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# What is This Thing Called LEASE?

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PART ONE

# Is It an Interest in Real Property?

If you are asking why you should care how an oil and gas lease is properly characterized—whether it is an interest in real property or in personal property, the nature and extent of the estate that it conveys, and how it should be construed contractually—you have fallen prey to the same misconception that has characterized the Ohio oil and gas industry for more than a century: the comforting and comfortable belief that everything will work out fine, because it always has. Such indifference may have been justified in the past, when such abstruse aspects of Ohio oil and gas law were, quite simply, not worth litigating. But the Utica Shale boom has altered the economics so profoundly that these issues are now the subject of a flood of lawsuits.

It would be safe to conclude that, thus far, the results have not been encouraging. The 2012 decision of the Monroe County Court of Common Pleas in *Hupp v. Beck Energy Corp.* [1] has confronted producers with the dire prospect of having their leases declared void, *ab initio*, as abhorrent to Ohio's purported public policy of encouraging timely development of the State's natural resources. Though the legal analysis set forth in *Hupp* is subject to challenge, the *Hupp* rationale for rendering oil and gas leases unenforceable—even when they are still within their primary terms and delay rentals are being paid, and even after a producing well has been drilled—has been seized upon and followed by other courts. We will present such a challenge beginning in Part 2 of this article. Unless these decisions are overturned, the consequences will ripen from discouraging to calamitous.

The intent of this article is to address the essential nature of the oil and gas lease and the estate granted thereby, clarifying how is can best be understood, and its effectiveness preserved, both as a contract and a conveyance. Before we get to that point, however, we must first address a yet more arcane issue, *i.e.*, whether an oil and gas lease is an interest in real property or in personal property.

## *A. Is it an interest in real property or a mere license to search for and to extract oil and natural gas?*

There is a split of authority in Ohio over whether an oil and gas lease is an interest in real property or in personal property. Inconsistent decisions by the Ohio Supreme Court have left other courts floundering over what course the Ohio Supreme Court will follow when it decides this issue, which it ultimately must.

Why this is important is sometimes apparent only to a handful of oil and gas attorneys who practice in Ohio and must confront on a fairly regular basis the myriad issues involved in the construction of an instrument that experts and dilettantes alike refer to as an "oil and gas ***lease***" but that is remarkably dissimilar to the commercial and residential leases with respect to which most persons have a passing familiarity. The classification of an interest in oil and gas as realty or as personalty is a question that is of profound significance to the determination of the nature of the "lease" itself, *i.e.*, whether it creates a freehold, a tenancy in real property, or a mere license or contract right. Or, perhaps, it is the other way around. There is, in fact, a pronounced circularity to the analysis that is maddeningly confounding; nevertheless, the issue

begs for resolution [2].

The other primary significance of this classification is to determine the applicability of statutes that deal in some respect with interests in real estate but that, typically, do not specifically mention oil and gas interests. These include the Statute of Frauds, recordation statutes, various taxation statutes, and statutes that relate to such diverse issues as adverse possession, dormant mineral interests, dower, judgment liens, the licensing of real estate brokers, *lis pendens*, partition, probate, and quiet title actions.

The split of authority can only be understood with a (relatively) brief explanation of the history of the development of the law on the ownership of oil and gas before it is removed from the ground. Under the common law, according to the so-called *ad coelum* doctrine [3], the owner of real property maintained rights to the property as it extended from the heavens all the way to the earth's core, including any minerals found in between. The *ad coelum* doctrine worked well for—and, hence, still applies to—"hard" minerals (coal, limestone, gravel, sand, and the like), but it proved troublesome when applied to oil and gas, which are fugacious, *i.e.*, they can, potentially, migrate from one property to another. They are also fungible, which means it is difficult, if not impossible, to attribute them to a given property.

## *B. Oil and gas as real property or personal property—the "ownership-in-place" theory versus the "nonownership" theory*

Two distinct theories have emerged to determine who owns subsurface oil and gas: the "ownership-in-place" theory; and the "nonownership" theory. Under the ownership-in-place theory, which is the rule in most states, ownership of oil and gas is the same as ownership of any other interest in real estate, and oil and gas, like hard minerals, may be the subject of absolute ownership in place. Under this theory, oil and gas are considered to be real estate, but, given their migratory nature, they are owned by a given surface or mineral estate owner only so long as they remain under that particular owner's tract of land; if they migrate to a neighboring property, they become part of that neighboring property and are then owned by that property's owner.

In this sense, the ownership of the fugacious substance can be viewed from a particular landowner's perspective as determinable [4]. Under this theory, a person has an estate in property—arguably an interest in fee simple "determinable"—*i.e.*, unless a stated condition occurs, resulting in the loss of that estate. In the case of oil and gas, the owner of the oil or gas is the person on whose land those substances are located; but, if the oil or gas migrates to another person's property, the original owner no longer owns it and the person to whose property it moved becomes the new owner. In jurisdictions that have adopted the ownership-in-place theory, the "owner" of the oil and gas *may* convey a fee interest in that oil and gas.

Under the "nonownership" theory (which is unequivocally followed in a minority of jurisdictions: Oklahoma; Louisiana; California; and Wyoming), oil and gas or other fugacious substances may not be the subject of ownership in place; instead, the surface or mineral estate owner has the exclusive right to reduce them to possession, at which time they become personal property and are subject to ownership as such. This right is sometimes viewed as a *profit à prendre*: a right to enter the land and to take some part of the land or

a product of the land [5]. Simply put, oil and gas are owned by the person who removes them from the land. What this means is that, in jurisdictions that have adopted the nonownership theory, the owner of a tract of land (or of the mineral estate underlying that tract) cannot convey a fee interest in the oil and gas underlying that person's property. The nature of the interest that such an owner may convey is the right to search for oil and gas on that person's land.

The so-called "rule of capture" modifies the *ad coelum* doctrine and is related to both theories of oil and gas ownership but focuses, however, not on ownership but on *use*. While often conflated with the nonownership theory, the rule of capture is apparently applied in all states, regardless of the particular ownership theory adopted, as a rule of nonliability: it provides that the owner of a tract of land acquires title to the oil and gas produced from wells drilled on that person's land even though it may be shown that part of the production migrated from adjoining lands. Under the rule of capture, there is no liability for "capturing" the oil and gas that drains from another person's land to a well on one's own land [6]. The rule of capture was created by the courts to encourage the development of oil and gas resources for the benefit of (American) society. Without it, the fear of liability would potentially curtail oil and gas exploration and production and deprive our society of these valuable resources.

The rule of capture is not absolute. A key limitation on the rule of capture is the doctrine of correlative rights, which effectively provides that a person's right to capture a neighbor's oil and gas does not apply when the removal of the hydrocarbons is done negligently or causes waste. The doctrine states that each owner has a right to a fair and equitable share of the oil and gas under his land, as well as the right to protection from negligent damage to the producing formation, giving each owner of minerals in a common source of supply the right to a fair chance to produce the oil and gas. Ohio statutorily defines "correlative rights" (for oil and gas purposes) as

> [t]he reasonable opportunity to every person entitled thereto to recover and receive the oil and gas in and under the person's tract or tracts, or the equivalent thereof, without having to drill unnecessary wells or incur other unnecessary expense [7].

The correlative-rights doctrine is a corollary to the rule of capture and is premised on the same ultimate purpose of encouraging oil and gas development. The correlative-rights doctrine confirms that activity inconsistent with that purpose is not protected by the rule of capture.

## *C. The split of authority in Ohio over whether an oil and gas lease is real property or personal property*

### *— 1. Ohio cases saying that oil and gas leases are interests in real property —*

Ohio courts have split over the treatment of a lessee's interest in oil and gas pursuant to a lease. In 1927, the Ohio Supreme Court, in *Pure Oil Co. v. Kindall* [8], clearly stated that "[i]t is well established that in Ohio oil and gas in place are the same as any part of the realty [9]." This is consistent with the ownership-in-place

theory. It is also consistent with the Court's 1897 decision in *Harris v. Ohio Oil Co.* [10], in which the Court construed an oil and gas lease as follows:

> *An instrument in such form is more than a mere license; it is a lease of the land* for the purpose and period limited therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary to perform the terms of the instrument on his part.
>
> In this case, possession was delivered to the lessee and operations commenced, wells drilled, and oil produced in paying quantities, and in such cases it cannot be doubted that the lessee has a vested, though limited, estate in the lands for the purposes named in the lease [11].

There is further support for the adoption of the ownership-in-place theory in Ohio in the 1903 decision in *Northwestern Ohio Natural Gas Co. v. Ullery* [12], where the Ohio Supreme Court stated:

> *Oil in the rock adheres to the real estate, and is a part thereof until brought to the surface, when it becomes personalty*, just as a tree, or stone coal or fire clay, is a part of the realty until severed, when it becomes personalty.
>
> That which is a part of the land before severance, belongs to the owner of the land after severance as well as before. *The fact that oil and gas are vagrant and transitory in their nature does not prevent them from adhering to and becoming part of the land while passing from one tract to another, and while so in one tract they are a part of that tract and belong to the owner thereof until they escape from such tract, and if brought to the surface before such escape, they become personal property belonging to the owner of the land* [13].

This language is consistent with both the ownership-in-place theory and the rule of capture. The Court in *Ullery* cited with approval its 1897 decision in *Kelley v. Ohio Oil Co.* [14], in which it had stated:

> *Petroleum oil is a mineral, and while in the earth it is part of the realty*, and should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract; and *it forms part of some tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property*, the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty and converts it into personalty [15].

Both cases illustrate how the ownership and nonliability doctrines have become intertwined, a complication not always recognized and understood by other courts.

In 1989, Ohio's Fourth District Court of Appeals, in *Wiseman v. Cambria Products Co.* [16], held that an 1894 deed that transferred "all the coal, iron ore *and other minerals* in, on, and underlying" the land

included the right to oil and gas under the land [17]. In its decision, the Court of Appeals cited *Hardesty v. Harrison* [18], in which the Fifth District Court of Appeals had stated:

> We believe it is a well settled law that petroleum oil is a mineral and *is a part of the realty*, like coal, iron and copper. A grant without qualifying or limiting words of the minerals underlying certain real estate will include oil and gas [19].

In 2007, Ohio's Ninth District Court of Appeals, in *Maverick Oil & Gas, Inc. v. Bd. of Educ. of Barberton City School Dist.* [20], was presented with a dispute over the right of the owner of an oil and gas lease to have access to the land that was the subject of the lease. In holding that the lessee of the oil and gas lease did have that right of access, the Court of Appeals stated:

> An oil and gas lease also creates a limited property right, such that the lessee has the right to possess the land to the extent reasonably necessary to perform the terms of the lease on his part. *Harris*, supra at 129-30. It is well settled that *where a grantor transfers an interest in real estate* and the transfer is recorded, *the grantor may only convey his remaining interest* to a subsequent grantee and nothing more. *Shields v. Titus* (1889), 46 Ohio St. 528, 22 N.E. 717, paragraph one of the syllabus. Thus, where the grantor holds the property subject to a lease which has been previously recorded, the grantee likewise takes the property subject to the lease, and the subsequent transfer has no effect on the prior lease. See id [21].

This decision explicitly declares an oil and gas lease to be an "interest in real estate" that, once granted and recorded, limits that grantor thereafter to transferring only his "remaining interest" in the real estate "and nothing more [22]."

In 2012, the United States District Court for the Northern District of Ohio, in *Binder v. Trinity OG Land Dev. & Exploration, LLC* [23], expressly held that an oil and gas lease was an interest in real estate. In that case, Binder sued Trinity, claiming that he had an oral agreement with Trinity to identify landowners with whom Trinity could negotiate to obtain mineral rights. Binder claimed he was entitled to a fee of $500,000 for his services in identifying over 10,000 acres of land to Trinity, which resulted in Trinity acquiring the mineral rights to all that acreage. Trinity moved for judgment on the pleadings, contending that Ohio law does not allow a person without a real estate brokerage license to seek compensation for the procuring of prospects "calculated to result in the sale, exchange, leasing, or renting *of any real estate* [24]." Binder did not have a real estate broker's license. The Court granted Trinity's motion for judgment on the pleadings, stating:

> Under Ohio law, "[r]eal estate includes leaseholds as well as any and every interest or estate in land situated in this state, whether corporeal or incorporeal, whether freehold or nonfreehold." *Id.* at § 4735.01(B). *Real estate, under Ohio law, has been held to include mineral rights, specifically "rights to coal, oil and gas." Colucy v. D & H Coal Co.*, 1961 Ohio Misc. LEXIS 261, *2 (Ohio Ct. Of Common Pleas 1961) [25].

## — 2. Ohio cases saying that oil and gas leases are not interests in real property —

Other Ohio cases, however, suggest that Ohio adheres to the nonownership theory, pursuant to which (a) oil or gas belongs to no one until reduced to possession and (b) the lessee's interest under an oil and gas lease is merely a license to explore, with *no* interest in the oil and gas until reduced to possession, at which time the lessee acquires an interest in the oil and gas as personalty, not realty. The authoritative treatise, Williams & Meyers, *Oil and Gas Law* [26], adds the following in its description of the nonownership theory:

> Of course one may not go upon the land of another to effect the capture, *so it is necessary to have such an interest in the land* upon which a well is drilled for the purpose of capturing the fugative [*sic*] minerals as will authorize the drilling of the well [27].

