. 103176 Neb. 1, 124 N.W.2d 699 (1963). [↑](#footnote-ref-42)
42. 104347 S.W.2d 5 (Tex. Civ. App. 1961). [↑](#footnote-ref-43)
43. 105345 S.W.2d 579 (Tex. Civ. App. 1961), *err. ref.*

    In Cobra ***Oil*** & Gas Corp. v. Armstrong, 520 S.W.2d 830 (Tex. Civ. App. 1975, *writ ref. n.r.e.*), 51 O.&G.R. 225, there was a failure to pay a delay rental under a Texas state lease, as required by statute, and the court upheld the Texas Land Commissioner in canceling the lease. [↑](#footnote-ref-44)
44. 106403 S.W.2d 537 (Tex. Civ. App. 1966), *err. ref.* [↑](#footnote-ref-45)
45. 107110 So. 2d 119, 237 La. 11 (1959). [↑](#footnote-ref-46)
46. 108121 So. 2d 229, 240 La. 31 (1960). [↑](#footnote-ref-47)
47. 109228 F. Supp. 446 (W.D. La. 1964). [↑](#footnote-ref-48)
48. 110125 So. 2d 451 (La. Ct. App. 1960). [↑](#footnote-ref-49)
49. 111776 So. 2d 766 (Ala. 2000), 147 O.&G.R. 1. [↑](#footnote-ref-50)
50. 111.1808 N.W.2d 671 (N.D. 2011). [↑](#footnote-ref-51)