Thus, the question is whether case law applying the nonownership theory to oil and gas itself would also result in an oil and gas *lease* being held to be a real property interest or an interest in personal property. On this issue there is confusion in the Ohio case law.

A leading case that comes close to addressing the question is *Back v. Ohio Fuel Gas Co.* [28], decided by the Ohio Supreme Court in 1953. In *Back*, a landowner executed a *general warranty deed* conveying to Ohio Fuel Supply Company "all the oil and gas in and under" the specified land, along with the "the right and privilege of operating upon the said premises [and doing all other things necessary to extract and transport the oil and gas to pipelines]." Ohio Fuel Supply then assigned the gas rights granted by that deed to Ohio Fuel Gas Company. Both the deed to Ohio Fuel Supply and the assignment to Ohio Fuel Gas were duly recorded in the *lease records* of Ashland County. The landowner thereafter sold the property to Back, who brought a quiet title action against Ohio Fuel Gas claiming that he was a bona fide purchaser for value of the premises without actual or constructive notice of the claimed rights of the gas company under the deed. Back's argument was that "the instrument conveying the oil and gas to the Ohio Fuel Supply Company and its assignee, the gas company, should have been recorded *in the deed records* and *not in the lease records* of the county."

The Ohio Supreme Court in *Back* held that recording the general warranty deed in the Ashland county lease records was sufficient to constitute constructive notice of the existence, operation, and effect of the deed to a subsequent purchaser of the property in question. In explaining the distinction between the deed to Ohio Fuel Supply and an oil and gas lease, the Court stated:

> *The character of the instrument of conveyance reveals that it is other than a grant of real property. Possession of oil and gas, having as they do a migratory character, can be acquired only by severing them from the land under which they lie, and in effect the instrument of conveyance in the instant case is no more than a license to effect such a severance.* The very sale of oil and gas, separate and apart from the real estate surface, constitutes, in law, a constructive severance such as occurs in the case of sale of standing timber or growing crops.
>
> *The instrument of conveyance, as a whole, bears the earmarks of a license.* It grants operating privileges on the land surface, just as would be necessary to remove standing timber or growing

> crops in a sale thereof. In the habendum clause of the instrument here, which measures the estate granted, the interests granted or conveyed are designated as "the above granted and bargained oil and gas rights, with the appurtenances thereunto belonging," and are not characterized as oil and gas in place. Likewise, the covenant of seizin and warranty relates solely to "the oil and gas rights in, upon and under the said above described premises." It is significant, also, that when the parties chose to transfer an interest granted under the original instrument of conveyance they did so by a mere assignment of the instrument and not by a new and subsequent deed which would be necessary in case real property was being transferred.
>
> *As a matter of fact, many authorities hold that the owner of the land surface does not own any oil or gas which may be "in place" thereunder*. The position of such authorities is that the owner has the exclusive right to drill wells on his premises for these minerals and to take the products of such wells as his own personal property from whatever source they may come to such wells [29].

Based on this language, Williams & Meyers concluded that Ohio has adopted the nonownership theory [30].

In May of 2012, a federal bankruptcy court sitting in Ohio noted the split in authority in the Ohio cases but chose to accept the view that Ohio is in the nonownership camp because the nonownership theory "is the more sensible approach to the ownership of oil and gas rights *for the purposes of valuation in bankruptcy* [31]." The court's explanation suggests that its decision may have limited applicability:

> Given the migratory nature of oil and gas, it is premature to give value to the oil and gas before they are extracted from the land. The varying price of oil and gas affects the exploration of real property for their existence and, therefore, to value real property to include the value of oil and gas is near impossible. Therefore, the value of the oil and gas cannot be determined to any degree until the oil and gas are extracted from the land or at least until an offer is made to a debtor to purchase the oil and gas rights to specific real property [32].

A 1989 decision by another federal bankruptcy court sitting in Ohio, *In re Frederick Petrol. Corp*. [33], is not so circumscribed:

> Following a review of the Ohio cases, the court concludes that the oil and gas leases in this case are not leases as that term is traditionally used. These leases are more than a mere rental agreement for the use of real property. Rather, the Ohio courts appear to recognize that such leases create a license to enter upon the land for the purpose of exploring and drilling for oil and gas, and any oil and gas produced under the terms of the lease becomes the personal property of the lessee, with the exception of the one-eighth royalty reserved by the lessor. The court feels that the Ohio courts, if given the opportunity to do so, would characterize the property interest involved as being like or similar to the interest recognized under Oklahoma law. The court reaches this conclusion in part due to the similarities which are apparent in discussions of the rights of the oil and gas "lessee" under both Ohio and Oklahoma law, regardless of the label ultimately applied to those rights. The court also notes the Ohio Supreme Court's decision in *Back v. Ohio Fuel Gas Co., supra*, where the court followed the view of law common in most oil producing states, including Oklahoma. This

> provides an indication that Ohio courts would be more inclined to adopt a rule of law common to oil producing states [34].

Finally, in the recent case of *Wellington Resource Group LLC v. Beck Energy Corp*. [35], federal Judge Algenon L. Marbley expressly disagreed with the defendant's contention that an oil and gas lease is an interest in real estate. *Wellington*, which involved a broker's right to a commission for the sale of oil and gas leases, involved the same basic fact pattern as *Binder* [36]. Wellington Resource Group had entered into a contract with Beck Energy to provide prospective purchasers to Beck for oil and gas leases that Beck owned in Monroe, Belmont, and Noble Counties. Wellington then entered a co-brokerage agreement with Transact Partners to find those potential buyers. Transact succeeded: a company called XTO Energy, Inc., bought the oil and gas leases and related property for $85 million. Beck then refused to pay either Wellington or Transact. Wellington sued; Transact Partners intervened to assert its claim to compensation as well. Beck moved to dismiss Transact's Third Party Complaint.

Beck argued that Transact could not recover (a) because oil and gas leases fall under the meaning of "real estate" as defined in the Ohio Revised Code, and (b) because Transact was not a licensed Ohio real estate broker, it was prohibited as a matter of law from recovering a fee for its brokerage services in connection with such leases. This, of course, is the same argument that succeeded in the Northern District of Ohio in the *Binder* case. Judge Marbley was respectfully "unconvinced" by the decision in *Binder*. Though he recognized that the Northern District of Ohio had decided that the definition of "real estate" in Ohio "has been held to include mineral rights, specifically rights to coal, oil and gas [37]," he cited *Back* and *Frederick*, among other cases [38], in concluding as follows:

> In essence, this Court reaffirms its prior conclusion in Frederick, where it stated that "Ohio courts, if given the opportunity to do so, would characterize the property interests involved [here] as being like or similar to the interest recognized under Oklahoma law," and common to many oil-producing states, and hold that oil and gas leases are not a grant of real property. 98 B.R. at 766 [39].

With due respect, there is sound reasoning to support the conclusion that that that Williams & Meyers and Judge Marbley may be wrong or, at the very least, misguided. In addition to the long line of cases, including multiple Ohio Supreme Court decisions, that suggest that Ohio adheres to the ownership-in-place theory and that, consequently, oil and gas leases are interests in real property, there are a number of additional arguments that support the proposition that Ohio adheres to the ownership-in-place theory. These will be discussed more fully in Part 2 of this article.

## *D. It IS an interest in real property!*

Notwithstanding the split of authority in Ohio over whether an oil and gas lease is real property or personal property and the inconsistent decisions on this issue by the Ohio Supreme Court and other courts construing Ohio law, there are a number of additional arguments that support our conclusion that, in Ohio, an oil and gas lease is most certainly an interest in real property. These are set forth below.

## — 1. Ohio's Dormant Minerals Act —

Ohio's Dormant Minerals Act [40] sets forth the circumstances under which a mineral interest may be deemed abandoned and revested in the "owner of the surface of the *lands subject to the interest* [41]," clearly indicating that a mineral interest is an interest in real property. This conclusion is bolstered by the definition of the term "mineral interest" as "a *fee interest* in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided [42]." The term "minerals" includes oil, gas, and other gaseous, liquid, and solid hydrocarbons [43].

In adopting the Dormant Minerals Act, the Ohio General Assembly clearly recognized that minerals may be owned in fee and that a mineral interest may be severed from the ownership of the surface and held by another party [44]. Notwithstanding the cases discussed above that appear to hold that oil and gas are not susceptible to being owned in place, Ohio courts have long recognized that minerals may be separately owned [45]. Oil, gas, and other minerals may be owned *in fee* only if they are real property.

There are numerous events that can prevent a severed mineral interest from revesting in the surface owner. One is if, during the twenty (20) years immediately preceding the date on the statutorily prescribed notice of abandonment [46] is served or published,

> [t]here has been actual production or withdrawal of minerals by the holder from the lands, *from lands covered by a lease to which the mineral interest is subject*, from a mine a portion of which is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations . . . [47]

It seems axiomatic that, if the mineral interest is clearly defined as an interest in real property, a lease to which that mineral interest is subject must likewise be an interest in real property.

## — 2. Ohio's recording statutes —

Ohio's recording statutes clearly treat oil and gas leases and other instruments relating to oil and gas leases as real property interests for recording purposes. ORC § 5301.09 requires that the following be filed for record and recorded:

> *[a]ll leases*, licenses, and assignments thereof, or of any interest therein, given or made *concerning lands or tenements in this state*, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto . . . [48]

The place for filing is the Office of the Recorder of "the county in which *the land subject to any such lease* is located 49]." Similarly, the statutory provision relating to the forfeiture of such leases refers to them as "leases of natural gas and oil *lands* [50]." To be entitled to recordation, an oil and gas lease, license, assignment, or affidavit of forfeiture must be executed and acknowledged in the same manner as instruments for the conveyance or encumbrance of real property [51]. Oil and gas leases and licenses would therefore appear,

*by definition*, to be interests in real property.

### *— 3. Ohio's Arbitration Act and Ohio's quiet title action statute —*

Ohio's Arbitration Act [52] mandates the enforcement of arbitration clauses in contracts as a method of settling disputes. However, the statute expressly does not apply to controversies involving the title to or the possession of real estate [53]. In a decision rendered in early 2014, *Riggs v. Patriot Energy Partners, LLC* [54], Ohio's Seventh District Court of Appeals held that the trial court had erred by permitting a quiet title claim challenging the validity of an oil and gas lease to go to arbitration since it is a controversy directly involving title to real estate and therefore exempt from arbitration pursuant to ORC § 2711.01(B)(1). The court stated:

> While Appellees do not address the quiet title claim specifically, Patriot asserts that oil and gas leases are purely contractual rights concerning personal property. However, we need not reach this issue in the narrow context presented by this case. R.C. 2711.01 exempts controversies involving title to or possession of real estate from going to arbitration, with certain exceptions that do not apply here. The purpose of a quiet title action is to resolve or remove any clouds on the title to real property. There is no need to predetermine the nature of the cloud to reach the conclusion that a quiet title action in this case will involve matters relating to the title to or possession of real estate, and is thus exempt from arbitration. Thus, the trial court erred by permitting the quiet title claim to go to arbitration since it is a controversy directly involving title to real estate and therefore exempt from arbitration pursuant to R.C. 2711.01(B)(1) [55].

While the court expressly declined to address the argument that oil and gas leases are purely contractual rights concerning personal property, it recognized that a quiet title action may be brought only "by a person in possession of *real property* [56]."

### *— 4. Ohio's partition statute —*

In 1922, the Ohio Supreme Court, in *Black v. Sylvania Producing Co.* [57], held that,

> [u]nder statutory partition, a leasehold for oil and gas, with the right to the use of the fee for the purposes of producing oil or gas, or of drilling for or otherwise discovering the same, *in an estate of land such as contemplated by the statute*, may be the subject of partition [58].

This would appear to be a clear-cut endorsement of the ownership-in-place theory, since statutory partition is available only to "[t]enants in common, survivorship tenants, and coparceners, of *any estate in lands, tenements, or hereditaments* within the state" of Ohio [59].

### *— 5. The Uniform Commercial Code —*

The Uniform Commercial Code ("UCC") has long wrestled with the thorny issue of classifying oil and gas interests. The current version of UCC Article 9, relating to secured transactions, has an entirely new category of collateral, which it calls "as-extracted collateral." The term is defined to include (a) oil, gas, or

other minerals that are subject to a security interest that is created by a debtor having an interest in the minerals *before extraction* and that attaches to the minerals *as extracted* and (b) accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest *before extraction* [60]. The drafters of UCC Article 9 felt constrained to provide the following explanation:

> ***Under this article, oil, gas, and other minerals that have not been extracted from the ground are treated as real property****, to which this article does not apply. Upon extraction, minerals become personal property (goods) and eligible to be collateral under this article. See the definition of "goods," which excludes "oil, gas, and other minerals before extraction."* To take account of financing practices reflecting the shift from real to personal property, this article contains special rules for perfecting security interests in minerals which attach upon extraction and in accounts resulting from the sale of minerals at the wellhead or minehead. See, e.g., sections 9-301 (law governing perfection and priority), 9-501 (place of filing), 9-502 (contents of financing statement), and 9-519 (indexing of records). The new term, "as-extracted collateral," refers to the minerals and related accounts to which the special rules apply. The term "at the wellhead" encompasses arrangements based on a sale of the produce at the moment that it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" of a well, the far side of a gathering tank, or at some other point. The term "at . . . the minehead" is comparable. [61]

The definition of the collateral category "goods" generally includes "all things that are movable when a security interest attaches," including fixtures [62], but, as noted in the Official Comment, it specifically excludes "oil, gas, or other minerals *before extraction* [63]."

A financing statement that covers as-extracted collateral must be filed in the office designated for filing a "mortgage on the related real property [64]." Such a financing statement must

> [p]rovide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the laws of this state if the description were contained in a record of the mortgage of the real property. [65]

These provisions make a financing statement covering as-extracted collateral closely analogous to a mortgage, which is clearly an encumbrance on a real property interest.

> The current version of UCC Article 2, relating to sales of goods, provides in pertinent part:
>
> *A contract for the sale of minerals or the like, including oil and gas*, or a structure or its materials to be removed from realty *is a contract for the sale of goods* within [UCC Article 2], *if they are to be severed* ***by the seller*** but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell [66].

The drafters of UCC Article 2 have provided the following observation that seems particularly relevant to determining the nature of an oil and gas lease:

> Notice that this subsection applies only if the minerals or structures "are to be severed by the seller". *If the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of the recording of land rights apply to them*. Therefore, the Statute of Frauds section of this Article does not apply to such contracts though *they must conform to the Statute of Frauds affecting the transfer of interests in land* [67].

In other words, a contract involving minerals that the seller will sever and extract is a contract for the sale of goods, *i.e.*, personal property. But if the seller conveys the minerals to the buyer in situ, with the intent that the buyer sever them, such a contract involves the transfer of an interest in land, *i.e.*, real property.

## *— 6. The groundwater analogy —*

The closest analogy to oil, gas, and other fugacious hydrocarbons is not a mineral at all; it is groundwater. In a 2006 decision, *McNamara v. City of Rittman* [68], the Ohio Supreme Court addressed a question of Ohio law that had been certified to it by the Sixth Circuit Court of Appeals, i.e., "Does an Ohio homeowner have a property interest in so much of the groundwater located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home?" The cities of Rittman and Columbus argued that, although property owners have the right to the reasonable use of the groundwater beneath their property, they have no right of title, no ownership right, in the water itself. The Supreme Court, after reviewing its decisions in *Frazier v. Brown* [69] and *Cline v. American Aggregates* [70], disagreed:

> . . . The title to property *includes* the right to use the groundwater beneath that property. The "reasonable use" standard set forth in *Cline* greatly expanded water rights protection, reflecting the importance of water rights to every piece of property. *Cline* recognizes the essential relationship between water and property and confirms that groundwater rights are a separate right in property. The Restatement section cited in *Cline* "recognizes that the right to withdraw ground water is a property right that may be granted and sold to others." 4 Restatement of Law 2d, Torts, Section 858, Comment *b*. That right is one of the fundamental attributes of property ownership and an essential stick in the bundle of rights that is part of title to property [71].

The Court concluded:

> Groundwater rights are knowable and protectible [*sic*]. This court in Cline established the nature of the right, and Ohio has statutorily defined what constitutes reasonable use. R.C. 1521.17. The well-being of Ohio homeowners, the stability of Ohio's economy, and the reliability of real estate transfers require the protection of groundwater rights. We therefore hold that *Ohio landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can constitute an unconstitutional taking* [72].

The Ohio Supreme Court's decision in *McNamara* was generally consistent with the Court's earlier decision in *Chance v. BP Chemicals, Inc.* [73] In *Chance*, the plaintiffs filed a suit on behalf of citizens of the City of Lima, Ohio, who owned an interest in property near BP Chemical's 200-acre chemical refinery.

Claiming that hazardous liquid waste from BP's deepwell disposal process migrated below their properties, the plaintiffs sought injunctive relief and general and punitive damages based upon theories of trespass, nuisance, negligence, strict liability and fraudulent concealment. The trial court bifurcated the litigation into separate liability and damage phases. At the close of the plaintiffs' case, the trial court issued a directed verdict to BP on the plaintiffs' claims for fraud, nuisance and ultrahazardous activity. The jury returned a verdict in favor of BP on the plaintiffs' trespass claim. The decision was affirmed by the court of appeals.

*Chance* dealt with the somewhat novel issue of whether the plaintiffs owned the native brine underlying their properties, such ownership being a necessary prerequisite to their trespass action. The Court began by disposing of the plaintiffs'/appellants' claim that this was resolved by the *ad coelum* doctrine:

> Appellants' argument implicates the ancient Latin maxim *cujus est solum, ejus est usque ad coelum et ad inferos*, defined in Black's Law Dictionary (6 Ed. 1990) 378, as "to whomsoever the soil belongs, he owns also to the sky and to the depths. The owner of a piece of land owns everything above and below it to an indefinite extent." In *Winton v. Cornish* (1832), 5 Ohio 477, 478, this court appeared to adopt the position illustrated by that maxim, stating, "The word *land* includes not only the face of the earth, but everything under it or over it. He who owns a piece of land, therefore, is the owner of everything underneath in a direct line to the center of the earth and everything above to the heavens."
>
> In *Willoughby Hills v. Corrigan* (1972), 29 Ohio St. 2d 39, 49, 58 Ohio Op. 2d 100, 105, 278 N.E.2d 658, 664, this court, citing the United States Supreme Court in *United States v. Causby* (1946), 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, stated that "the doctrine of the common law, that the ownership of land extends to the periphery of the universe, has no place in the modern world." The court in *Willoughby Hills*, 29 Ohio St. 2d at 50, 58 Ohio Op. 2d at 106, 278 N.E.2d at 665, quoted from *Hinman v. Pacific Air Transp.* (C.A.9, 1936), 84 F.2d 755, 758: "'We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it [74].'"

The Ohio Supreme Court went on to find that the appellants, given all the factors present in *Chase*, did *not*, as a matter of law, establish an unlawful entry on their properties by BP [75]. In so holding, the Court enunciated what could be described as a "less-than-absolute-ownership-but-ownership-nonetheless" doctrine:

> Consequently, we do not accept appellants' assertion of absolute ownership of everything below the surface of their properties. Just as a property owner must accept some limitations on the ownership rights extending above the surface of the property, we find that there are also limitations on property owners' subsurface rights. We therefore extend the reasoning of *Willoughby Hills*, that absolute ownership of air rights is a doctrine which "has no place in the modern world," to apply as well to ownership of subsurface rights. Furthermore, as we will discuss below regarding other considerations in this case, given the unique facts here we find that *appellants' subsurface rights in their properties include the right to exclude invasions of the subsurface property that actually*

*interfere with appellants' reasonable and foreseeable use of the subsurface*. [76]

The subsurface rights recognized by the Court are thus circumscribed but are clearly significantly more that would exist were the nonownership theory in effect.

Based upon our reading of *Chance* and *McNamara*, we believe it likely that the Ohio Supreme Court, if confronted with the issue of a landowner's interest in the oil and gas underlying his or her land, would conclude (a) that the landowner has a real property interest in that oil and gas and (b) that the landowner's ownership of that oil and gas is subject to the correlative rights of adjoining landowners. This would be consistent with the ownership-in-place theory.

## *E. Epilogue*

While an epilogue typically connotes an ending, this is merely the end of Part 1. The balance of this article will be devoted to an issue of far greater concern to our readers than the rather academic discussion that we now conclude, *i.e.*, the resolution of the question that gives this article its title. As a result of the Utica Shale boom, Ohio is now experiencing a flood of cases involving oil and gas leases unlike anything it has witnessed in the past. Regrettably, many of these cases are being wrongly decided because of the woeful lack of understanding (and meaningful precedent) regarding the nature of an oil and gas lease as an instrument of conveyance. Determining what is this thing we call an oil and gas *lease* and what interest it conveys will test our predictive powers in a context of vital significance to the State of Ohio and, in particular, to the development of its natural resources.

PART TWO

# The Battle over the Nature of the Interest Being Conveyed

## *A. Is it an interest in real property or a mere license to search for and to extract oil and natural gas?*

Having devoted Part 1 of this article to the rather academic and arguably pedantic discussion of whether oil and gas may be owned and transferred *in situ*, we now turn to the far more meaningful issue that gives this article its title. As noted at the outset, the somewhat blithe indifference of the Ohio oil and gas industry to the essential nature of the oil and gas lease is now threatening that industry with a legal calamity that would have been unimaginable only a few short years ago. The unprecedented flood of cases involving oil and gas leases engendered as a result of the Utica Shale boom [77] assures that Ohio's courts will be called upon to resolve legal issues that, quite simply, were previously not worth litigating but that now involve significant economic and social consequences.

Foremost among these issues is the essential nature of the oil and gas lease and the estate that it conveys. Ohio, like most other states, treats an oil and gas lease as both a conveyance and a contract. The conveyance defines the nature and scope of the mineral interest being transferred by the "lessor" to the "lessee." The contract establishes the rights and obligations of the parties with respect to the development of the minerals transferred:

> The rights and remedies of the parties to an oil or gas lease, must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form. Such leases are contracts, and the terms of the contract with the law applicable to such terms, must govern the rights and remedies of the parties [78].

In fact, the state of affairs with respect to oil and gas leases may not be quite so untidy as the Ohio Supreme Court perceived it in 1897. The *essential* provisions of "modern" oil and gas leases are not all that dissimilar [79]. It now appears, however, that Ohio's lower courts are not playing by the long-established rules of oil and gas law that were developed during the evolution of such instruments.

If one accepts the proposition that oil and gas may not be owned until they are reduced to possession (which, one hopes, was successfully debunked in Part 1 of this article), an oil and gas lease is nothing more than a license to explore, the oil and gas law equivalent of a hunting license. If, on the other hand, we begin this discussion with the eminently supportable conclusion that oil and gas may be owned in place, the nature of the oil and gas lease and the estate that it conveys become both more complicated and more meaningful, both legally and practically.

The Ohio Supreme Court has not, however, ruled on the precise nature of the oil and gas lease as a conveyance. There are three principal possibilities. The instrument could be some form of mining lease that simply creates a tenancy (the nature of which—including any mechanism for termination or forfeiture—would be governed by the particular provisions of each such lease contract and applicable common law), or it could be either of two estates in fee simple: (a) a fee simple determinable; or (b) a fee simple subject to a condition subsequent [80]. The primary distinction between these closely related real-property concepts is that a fee simple determinable automatically terminates and revests in the lessor, pursuant to the lessor's possibility of reverter, upon the violation of any stated condition (or, more precisely, special limitation) in the lease, whereas, with a fee simple subject to a condition subsequent, the breach of the condition simply gives the lessor the right to terminate the lease by taking legal action to enforce a so-called "power of termination" or "right of entry [81]." Either conclusion results in a construction of the oil and gas lease that resolves—occasionally with "game-changing" effect—many of the legal challenges currently being directed against existing oil and gas leases in the State of Ohio.

Ultimately, the Ohio Supreme Court will be compelled to choose between the increasingly disparate positions being adopted by Ohio's common pleas and appellate courts and by federal courts construing (and anticipating) Ohio law. Significantly, it is at least arguable that the Ohio Supreme Court effectively disposed of the key aspects of this issue more than a century ago in its seminal oil and gas law decision, *Brown v. Fowler* [82]. There the Court considered the operation of an oil and gas lease in which the habendum clause provided as follows:

> To have and to hold the same unto the lessee, his heirs and assigns for the term of two years from the date hereof, and as long thereafter as oil or gas is found in paying quantities thereon, not exceeding in the whole the term of twenty-five years from the date hereof [83].

The Court's construction of this provision was clear and unequivocal:

> *This clause means that the term of the lease is limited to two years*, but that if within the two years oil or gas shall be found, then the lease shall run as much longer thereafter as oil or gas shall be found in paying quantities; *but if no oil or gas shall be found within the two years, the lease shall at the end of the two years terminate, not by forfeiture, but by expiration of term; and after the expiration of said two years no further drilling can be done under the lease*; and even if oil or gas or both shall be found within the two years, the whole term of the lease must terminate at the end of twenty-five years from the date of the lease. *Detlor v. Holland*, 57 Ohio St., 492.
>
> *So that, by the aid given by the habendum clause to the granting clause, the length of the term of the lease is settled and definitely fixed* [84].

Although the Ohio Supreme Court did not use the words "fee simple determinable," its construction of the habendum clause before it is consistent with the granting of such an estate. Regrettably, however, the Court could not have reached the essential issue because neither of the oil and gas leases at issue in *Fowler* could possibly have conveyed a fee simple estate because each was *expressly limited in duration* to a maximum of twenty-five (25) years.

## *B. The gathering storm*

### *1. Ohio appellate court decisions holding that a typical oil and gas lease conveys a fee simple determinable*

The pivotal issue that has not yet reached the Ohio Supreme Court has been directly or indirectly addressed by several of Ohio's appellate courts. In its 1979 decision in *Stitzlein v. Willey* [85], Ohio's Fifth District Court of Appeals considered a 1950 lease "for a term of ten (10) years and so much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon [86]." Three producing wells were drilled during the primary term, but production from these wells had ceased by 1966, and there was no further production from the leased premises until 1976 [87]. Although the landowners had advised the lessee that they considered the lease void, the lessee nevertheless drilled a fourth well, and the landowners received several royalty checks before the litigation commenced [88]. The trial court held that, although the lease was null and void, the plaintiffs had done nothing to prevent the drilling of the fourth well and had accepted the benefits of the production from that well and were thereby estopped from asserting that the defendant lessee had no right to continue production from the fourth well [89]. The District Court agreed that "the lease had expired by its own terms upon the cessation of production after the expiration of the primary term of ten years [90]" but concluded that Ohio's recording statute, Ohio Revised Code ("ORC") § 5301.01, "precludes the concept that a lease may be 'reborn by estoppel [91].'" Although the Court did not employ the words "fee simple determinable," it clearly held that an oil and gas lease terminates, irrevocably, once the conditions for extension into the secondary term cease to be met (typically, when production ceases) [92].

It is equally clear that the primary term of an oil and gas lease will terminate *automatically*, at the end of the stated primary term, unless drilling has commenced during the primary term, resulting, ultimately, in production. In its 1992 decision in *American Energy Services, Inc. v. Lekan* [93], the Fifth District Court of Appeals considered an August 10, 1968, lease that contained the following habendum clause:

> It is agreed that this lease shall remain in force for a primary term of five years from this date and if lessee shall commence to drill within said primary term or any extension thereof, the said lessee shall have the right to continue drilling to completion, with reasonable diligence and said term shall extend as long thereafter as oil and gas, or either of them, is produced by lessee from said land, or from a communitized unit as hereinafter provided [94].

The District Court clearly delineated the difference between the primary and secondary terms of the lease:

> It is this document that establishes the rights and obligations between the parties. The contractual intent and substance of the agreement between the parties is set forth and established in the habendum clause. The habendum clause in the oil and gas lease is two tiered. The first tier, or primary term, is of definite duration and is five years in this case. The second tier is of indefinite duration and operates to extend the lessee's rights under the lease so long as the conditions of the secondary term are met [95].

Although a well was commenced on October 8, 1972, it was not completed until September of 1973, the month following the expiration of the five (5)-year primary term, and it never produced any oil or gas [96]. The Court concluded that,

> for the lessee or lessee's assignee to continue the secondary term of this lease and to give the assignee his ability to claim rights thereunder, he must continue to produce oil and gas, or either of them, from the leased premises. *If after the expiration of the primary term the conditions of the secondary term are not continuing to be met, the lease terminates by the express terms of the contract herein and by operation of law and revests the leased estate in the lessor*. See *Gisinger v. Hart* (1961), 115 Ohio App. 115, 20 O.O.2d 226, 184 N.E.2d 240 [97].

*Automatic* termination for breach of a condition subsequent is, of course, a hallmark of an estate in fee simple determinable.

In 1994, Ohio's Eleventh District Court of Appeals, in *Tisdale v. Walla* [98], held as follows:

> *The terminology utilized in the habendum clause ("and as long thereafter as") is generally construed to create a determinable fee interest, such that the lessee's interest automatically terminates upon lessee's failure to satisfy any of the listed provisions which would serve to extend the term of the lease*. In such a case, no affirmative action on the part of a lessor is required to formally terminate the lease; it expires on its own terms [99].

This appears to be the earliest Ohio decision that expressly construes a typical oil and gas lease as a conveyance of a fee simple determinable [100].

The same result was reached by Ohio's Ninth District Court of Appeals in its 2011 decision in *Kramer v. PAC Drilling Oil & Gas, LLC* [101] :

> Under the terms of the oil and gas lease at issue in this case, the Kocsises "grant[ed] unto [McClanahan Oil] all of the oil and gas and all of the constituents of either in and under [the 149 acres] together with the exclusive right to drill for, produce and market oil and gas and their constituents[.]" The Ohio Supreme Court has recognized that language like the language used in this lease operates as "more than a mere license." *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897). Rather, it conveys "a vested, though limited, estate in the lands for the purposes named in the lease." *Id.* at 130. *The lease separated the surface estate of the Kocsises' land from its oil and gas estates and conveyed ownership of the oil and gas estates to McClanahan Oil*. See *Bath Twp. v. Raymond C. Firestone Co.*, 140 Ohio App. 3d 252, 256, 747 N.E.2d 262 (2000) ("[I]t is possible for the total interest in real property to be divided in such a way that the surface estate is severed from the mineral estate"); see also *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 499, 80 N.E. 6, 4 Ohio L. Rep. 673 (1907) (recognizing that a lease may sever the ownership of the surface of land from the mineral rights to that land). *McClanahan Oil became the fee-simple owner of the conveyed oil and gas estates while the Kocsises retained a possibility of reverter as provided in the lease. Because of the possibility of reverter, McClanahan Oil's fee-simple estate in the oil and gas was*

*a fee simple determinable rather than a fee-simple absolute. Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 130-31, 48 N.E. 502 (1897) (noting that, when an oil and gas lease ends, "whether caused by the exhausting of the oil and gas, or by the permanent abandonment of production, the lease will cease, and the whole estate in the premises will become the property of the owner of the fee, not by forfeiture, but by virtue of the terms of the lease."); see *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 499, 80 N.E. 6, 4 Ohio L. Rep. 673 (1907) (recognizing that fee-simple mineral estate is determinable upon the exhaustion of the minerals); see also *Natural Gas Pipeline Co. of America v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003) ("[A]n oil and gas lease is not a 'lease' in the traditional sense of a lease of the surface of real property. In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor. The lessee's/grantee's interest is 'determinable' because it may terminate and revert entirely to the lessor/grantor upon the occurrence of events that the lease specifies will cause termination of the estate.") [102].

As recognized by the Ohio appellate court in *Kramer*, Texas has long considered an oil and gas lease that contains a habendum clause that establishes a secondary term "for so long as oil and gas is produced in paying quantities" or the like as creating a fee simple determinable estate [103]. *Kramer* is particularly noteworthy for the District Court's obvious conclusion that at least one prior Ohio Supreme Court decision relating to an oil and gas lease—*Harris*—is consistent with a fee simple determinable construction [104].

## *2. Ohio common pleas court decisions holding that a typical oil and gas lease is a perpetual lease that is void, ab initio, as abhorrent to Ohio's public policy*

### *a. Hupp v. Beck Energy Corporation [105]*

Other Ohio courts have taken a far more critical and analytically questionable approach. This trend began with the 2012 decision of the Monroe County Court of Common Pleas in *Hupp*. *Hupp* involved three oil and gas leases (collectively, the "*Hupp Leases*"), each with a ten (10)-year primary term [106], that were identical except for the date of the Lease in question, the names and addresses of the lessors, the summary legal description of the leased premises, and the amount of the delay rental payments (which were consistently and erroneously referred to in the opinion as delayed rental payments) [107]. No wells had been drilled pursuant to any of the Hupp Leases as of the filing of the Complaint [108], but each of those Leases was still within its primary term [109], and the respective lessors were apparently accepting the delay rental payments tendered by the lessee [110].

The opinion issued by Judge Ed Lane on July 12, 2012, denied the combined Motion to Dismiss and/or to Change Venue of Defendant Beck Energy Corporation ("*Beck*") [111] and granted the Motion for Summary Judgment of Plaintiffs Clyde and Molly Hupp, *et al.* (collectively, the "*Hupp Plaintiffs*") [112]. The Hupp

Plaintiffs made the following assertions in their Motion for Summary Judgment: (a) that the Hupp Leases were leases in perpetuity and, as such, were void and unenforceable as against the public policy of the State of Ohio; (b) that Beck had breached the implied covenant to reasonably develop the Hupp Plaintiffs' land, rendering the Hupp Leases null and void; and (3) that the provisions of the Hupp Leases "for foregoing development by the payment of delayed [sic] rentals has expired because the Defendant failed to commence a well within the required times [113]."

Beck countered by stating that it had not received the written notice required from the Hupp Plaintiffs setting forth any alleged noncompliance by Beck with the terms of each of the Hupp Leases [114]. This was apparently the sole predicate for Beck's Motion to Dismiss [115]. The Hupp Plaintiffs did not dispute that they submitted no thirty (30)-day notice that they considered Beck to be in violation of any of its express or implied obligations under the Hupp Leases and setting out specifically in what respects Beck was in breach [116], maintaining that they were not required to give such notice because the Hupp Leases were void *ab initio* [117]. The final point of dispute related to the appropriate remedy:

> [Beck] also maintains that the sole remedy that the Plaintiffs are entitled to is damages and not forfeiture of the leases. *The Plaintiffs maintain that because the leases are void and unenforceable from the beginning they are entitled to forfeiture of the lease* [118].

After a lengthy foray into the public-policy exception to the generally prevailing principle of freedom of contract, Judge Lane concluded that the Hupp Leases

> clearly, unequivocally and seriously offend public policy in that they are perpetual leases that, by their terms and the payment of a nominal delayed [*sic*] rental may never have to be put into production [119].

So significant is this conclusion that Judge Lane's analysis will be quoted at length, commencing with the following:

> *Public policy analysis requires a Court to consider the impact of a contract at issue in a case upon society as a whole. Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).
>
> Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy. *Brown v. Gallagher*, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. *Taylor Building Corp. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶61; *Polk v. Cleveland Railway Co.*, 20 Ohio App. 317, 320-21, 3 Ohio Law Abs. 258, 151 N.E. 808 (8th Dist. 1925); *Buoscio v. Lord*, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); *Conny Farms, Ltd. v. Ball Resources*, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." *Eagle* at ¶64. *Unlike a contract that is merely voidable at the election of one of the parties, a contract is void ab initio if it seriously offends public policy. Walsh v. Bollas*, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

"It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." *Newbury Township Board of Trustees v. Lomak Petroleum* (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); *Northampton Building Co. v. Board of Zoning Appeals*, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). See also *State v. Baldwin Producing Corp.*, 10th Dist. No. 76AP-892, 1977 Ohio App. LEXIS 7165, 1977 WL 199981, *2 (Mar. 10, 1977). To this end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. *Newbury Township* at 389-90; *Northampton Building Co.* at 198-99.

Historically, the ultimate duration of oil and gas leases has been the subject of tension between lessors, lessees and the courts. *Jacobs v. CNG Transmission Corp.*, 332 F.Supp.2d 759, 786 (W.D. Pa. 2004). Because fixed-term leases were disadvantageous to lessees if production was not achieved until the end of the term, the initial term was shortened and supplemented with (1) what became known as an "unless" drilling clause, under which the lessee had the right to postpone development by paying a delay rental, and (2) a surrender clause under which the lessee could terminate his obligations as to unproductive property. *Id.*, n.15 (citing 2 Summers, *The Law of Oil and Gas*, §289). Lessees then devised leases under which the lessee could extend the exploration period for as long as they considered payment of delay rentals worthwhile. *Id.* This was effected by what became known as a "no-term lease," featuring a habendum clause that simply conveyed the premises subject to a list of conditions, one of which was the payment of a rental. *Id.*

However, the no-term lease was not favored by the courts. *Id.* One line of cases held that, because the lease failed to establish a time beyond which the lessee could not delay development and the payment of royalties, it was unfair and unenforceable against the lessor. *Id.* The other line of cases read into the no-term lease an implied condition compelling the lessee to drill within a reasonable time, the breach of which was cause for forfeiture. *Id.*

*The Plaintiffs' position in this matter is that their leases with the Defendant are a [sic] no-term leases: through the boilerplate embedded in their leases, exemplified by Defendant's failure to commence any drilling on any of the Plaintiffs' lands, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the acreage in perpetuity, either by making nominal delay rental payments pursuant to paragraph 3 of the Lease, or by determining in its own judgment that the premises are capable of producing oil or gas in paying quantities pursuant to paragraph 2.*

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties."*** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

*Jacobs*, 332 F.Supp.2d at 779. Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The mineral leases in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 2 Ohio B. 678, 443 N.E.2d 504 (1983), contained no time limitation during which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. *In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:*

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. ***Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy*** [120].

The following language is a synopsis of the key elements of Judge Lane's analysis in *Hupp*:

> The leases in this case are, in effect, a *[sic]* no-term leases: *through the boilerplate prepared by the Defendant and contained in the leases, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the Plaintiffs' acreage in perpetuity. Paragraph 2* provides that the leases shall continue in force for a term often *[sic]* years "and so much longer thereafter as oil or gas. . . are capable of being produced on the premises in paying quantities, in the judgment of the Lessee . ." but *does not impose a time limitation as to how long this Defendant can extend the duration of the leases by exercising its judgment. Paragraph 3* provides that the leases shall become null and void if a well is not commenced within twelve (12) months, "...unless lessee shall thereafter pay a delay rental of Dollars each year, ..." but *likewise does not impose a limitation as to how long this Defendant can avoid termination by paying delay rentals.* Furthermore, pursuant to the language contained in paragraph 13 of the leases ("failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part"), Defendant could ostensibly cease making the delay rental payments referenced in paragraph 3; but still retain the ability under paragraph 2 to extend the leases indefinitely by exercising its unfettered subjective judgment. Also, only Defendant has the unilateral right to terminate the leases, or any

part thereof, by surrender. Lease, paragraph 15.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties." *** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

*Jacobs*. Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id*. at 782 [121].

Judge Lane dismissed Defendant Beck's arguments:

> The Defense maintains that a reasonable interpretation of these form leases is that they shall drill a well within twelve months or have the right to pay the delayed [*sic*] rental for a period of ten years and drill the well within that period. The Defendant wrote all of the leases involved herein. *If that was their intention then they should have stated it in their leases. That was never their intention or they would have written this language into their leases. It probably only became their intention when they were confronted with this lawsuit and law of Ohio on this issue*. The Plaintiffs maintain that this is a lease in perpetuity and violates public policy. The lease by its term requires that a well be drilled within twelve months or that delayed [*sic*] payments be made quarterly to preserve the right to drill at a later date. This Court does not find in either paragraph 2 or 3 any limitation on the number of years that the delayed [*sic*] rental can be paid. Further, paragraph 2 provides that the leases have a term often [*sic*] years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities. They have no provision for a well to be drilled. *It also leaves the determination of what paying quantities means up to the Defendant*. It gives no deadline for the time in which once a well is commenced that it be completed. A well is deemed "commenced" when preparations for drilling have been commenced. *There is no deadline for the completion of a wel*l. Some of the cases cited to the Court by the Defendant refer to the term "well" and not "lease". *This case is not dealing with a situation where a well has been drilled. No wells have been drilled on any of the Plaintiffs' leases in Monroe County per the allegations of the Plaintiffs in their briefs* [122].

In construing the Hupp Leases and Beck's performance thereunder, the court analogized the Hupp Leases to the lease at issue in Ionno v. Glen-Gery Corporation [123]:

> The "long term" lease in *Ionno and the Beck Leases in this case are no-term leases bestowing upon the lessees the unilateral right to extend in perpetuity the time within which to develop the leased premises*. As in *Ionno*, there has been no development of Plaintiffs' acreage over a period of years. *Like the lease in Ionno under which there had been no development, the leases herein are unenforceable as against public policy* [124].

It concluded that the Hupp Plaintiffs are entitled to summary judgment both for this reason and also because of Beck's "breach of the implied covenant to reasonably develop the land by failing to drill any wells on any of the Plaintiffs acreage [125]." As construed by Judge Lane, the delay rental provision of the Hupp Leases, coupled with the implied covenant to reasonably develop the land, required that Beck drill a well within twelve (12) months [126].

The court rejected Beck's argument that the Hupp Plaintiffs had disclaimed any implied warranty and determined that the Hupp Lease form

> first provides the lessor with the right to bring an action against the lessee for breach of an implied obligation. Lease, paragraph 17. Two paragraphs later, the lease purports to disclaim any implied covenants. *Permitting the lessor to sue based on the breach of an implied obligation cannot be reconciled with a blanket disclaimer of all implied obligations or covenants*. Because the lease can reasonably be interpreted to allow or disallow a lessor to maintain an action for breach of an implied obligation, the lease is ambiguous and must be construed against the Defendant, the proponent of the language at issue.
>
> This lease contains contradictory provisions permitting the Plaintiffs to bring legal action against the Defendant for breaching implied obligations while at the same time disclaiming all implied obligations. *Moreover, the provisions ostensibly vesting discretion in the Defendant to drill or not to drill either (1) renders the lease illusory unless coupled with an implied covenant to reasonably develop, or (2) is ambiguous with respect to whether the discretion to drill or not to drill applies only to "further" drilling beyond what is required to produce oil or gas, or (3) is unenforceable as against public policy if construed to indefinitely allow Beck to elect to drill or not to drill for all purposes. Accordingly, in that all of these provisions are ambiguous, all provisions must be construed against the Defendant, rendering the general disclaimer of implied obligations ineffective* [127].

The court ***appears*** to have concluded that, absent the existence of an implied covenant to develop, the Hupp Leases would be illusory.

> Somewhat circuitously, Judge Lane held that forfeiture, rather than damages, was
>
> the appropriate remedy because [the Hupp Leases] were void *ab initio* and as such the Plaintiffs do not have to give the Defendant the contractual notice to cure notice [128].

From Judge Lane's perspective, forfeiture was the only possible remedy:

> In the instant case, the parties' lease does not specify any grounds for forfeiture. The Defendant has held leases to Plaintiffs' lands for years without drilling even an initial exploratory well, encumbering Plaintiffs' property for nominal delay rental payments. Forfeiture is warranted to assure the protection of Plaintiffs' interests in their lands. Moreover, even if damages could do justice to the parties, calculating a damage award would be speculative at best because no exploration or drilling

> has ever taken place. Accordingly, forfeiture is warranted in this case because legal remedies are clearly inadequate [129].

The public-policy exception to the prevailing rule of freedom of contract, as well as the misconceptions and misconstructions that underpin the dubious conclusion that oil and gas leases are leases in perpetuity, will be discussed more fully below [130].

### *b. Belmont Hills Country Club v. Beck Energy Corporation [131]*

*Belmont Hills* involved an August 24, 2009, oil and gas lease (the "*BHCC Lease*") from Plaintiff Belmont Hills Country Club ("*BHCC*") to Defendant Beck that was assigned by Beck to Defendant Petroleum Development Corporation ("*PDC*") on October 20, 2011 [132]. The habendum clause of the BHCC Lease provided for

> a term of five years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in search for oil and gas as provided in Paragraph 7 following [133].

The BHCC Lease contained a delay rental provision that stated that the Lease would terminate, unless, within six (6) months of its execution date, the lessee either commenced the drilling of a well or tendered a specified delay rental [134]. Since termination for nonpayment of delay rentals was not at issue in the case, either Beck or PDC presumably made, and BHCC presumably accepted, the stipulated delay rental payments.

The BHCC Lease also contained the following integration provision that expressly negated implied covenants:

> It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and *no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them* [135].

In addition, it contained a judicial ascertainment clause that began with the following sentence:

> In the event lessor considers that lessee has not complied with any of its obligations hereunder, express or implied, lessor shall notify lessee in writing setting out specifically in what respect lessee has breached this contract [136].

In his July 18, 2013, Entry, Judge Linton D. Lewis, Jr., sitting by assignment [137], rejected BHCC's contention that the BHCC Lease should be forfeited for breach of the implied covenant to reasonably develop the leased premises. The court apparently based its conclusion that the implied covenant to develop, which

it found to exist in the BHCC Lease [138], had not been breached on the fact that the BHCC Lease was still within its primary term [139]. It nevertheless concluded that the express disclaimer of implied covenants included in the BHCC Lease was trumped by the more specific preservation of "rights" to assert the breach of implied covenants embodied in the judicial ascertainment provision of the BHCC Lease [140].

The trial court accepted BHCC's argument that the BHCC Lease provided for a lease in perpetuity, focusing primarily on the delay rental provision and concluding as follows:

> Pursuant to the terms of the lease, the Lessee needn't drill a well, he must merely commence preparations for drilling. Commence preparations is not defined in the lease. The Lessee need not complete a well. As long as the Lessee commenced preparations to drill, the lease continues in perpetuity. This Court therefore finds that the terms of the lease provide for a lease in perpetuity [141].

Relying on *Hupp* and several of the cases cited by Judge Lane in *Hupp*, Judge Linton reached the following conclusion:

> In light of the [habendem and delay rental provisions], the Defendant Beck has constructed a no term lease. The Defendant may extend the lease in question indefinitely by either self-determining that oil and gas.....are capable of being produced in paying quantities or commencing preparations for drilling (there is no date required for completion). *Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy. Ionno*, supra. *This Court finds that the lease herein, prepared by Beck, seriously offends public policy and is void ab initio* [142].

He also found, for the same reasons, that "[t]here is a failure of mutuality and consideration in the lease contract at issue herein. The lease contract, by its terms, is illusory [143]."

> Judge Linton concluded, therefore, as follows:
>
> The lease at issue herein does not specify any grounds for forfeiture. Forfeiture will be granted when necessary to do justice to the parties, even where specific grounds for forfeiture are set forth in the lease. Ionno, supra. "The rationale for allowing forfeiture is the fact that the real consideration for the lease is the expected return derived from the actual mining of the land, not the rental income." *Moore v. Adams* 2008-Ohio-5953 & Case No. 2007-AP-090066. ... Calculating a damage award would be speculative at best because no exploration or drilling has ever taken place. Hupp supra at p.28. The decision to order a forfeiture of an oil and gas lease is within the trial court's discretion. *Moore* supra para 51. *In that all other legal remedies are clearly inadequate, forfeiture is the proper remedy in the case at bar.*
>
> *The lease at issue is a lease in perpetuity. It is in violation of public policy and void ab initio. It is void of mutuality of obligation and it is thereby an illusory contract and subject to rescission* [144].

He declared the Defendants' rights in the BHCC Lease forfeited and rescinded the Lease contract [145].

### *c. Bentley v. Beck Energy Corporation [146]*

Bentley involved four separate oil and gas leases to Defendant Beck executed in 2009 and 2010, two of which had been assigned by Beck to Defendant PDC, from four different sets of lessors. The primary term of the July 23, 2009, lease from Craig and Susan Bentley (the "*Bentley Lease*") was ten (10) years. The primary terms of the April 12, 2010, lease from Dennis and Margaret Menoski (the "*Menoski Lease*"), the April 12, 2010, lease from Barbara and Leo Chambers, et al. (the "*Chambers Lease*"), and the June 29, 2010 lease from Charles and Joan Busby (the "*Busby Lease*") were each three (3) years. Consequently, the Bentley, Menoski, Chambers, and Busby Leases (collectively, the "*Beck Leases*") were all still within their primary terms when the litigation commenced [147].

The Bentley, Menoski, and Chambers Leases each provided for a potential secondary term of

> as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in search for oil and gas as provided in Paragraph 7 following [148].

The Busby Lease, which prohibited surface operations by the lessee [149], provided for a potential secondary term of "so much longer thereafter as oil and gas or their constituents are produced in paying quantities or operations are maintained [150]." All four Beck Leases contained delay rental provisions that stated that such Leases would terminate, unless, within twelve (12) months of their respective execution dates, the lessee either commenced the drilling of a well or tendered a specified delay rental [151]. Since termination for nonpayment of delay rentals was not issue in the case, either Beck or PDC presumably made, and the respective lessors presumably accepted, the designated delay rental payments.

The Bentley, Menoski, and Chambers Leases each contained the following integration provision that expressly negated implied covenants:

> It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them [152].

Each also contained a judicial ascertainment clause that began with the following sentence:

> In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, express or implied, Lessor shall notify in writing setting out specifically in what respect Lessee has breached this contract [153].

In his September 16, 2013, Entry, Judge Linton D. Lewis, Jr., sitting by assignment, effectively replicated

his Entry in *Belmont Hills*. He rejected the Plaintiffs' contention that the Beck Leases should be forfeited for breach of the implied covenant to reasonably develop the respective leased premises. As in *Belmont Hills,* the trial court apparently based its conclusion that the implied covenant to develop, which it found to exist in the Beck Leases [154], had not been breached on the fact that the Beck Leases were still within their respective primary terms [155]. Once again, it nevertheless concluded that the express disclaimer of implied covenants included in the Bentley, Menoski, and Chambers Leases was trumped by the more specific reservation of "rights" to assert the breach of implied covenants embodied in the judicial ascertainment provision of those Leases [156].

The court accepted the Plaintiffs' argument that each of the Beck Leases provided for leases in perpetuity [157] and, in consequence, were against public policy. Relying on Hupp and several of the cases cited by Judge Lane in *Hupp*, Judge Linton concluded:

> In light of the [habendem and delay rental provisions] of the Bentley, Menoski and Chambers et al. leases and [the habendum provision] of the Busby lease, the defendant Beck has constructed no term leases. The Defendant may extend the lease in question indefinitely by either self determining that oil and gas.....are capable of being produced in paying quantities or commencing preparations for drilling (there is no date required for completion) in the leases of Bentley, Menoski and Chambers et al. In the Busby lease Beck must maintain operations (and [sic] undefined term) – not necessarily drill, produce or unitize the Busby acreage. *Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy. Ionno*, supra. *This court finds that the leases herein, prepared by Beck, seriously offend public policy and are void ab initio* [158].

He also found, for the same reasons, that "[t]here is a failure of mutuality and consideration in the lease contracts at issue herein. The lease contracts, by their terms, are illusory [159]."

Judge Linton concluded, therefore, based on the same rationale that underlies his decision in *Belmont Hills*, as follows:

> *The leases at issue are leases in perpetuity. They are in violation of public policy and void ab initio. They are void of mutuality of obligation and are therefore illusory contracts and subject to rescission* [160].

He declared the Defendants' rights in the Beck Leases forfeited and rescinded the Lease contracts [161].

### *d. Oxford Oil Company v. West [162]*

The October 4, 2013, Opinion and Judgment of Belmont County Common Pleas Court Judge Frank A. Fregiato in *West* involved the October 25, 2006, oil and gas lease (the "*West Lease*") from the Defendants Barry, Stacey, Brian, and Shelly West (collectively, the "*Wests*") to Plaintiff Oxford Oil Company ("*Oxford*"). The habendem clause of the West Lease provided for

> a term of five (5) years and so much longer as oil, gas or their constituents are produced or are capable of being produced in paying quantities (in the sole opinion of Lessee) or as long as gas is stored or gas, air, brine or any other substance is injected as provided herein or operations and/or transportation is maintained on all or any part of that certain tract of land . . . *provided, however, that if at the termination of said term, either primary or extended, there is a well in process of being drilled on said lands, then this lease shall continue in force so long as the drilling of such well is continued with reasonable diligence and so much longer thereafter as oil or gas or their constituents are found on said premises in paying quantities, in sole opinion of Lessee* [163].

The West Lease also contained a provision allowing the commencement of drilling to be deferred by the timely payment of delay rentals, and the stipulated delay rental payments were made by Oxford and accepted by the Wests [164].

On July 22, 2011, approximately three months before the primary term of the West Lease was due to expire, Oxford sent the Wests a letter advising them of its planned scheduled development of the leased premises. When Oxford attempted to enter the leased premises, within the five (5)-year primary term, to begin its survey process, to stake a well location, and to apply for a permit, the Wests prevented Oxford from proceeding [165]. Faced with this denial of entry, Oxford filed its Complaint alleging breach of contract, unjust enrichment, promissory estoppel, and *force majeure* and seeking damages, a declaratory judgment, and a permanent injunction regarding Oxford's status as lessee under the West Lease [166]. For reasons that were not explained, the court indicated that it would only address the Wests' argument that the West Lease was void as a lease in perpetuity contrary to and violative of the public policy of the State of Ohio [167].

Judge Fregiato unequivocally ruled that the West Lease was void *ab initio* and that, in fact, all oil and gas leases that are leases in perpetuity according to his analysis are void *ab initio* [168]. In granting the Wests' Motion for Summary Judgment he enunciated what can only be characterized as a *very* summary judgment indeed:

> It is the public policy of the State of Ohio to encourage oil and gas production when it can be accomplished without undue threat or harm to safety, and welfare of our citizens. The production is the issue; otherwise a lease could allow a lessee " . . . to encumber a lessor's property in perpetuity merely by paying an annual sum." ***Ionno v. Glen – Gery Corp.***, (1983) 2OhSt3d 131 at 134.
>
> *The subject Oxford – West lease has no term. There is no specific ending point. There is no set duration. Oxford has constructed a no-term lease which may be extended indefinitely. Oxford has retained the right to determine the nature of its performance and the length of its obligations and interest in the property. It is more in the nature of fee simple ownership than a leasehold interest.* See ***Hupp, et al. v. Beck Energy Corporation***, (Monroe County Common Pleas Court, Case No. 2011-345; decided July 12, 2012) and ***Belmont Hills Country Club v. Beck Energy Corporation, et al.*** (Belmont County Common Pleas Court, Case No. 11-CV-290, decided July 8, 2013). The case of ***Phillips Exploration, Inc. v. Reitz***, (2012), U.S. District Court for the Southern District of Ohio) does not support Oxford. The lease in the ***Phillips*** case permitted only

> a five year renewal and not a perpetual extension. The Court noted in ***Phillips*** that ". . .Perpetual extensions . . .would present a 'no term' lease," which was not the case in ***Phillips*** [169].

He declared the parties' rights to the West Lease forfeited and the West Lease rescinded [170].

### *e. Bohlen v. Anadarko E & P Onshore LLC [171]*

Judge Lane returned home to Washington County to preside over *Bohlen*, which involved a February 15, 2006, oil and gas lease covering six noncontiguous tracts of land (the "*Bohlen Lease*") [172] from Plaintiffs Ronald and Barbara Bohlen (the "*Bohlens*") to Defendant Alliance Petroleum Corporation ("*Alliance*") [173]. According to the habendum clause, the term of the Bohlen Lease was

> [o]ne (1) years [sic] and so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee or as the premises shall be operated by the lessee in the search for oil and gas and as provided in Paragraph 7 following [174].

The Bohlen Lease also included, in the Addendum, the following renewal option:

> Prior to the end of the primary term hereof, the lessee shall have the option to renew this lease for an additional period of one (1) year. The lessee may exercise this option by paying to the Lessor the sum of $5,500.00, *which payment shall be regarded as an option payment and not as a delay rental*. If lessee exercises this option to renew, the lease shall continue under the same terms and conditions [175].

In addition to the foregoing, the Bohlen Lease contained, as Paragraph 3 (after deletions), the following delay rental provision:

> This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate, unless, unless [*sic*] the Lessee shall thereafter pay a delay rental of $5,500.00 Dollars each year, payments to be made yearly, but in no event not less than yearly, for the privilege of deferring the commencement of a well. A well shall be deemed commenced when drilling operations have commenced on leased premises. . . .. [176]

Finally, in Paragraph 1 of the Addendum, the Bohlen Lease contained the following provision:

> *In the event that during any calendar year the total royalties paid* ***from production*** of the leased premises*, shall be less than the annual rental of $5,500.00, Lessee shall tender to Lessor such sum that will equal to* ***the $5,500.00 annual rental payment***. [177]

As construed by Judge Lane, the parties, by including this provision in the Addendum, "guaranteed the

delay rental payment of $5,500.00 in the event of insufficient production [178]."

In February of 2006, following the execution of the Bohlen Lease (including the Addendum), Alliance paid the Bohlens sum of $5,500.00 [179]. Alliance drilled and completed two wells on the leased premises during the primary term of the Bohlen Lease. The first, Well No. 1CM, was commenced on September 5, 2006, and was completed on September 18, 2006. The second, Well No. 2CM, was commenced shortly thereafter and was completed on October 1, 2006. No other wells were drilled on the premises covered by the Bohlen Lease pursuant to the terms of the Bohlen Lease [180].

Well No. 1CM produced 76 Mcf of natural gas in 2007, but that was the total extent of production, and that well was subsequently scheduled to be plugged. During the six years following its completion, Well No. 2CM produced a total of 4,472 Mcf of natural gas, with production gradually declining throughout that period [181]. Alliance paid the Bohlens $5,500.00 in 2007 but "never once paid the full annual rental for the years 2008 through 2013 despite the fact that the total annual royalties in each year were below $5,500.00 [182]." According to the Decision, "Defendant Alliance has calculated the total shortage due to Plaintiffs for *annual delay rentals* as $3,949.23 [183]."

The issues the court intended to decide are not easily identifiable in the Decision. At the outset of the Decision, Judge Lane described the Bohlens' position as follows:

> *The Plaintiffs' position is that their lease with the Defendants is void by operation of law as a lease in perpetuity and has been breached by reason of the Defendant's failure to abide by the terms of the lease.* This situation is a little unique as the lease in question is not on one contiguous tract of land. The Plaintiffs own several non-contiguous tracts of land and entered into one lease covering all of their acreage. Also, two wells have been drilled on the Plaintiffs' property. *Additionally, the Plaintiffs maintain that the two wells cannot hold the non-contiguous tracts.*
>
> *As to the third issue, the Court rejects the Plaintiffs' position.* Parties are free to contract (lease) whatever land they agree to. The fact that these are non-contiguous tracts is not determinative. The lease covers the land the parties chose to cover. *The secondary issue is whether two wells equal the requirement of reasonable development. This is an issue to be determined at trial after hearing all the evidence. This is not an issue that can be decided summarily when applying the strict guidelines set forth in Civ.R. 56(C).*
>
> *However, Plaintiffs' first two assertions do present issues that can be ruled on summarily. This lease is a lease that can extend in perpetuity by paying a nominal delay rental. This violates the public policy of Ohio and The United States of America, which is to encourage the development of material resources. For many good reasons the law does not recognize a contract in perpetuity* [184].

Judge Lane apparently concluded that he *could* decide summarily two of the issues raised by the Bohlens: (a) whether the Bohlen Lease is void by operation of law as a lease in perpetuity; and (b) whether the Bohlen Lease had been breached by reason of the Defendants' failure to abide by the terms of the Bohlen Lease. He

further concluded, it appears, that the issue of whether the drilling of two wells was sufficient to satisfy the implied covenant of reasonable development, particularly given the fact that the Bohlen Lease covered non-contiguous tracts of property, could not be disposed of in this Decision, which was addressing the Motions for Summary Judgment of both the Bohlens and the Defendants. As will be seen, however, his decision nevertheless addresses the implied covenant to develop the leased premises.

Not unsurprisingly, Judge Lane, citing primarily to *Hupp* and *Ionno*, reaches the following conclusion of the first issue raised by the Bohlens:

> Following the clear dictates of Ohio law, the Lease is a perpetual, "no-term" which seriously offends public policy, and therefore, is void *ab initio*. For this reason alone, the Bohlens are entitled to judgment as a matter of law [185].

The court was able to justify this result based upon its conclusion that the delay rental provision in the Bohlen Lease permitted Defendants to hold the Lease forever, without ever developing the leased acreage, simply by paying the Bohlens an annual delay rental of $5,500.00 per year [186].

Judge Lane next turned to the Bohlens' second proposition, which he accepted in unequivocal terms:

> Additionally, this lease has terminated by its own terms. *If a contract is breached it is over. Parties do not have to seek a judicial determination to terminate a contract once it has been breached.* They do have the right to seek damages caused by a breach if they choose [187].

Judge Lane enunciated two distinct reasons for his conclusion that the Bohlen Lease had been *terminated* by reason of the Defendants' failure to abide by its terms. The first reason was again predicated on his conclusion that the delay rental provision of the Bohlen Lease continued to be operable even after two wells had been timely commenced:

> *The language of the Lease is clear and can be subject to only one interpretation*. The parties executed a Lease which contains a definite delay rental provision. Under Paragraph 3 of the lease, Defendant Alliance was required to pay Plaintiffs the sum of $5,500.00 each year *for the privilege of deferring the commencement of a well. The Lease is clear that if Defendant Alliance failed to pay the annual delay rental, the Lease is "null and void and all rights of either party hereunder shall cease and terminate." However, the parties also separately executed an Addendum to the Lease which, in part, expands the annual delay rental beyond the commencement of a well, but also to circumstances where insufficient production results in annual royalties below the annual delay rental of $5,500.00*. In such instances, Defendant Alliance agreed to pay the annual delay rental of $5,500.00 offset by the total royalties paid to Plaintiffs from production in the calendar year.
>
> For the years 2008, 2009, 2010, 2011, 2012 and 2013, the total royalties paid from production of oil and gas on the Property were less than the annual delay rental, yet Plaintiffs still never received the full annual rental payment of $5,500.00 (minus the total royalties paid from production in

> the calendar year) from Alliance petroleum [sic] Corporation as required under Paragraph 1 of the Addendum to the Lease. *These acts alone terminate the lease*. A lease is a contract that requires the parties to do those acts they contracted to. Alliance did not fulfill its obligations under this lease.

As its own documents prove, Alliance knew of its obligation to pay the difference, but failed to do so. In fact, Exhibit "1" submitted by Defendant Alliance in response to plaintiff's Second Set of Interrogatories shows the total shortage due to Plaintiffs for annual rental payments is $3,949.23. The amount is not relevant. *Any amount less than the amount agreed to by the parties constitutes a breach. Given that failure to pay the annual delay rental is automatic grounds for termination of the Lease, and the undisputed evidence that Alliance failed to make the requisite payment under Paragraph 1 of the Addendum to the Lease, this Lease has terminated by its own terms* [188].

After a brief discussion of the primary and secondary terms of an oil and gas lease, Judge Lane first noted that, "[f]or a lease to remain in effect there must be active production of oil and gas. Absent production, the secondary term ends, and the lease is terminated [189]." Then, in what comes as a major surprise given his decision in *Hupp*, the court, citing *Tisdale*, appears to have adopted that the position that the Bohlen Lease conveyed a fee simple determinable:

> If the conditions of the secondary term are not met, the lease expires under its own terms and "revests in the lessor." *The terminology of the secondary term, "as long as gas or oil is produced in paying quantities," is generally construed to create a determinable fee interest, such that the lessee's interest automatically terminates upon lessee's failure to satisfy any of the listed provisions which would serve to extend the term of the lease*. "In such a case, no affirmative action on the part of a lessor is required to formally terminate the lease; it expires on its own terms."
>
> Put differently, if the well stops producing in paying quantities, the lease ends with no further action required of the lessor. As a "determinable interest," the landowner need take no action: the lease simply expires.
>
> * * *
>
> *The facts of the present case are undisputed. The primary term of the Lease has expired. Therefore, per the habendum clause, the duration of the subject lease is now governed by the secondary term* which extends the lease term indefinitely as long as "oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee or as the premises shall be operated by the Lessee in the search for oil and gas and as provided in Paragraph 7 following [190].

The court then turns abruptly to a discussion of the Defendants' Motion for Summary Judgment, without stating clearly why it had concluded that the Bohlen Lease had terminated. It may have been relying on its aforestated construction of the nonpayment of delay rentals. But, since the court's discussion appeared focused on the issue of production in paying quantities [191], the more likely conclusion is that the court concluded that, *as a matter of law*, the 76 Mcf of natural gas produced from the Well No. 1CM produced in

2007 and the 4,472 Mcf of natural gas produced from Well No. 2CM during the period from 2007 through 2013 were insufficient to hold the Bohlen Lease.

Defendants' Motion for Summary Judgment asserted that the Bohlen Lease was valid for a number of reasons, including three that the court addressed. As the court somewhat tautologically noted, "[m]ost of the Defendants' assertions are not valid due to the Court's granting of summary judgment to the Plaintiffs hereinabove [192]." The court first summarily dismissed the Defendants' allegation that the Bohlens waived any right to deny the validity of the Bohlen Lease by accepting royalty payments from Alliance, stating that "estoppel does not revive a terminated lease [193]." The court further stated that,

> [u]nder the rationale in Bonner [*Farms, Ltd. v. Fritz*, 355 Fed. Appx. 10, 2009 U.S. App. LEXIS 26038 (6th Cir. 2009)] and *Stitzlein*, acceptance of these payments does not bar Plaintiffs from asserting that the Lease has terminated because, as landowners with mineral rights to the property, they were entitled to the benefits with or without the Lease [194].

Defendants contended that the Bohlens were not entitled to the equitable remedy of forfeiture for three reasons: (a) forfeiture is not an appropriate remedy for breach of the implied covenants to reasonably develop the land; (b) Plaintiffs disclaimed all implied covenants in the Lease; and (c) Plaintiffs waived the right to forfeiture by accepting royalty payments from Alliance. Judge Lane held that the Bohlens did not waive forfeiture of the Bohlen Lease by accepting royalty payments because those payments "represented gas produced from their land to which they were entitled regardless of the existence of the Lease [195]." Ignoring his earlier statement that the question of whether the drilling of two wells was sufficient to satisfy the implied covenant of reasonable development was an issue to be determined at trial after hearing all the evidence and not an issue that can be decided summarily [196], Judge Lane concluded, citing *Beer v. Griffith* [197] and *Ionno*, held that, where legal remedies are inadequate, forfeiture is an appropriate remedy for breach of an implied covenant [198].

The court also rejected the Defendants' argument that the Plaintiffs disclaimed all implied covenants in the Lease, noting that

> *the Lease contains only a general disclaimer* that "[t]he parties hereby expressly disclaim any and all implied covenants, whether at law or in equity, regarding production, continuing production, or future production [199].

Citing *Beer* for the proposition that "Ohio law requires a specific disclaimer of the implied covenant to be disclaimed [200]," the court held:

> There was no *specific* provision in the lease that disclaimed Defendants' obligation to develop the land for oil and gas production within a reasonable time [201].

Finally Judge Lane dismissed the Defendant's argument that the Bohlens were barred from asserting the allegations in their Complaint because they had failed to give the Defendants thirty (30) days' notice, and an opportunity to cure, the alleged defaults, as required by the judicial ascertainment provision of the Bohlen

Lease [202]. He reached this conclusion as a result of his ruling that the Bohlen Lease was void ab initio and had expired by its terms:

> Under the reasoning in *Hupp*, *Cameron* [203], and *Tisdale*, the notice requirement under Paragraph 17 of the Lease cannot serve to resurrect the expired Lease or modify the *habendum* clause to extend the term beyond the termination of the Lease. Here, the Lease is void as against public policy, and also, had already expired by its terms at the time Plaintiffs filed the instant lawsuit. *Therefore, no Lease existed with which Plaintiffs were required to comply*. Therefore, Plaintiffs had no obligation to provide notice of non-compliance to Defendants under Paragraph 17 of the Lease prior to filing this action [204].

The court failed to mention that, if we begin with the proposition that the Bohlen Lease was void *ab initio*, then, *ipso facto*, no lease existed with which ***either*** party was required to comply. Viewed from this perspective, the Defendants could not have breached any of their obligations under the Bohlen Lease, express or implied, and the Bohlen Lease could not have expired by its terms, for the simple and obvious reason that, *under this construction*, the Bohlen Lease never existed.

# ENDNOTES

1. *Hupp v. Beck Energy Corp.*, 2012 Ohio Misc. LEXIS 245 (Monroe County C.P. 2012) ("*Hupp*").

2. Many commentators have addressed, often in mystifying detail, the complex and occasionally unfathomable issues surrounding the theory of ownership embraced by a particular jurisdiction. The most digestible of these is John S. Lowe's admirable presentation in the eminently readable *Oil and Gas Law in a Nutshell* (5th Ed. 2009), Ch. 2.

3. This is short for *cujus est solum, ejus est usque ad coelum et ad inferos*, a Latin phrase meaning that ownership of land includes everything from the air space above to the center of the earth, *i.e.* from heaven to hell. J. Thomas Lane, "Ownership Determination and Resolving Ambiguities: What To Do When Confusing Deeds Stymie the Imagination," Energy & Mineral Law Foundation Special Institute on Title and Development Issues in the Utica Shale – Ohio (April 14-16, 2013), p. 2.

4. *Id.*, at pp. 3-4.

5. *Id.*, at p. 5.

6. *Id.*, at p. 6.

7. Ohio Revised Code ("ORC") § 1509.01(I). The correlative-rights doctrine also applies, with respect to groundwater, to limit the rights of landowners to a common source of groundwater (such as an aquifer) to a reasonable share, typically based on the amount of land owned by each on the surface above. This will be addressed in Part 2(F) of this article.

8. *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 156 N.E. 119 (1927).

9. *Id.*, 116 Ohio St. at 201, 156 N.E. 119.

10. *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502 (1897) ("*Harris*").

11. *Id.*, 57 Ohio St. at 129-130, 48 N.E. at 506 (emphasis added).

12. *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio St. 259, 67 N.E. 494 (1903) ("*Ullery*").

13. *Id.*, 68 Ohio St. at 271-272, 67 N.E. at 496 (emphasis added).

14. *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N.E. 399 (1897).

15. *Id*, 57 Ohio St. at 328, 49 N.E. at 401 (emphasis added).

16. *Wiseman v. Cambria Products Co.*, 61 Ohio App. 3d 294, 572 N.E.2d 759 (4th Dist. Ct. App. 1989).

17. *Id.*, 61 Ohio App. 3d at 299, 572 N.E.2d at 762.

18. *Hardesty v. Harrison*, 61 Ohio Law Abs. 445, 27 Ohio Law Rep. 282 (5th Dist. Ct. App. 1928).

19. *Id.*, 61 Ohio Law Abs. at 445 (emphasis added).

20. *Maverick Oil & Gas, Inc. v. Bd. of Educ. of Barberton City School Dist.*, 171 Ohio App. 3d 605, 872 N.E.2d 322 (9th Dist. Ct. App. 2007).

21. *Id.*, 171 Ohio App. 3d at 612, 872 N.E.2d at 327 (emphasis added).

22. *See also, Fourth & Central Trust Co. v. Woolley*, 31 Ohio App. 259, 261, 165 N.E. 742 (1st Dist. Ct. App. 1928) ("It is settled law that oil before its extraction is a mineral, and a part of the land"). These cases support the argument that an oil and gas lease is an interest in real estate.

23. *Binder v. Trinity OG Land Dev. & Exploration, LLC*, No. 4:11-CV-02621, 2012 U.S. Dist. LEXIS 76183, 2012 WL 1970239 (N.D. Ohio May 31, 2012) ("Binder").

24. *Id.* (emphasis added).

25. *Id.* at *9 (emphasis added).

26. Williams & Meyers, *Oil and Gas Law* (2013).

27. *Id. § 203.1* (emphasis added).

28. *Back v. Ohio Fuel Gas Co.*, 160 Ohio St. 81, 113 N.E.2d 865 (1953) ("*Back*").

29. *Id.*, 160 Ohio St. at 86-87, 113 N.E.2d at 867-868 (emphasis added).

30. Williams & Meyers, *Oil and Gas Law* § 203.1.

31. *In re Loveday*, 2012 Bankr. LEXIS 1937 (N.D. Ohio May 2, 2012) (emphasis added).

32. *Id*, at pp. 7-8.

33. *In re Frederick Petrol. Corp.*, 98 B.R. 762 (S.D. Ohio 1989) ("Frederick").

34. *Id.*, 98 B.R. at 766.

35. *Wellington Resource Group LLC v. Beck Energy Corp.*, Case No. 2:12-CC-104, 2013 U.S. Dist. LEXIS 134838 (S.D. Ohio Sept. 20, 2013) ("*Wellington*").

36. See above, text accompanying notes 24-25.

37. Judge Marbley also premised his decision on his interpretation of House Bill 493, then under consideration by the Ohio General Assembly, which, among other things, would have given the Chief of the Division of Oil and Gas Resources Management of the Ohio Department of Natural Resources authority to regulate designated "land professionals." That Bill, which was introduced on March 27, 2012, was never brought to a vote and has not been reintroduced in the current legislative session.

38. These included *Detlor v. Holland*, 57 Ohio St. 492, 505, 49 N.E. 690, 693 (1898) ("The contract between the parties in this case was not a lease of the lands, but only a grant of the sole right to produce petroleum and natural gas for and during the term of ninety days from that date, and as much longer as oil or gas should be found, operated and produced in paying quantities"); *Herrington v. Wood*, 3 Ohio C.D. 475, 6 Ohio C.C. 326, 330 (3rd Cir. Ct. App. 1892 ) (An oil and gas lease "is not strictly a lease, but a license coupled

with a conditional grant, conveying the grantor's interest in the gas well, conditioned that gas or oil is found in paying quantities"); and *Ohio Oil Co. v. Toledo, Findlay & Springfield R.R. Co.*, 2 Ohio C.D. 505, 4 Ohio C.C. 210, 215-216 (6th Cir. Ct. App. 1889) ("We have arrived at the conclusion that the right of the plaintiff Company under these leases is in the nature of an incorporeal hereditament; that, strictly speaking, it is not a right in the land as such, but a right to enter upon the land, to sink its wells, and to take from underneath the soil such oil as it may find--to take it from the land and to render a portion of it to the land owner, the remainder to become its own to dispose of as it sees fit"). Judge Marbley also cited several decisions from other states that consider oil and gas leasehold interests to be personal property, without discussing the law in the many other oil-and-gas producing states that regard them as real property.

39. *Wellington, supra*, at pp. 26.

40. ORC § 5301.56.

41. ORC § 5301.56(B) (emphasis added).

42. ORC § 5301.56(A)(3) (emphasis added).

43. ORC § 5301.56(A)((4).

44. Such a severance may be accomplished by a conveyance of such rights by the surface owner or by a reservation of such rights in a transfer to the surface owner.

45. *See, e.g., Gill v. Fletcher*, 74 Ohio St. 295, 302, 78 N.E. 433, 435 (1906); *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 499, 80 N.E. 6, 7 (1907); *Chartiers Oil Co. v. Curtiss*, 14 Ohio C.C. (n.s.) 593, 594, 24 Ohio C.D. 106 (5th Cir. Ct. App. 1911), *aff'd*, 88 Ohio St. 594, 106 N.E. 1053 (1913); and *Bath Twp. v. Raymond C. Firestone, Co.*, 140 Ohio App. 3d 252, 256-267, 747 N.E.2d 262, 265 (9th Dist. Ct. App. 2000).

46. *See* ORC § 5301.56(E).

47. ORC § 5301.56(B)(3)(b) (emphasis added).

48. ORC § 5301.09 (emphasis added).

49. ORC § 5301.09 (emphasis added). It should be noted that "[n]o such lease or license is valid until it is filed for record, except as between the parties thereto, *unless the person claiming thereunder is in actual and open possession*." ORC § 5301.09 (emphasis added). Presumably, this does ***not*** mean that, under such circumstances, an oil and gas lease need not satisfy the Stature of Frauds, *i.e.*, be in writing and signed by the lessor. *See* ORC § 1335.04. We have found no reported decisions that address the applicability of the Statute of Frauds to oil and gas leases.

50. ORC § 5301.332 (emphasis added).

51. ORC § 5301.01.

52. ORC Chapter 2711.

53. ORC § 2711.01(B)(1).

54. *Riggs v. Patriot Energy Partners, LLC*, 2014-Ohio-558, 2014 Ohio App. LEXIS 541 (7th Dist. Ct. App. 2014).

55. *Id.*, at ¶ 25.

56. ORC § 5303.01 (emphasis added).

57. *Black v. Sylvania Producing Co.*, 105 Ohio St. 346, 137 N.E. 904 (1922).

58. *Id.*, 105 Ohio St. at 350, 137 N.E. at 905 (emphasis added).

59. ORC § 5307.01 (emphasis added).

60. ORC § 1309.102(A)(6).

61. Official Comment 4(c) to UCC § 9-102 [ORC § 1309.102] (emphasis added).

62. ORC § 1309.102(A)(44)(a).

63. ORC § 1309.102(A)(44)(c) (emphasis added).

64. ORC § 1309.501(A)(1)(a).

65. ORC § 1309.502(B)(3).

66. ORC § 1302.03(A) (emphasis added).

67. Official Comment 1 to UCC § 2-107 [ORC § 1302.03] (emphasis added).

68. *McNamara v. Rittman*, 107 Ohio St. 3d 243, 838 N.E.2d 640 (2005) ("*McNamara*"). *McNamara* consolidated two (2) cases, *Hensley v. Columbus*, 102 Ohio St. 3d 1420, 807 N.E.2d 365 (2004), and *McNamara v. Rittman*, 102 Ohio St. 3d 1420, 807 N.E.2d 365 (2004), in which the same question of Ohio law was at issue.

69. *Frazier v. Brown*, 12 Ohio St. 294 (1861).

70. *Cline v. American Aggregates Corp.*, 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984), *appeal after remand*, 64 Ohio App. 3d 503, 582 N.E.2d 1 (10th Dist. Ct. App. 1989), dismissed, 48 Ohio St. 3d 708, 550 N.E.2d 479 (1990) ("*Cline*").

71. *McNamara, supra*, 107 Ohio St. 3d at 246-247, 838 N.E.2d at 644-645 (emphasis in original).

72. *Id.*, 107 Ohio St. 3d at 249, 838 N.E.2d at 646 (emphasis added). The *McNamara* holding became part of the Ohio Constitution as a result of a 2008 amendment. The Ohio Constitution now provides: "A property owner has a property interest in the reasonable use of the ground water underlying the property owner's land." Oh. Const. Art. I, § 19b(C). Ohio has statutorily defined what constitutes reasonable use of water. That determination "depends upon a consideration of the interests of the person making the use, of any person harmed by the use, and of society as a whole." ORC § 1521.17(A). All of the following factors must be considered in determining whether a particular use of water is reasonable: (a) the purpose of the use;(b) the suitability of the use to the watercourse, lake, or aquifer; (c) the economic value of the use; (d)

the social value of the use; (e) the extent and amount of the harm it causes; (f) the practicality of avoiding the harm by adjusting the use or method of use of one person or the other; (g) the practicality of adjusting the quantity of water used by each person; (h) the protection of existing values of water uses, land, investments, and enterprises; and (i) the justice of requiring the user causing harm to bear the loss. ORC § 1521.17(B).

73. *Chance v. BP Chemicals, Inc.*, 77 Ohio St. 3d 17, 670 N.E.2d 985 (1996) ("Chance").

74. *Id.*, 77 Ohio St. 3d at 24-25, 670 N.E.2d at 991-992.

75. *Id.*, 77 Ohio St. 3d at 27, 670 N.E.2d at 993.

76. *Id.*, 77 Ohio St. 3d at 26, 670 N.E.2d at 992 (emphasis added).

77. For a flavor of what is happening, *see* Blake A. Watson, *Oil and Gas Litigation in the New Fracking Era*, 78 OHIO ST. L.J. FURTHERMORE 47 (2013).

78. *Harris, supra*, 57 Ohio St. at 129, 48 N.E. at 506.

79. As used in this article, a "modern" or "typical" oil and gas lease is one that contains, at a minimum, a granting clause, a habendum clause that provides for a definite primary term that continues as an indefinite secondary term as long as specified conditions are met, a delay rental clause that permits the commencement of drilling to be deferred, *during the primary term*, by the payment of an agreed delay rental, and a royalty provision that specifies the lessor's share of production and/or production revenue. It has become increasingly commonplace for producers to use a so-called "paid-up lease" form, in which delay rentals for the entire primary term are paid in advance with the lease bonus consideration, but that is not the case with respect to the leases under consideration here.

80. Nothing in any Part of this article, including the use of such terms as "lease," "lessor," "lessee," and "leased premises," should be deemed by the discerning reader as suggesting that the authors regard a typical oil and gas lease as a lease that conveys nothing more than a tenancy with respect to a leasehold interest. Such terms are used for purposes of convenience only based on longstanding tradition.

81. Bruce M. Kramer, *The Temporary Cessation Doctrine: A Practical Response to an Ideological Dilemma*, 43 BAYLOR L. REV. 519, 521 (1991). It is the intention of the authors to explore the ramifications of this distinction in Part 5 of this article.

82. *Brown v. Fowler*, 65 Ohio St. 507, 63 N.E. 76 (1902) ("*Fowler*").

83. *Id.*, 65 Ohio St. at 521, 63 N.E. at 77-78.

84. *Id.*, 65 Ohio St. at 521-522, 63 N.E. at 78 (emphasis added).

85. *Stitzlein v. Willey*, 1979 Ohio App. LEXIS 8691 (5th Dist. Ct. App. 1979) ("*Stitzlein*").

86. *Id.*, at 1-2.

87. *Id.*, at 2.

88. *Id.*, at 3.

89. *Id.*, at 4.

90. *Id.*, at 5.

91. *Id.*, at 6.

92. *Id.*, at 4-5. It is nevertheless generally agreed that a

> [m]ere temporary cessation in the production of a gas or oil well will not terminate the lease under a habendum clause of an oil and gas lease where the owner of the lease exercises reasonable diligence and good faith in attempting to resume production of the well.
>
> *Wagner v. Smith*, 8 Ohio App. 3d 90, 456 N.E.2d 523, syllabus ¶ 1 (4th Dist. Ct. App. 1982) ("*Wagner*"). The determination of what constitutes a "temporary" cessation of production requires consideration of the length of time the well is out of production and all attendant circumstances. *Id.*, at syllabus ¶ 2.

93. *American Energy Services, Inc. v. Lekan*, 75 Ohio App. 3d 205, 598 N.E.2d 1315 (5th Dist. Ct. App. 1992) ("*Lekan*").

94. *Id.*, 75 Ohio App. 3d at 212, 598 N.E.2d at 1319.

95. *Id.*

96. *Id.*, 75 Ohio App. 3d at 209, 598 N.E.2d at 1318.

97. *Id.*, 75 Ohio App. 3d at 212, 598 N.E.2d at 1319-1320 (emphasis added).

98. *Tisdale v. Walla*, 1994 Ohio App. LEXIS 5941 (11th Dist. Ct. App. 1994) ("*Tisdale*").

99. *Id.*, at 9-10 (emphasis added).

100. The District Court reached this conclusion notwithstanding the presence in the lease of a so-called "judicial ascertainment clause." The clause in question provided:

> This lease shall never be forfeited for failure of Lessee to perform in whole or part any of its express or implied covenants, conditions or obligations until it shall have first been finally judicially determined that such failure exists, and Lessee shall have been given a reasonable time after such final determination within which to comply with any such covenants, conditions, or obligations.

*Id.*, at 6. The conclusion reached in *Tisdale* is consistent with that of Ohio's Fifth District Court of Appeals in *Stockert vs. East Ohio Gas Co.*, 1982 Ohio App. LEXIS 13762 (5th Dist. Ct. App. 1982) ("*Stockert*"). The District Court there held that

> the provision in this lease requiring written notice for "forfeiture or rescission" does not apply as a condition precedent to the existence of the concept of "expiration." In other words, the judgment quieting title is entitled to affirmance because the lease had expired.

*Id.*, at 5.

101. *Kramer v. PAC Drilling Oil & Gas, LLC*, 197 Ohio App. 3d 554, 2011-Ohio-6750, 968 N.E.2d 64 (9th Dist. Ct. App. 2011) ("*Kramer*").

102. *Id.*, 197 Ohio App. 3d at 558-559, 968 N.E.2d at 67-68 (emphasis added).

103. *See, e.g. Stephens Cnty. v. Mid-Kan. Oil & Gas Co.*, 254 S.W. 290, 290 (Tex. 1923).

104. The Ohio Supreme Court's decision in *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 80 N.E. 6 (1907), which actually used the word "determinable," involved a severed mineral estate in *coal*.

105. *Hupp, supra*, 2012 Ohio Misc. LEXIS 245.

106. *Id.*, at 4.

107. *Id.*, at 3-4.

108. *Id.*, at 4.

109. The action was filed on September 14, 2011. *Id.*, at 1. Each of the Hupp Leases was executed in or after 2003. *Id.*, at 3.

110. This can be verified by a review of the pleadings.

111. *Hupp, supra*, at 15.

112. *Id.*, at 17-18.

113. *Id.*, at 15-16.

114. *Id.*, at 16. Each of the Hupp Leases contained, as Paragraph 17, a judicial ascertainment provision that provided as follows:

> In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have 30 days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of 30 days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

*Hupp, supra*, at 8.

115. *Id.*, at 9.

116. *Id.*, at 8.

117. *Id.*, at 16.

118. *Id.* (emphasis added). It is difficult to reconcile the concepts of a lease that is void *ab initio* being subject to forfeiture. One cannot forfeit something that never existed.

119. *Id.*, at 24. *See also id.*, at 27 and at 36-37.

120. *Id.*, at 9-15 (bold, italicized emphasis in *Hupp*; other emphasis added). Much of this is repeated *id*, at 21-27.

121. *Id.*, at 24-26 (emphasis added).

122. *Id.*, at 20-21 (emphasis added).

123. *Ionno v. Glen-Gery Corp.*, 2 Ohio St. 3d 131, 443 N.E.2d 504 (1983) ("*Ionno*").

124. *Id.*, at 27 (emphasis added).

125. *Id.*, at 24. *See also id.*, at 27 and at 36.

126. *Id.*, at 35-36.

127. *Id.*, at 32-33 (emphasis added).

128. *Id.*, at 42.

129. *Id.*, at 44-45.

130. *See* Part 3 of this article.

131. *Belmont Hills Country Club v. Beck Energy Corp.*, Case No. 11-CV-290 (Belmont County C.P., July 8, 2013) ("*Belmont Hills*").

132. *Id.*, at pp. 1-2.

133. *Id.*, at p. 6. The BHCC Lease was still within its primary term when the Entry was issued in this proceeding.

134. *Belmont Hills*, supra, at p. 6.

135. *Id.*, at p. 4 (emphasis added).

136. *Id.*

137. Judge Lewis retired from the Perry County Court of Common Pleas in 2010.

138. *Belmont Hills*, *supra*, at p. 4.

139. *Id.*, at pp. 5-6.

140. *Id.*, at p. 4.

141. *Id.*, at p. 7.

142. *Id.*, at pp. 8-9 (italicized emphasis added).

143. *Id.*, at p. 9.

144. *Id.*, at pp. 10-11 (emphasis added).

145. *Id.*, at p. 11.

146. *Bentley v. Beck Energy Corp.*, Case No. 11-CV-513 (Belmont County C.P., September 16, 2013).

147. The original Complaint was filed on December 16, 2011.

148. *Bentley*, *supra*, at p. 6.

149. *Id.*, at p. 5.

150. *Id.*, at p. 7.

151. *Id.*, at pp. 6-7.

152. *Id.*, at p. 4.

153. *Id.*

154. *Id.*, at p. 5.

155. *Id.*, at pp. 5-6.

156. *Id.*, at pp. 4-5.

157. *Id.*, at p. 7.

158. *Id.*, at p. 9 (italicized emphasis added).

159. *Id.*, at p. 10.

160. *Id.*, at p. 11 (emphasis added).

161. *Id.*, at p. 11.

162. *Oxford Oil Co. v. West*, Case No. 11-CV-435 (Belmont County C.P., October 4, 2013) ("*West*").

163. *Id.*, at pp. 2-3 (emphasis added). The italicized language from the habendum clause of the West Lease is not found in the Opinion and Judgment.

164. *Id.*, at p. 3.

165. *Id.*

166. *Id.*, at p. 1.

167. *Id.*, at p. 3.

168. *Id.*, at p. 5.

169. *Id.*, at pp. 4-5 (emphasis added).

170. *Id.*, at p. 5.

171. *Bohlen v. Anadarko E & P Onshore*, Case No. 13-OT-167 (Washington County C.P., March 27, 2014) ("*Bohlen*").

172. The Bohlen Lease incudes a separately executed addendum (the "*Addendum*") that was presumably added to address specific concerns of the Bohlens. While this is not expressly stated in the Addendum, it is customary for producers to deviate from their preprinted forms only to address specific requests made by prospective lessors.

173. *Bohlen*, *supra*, at p. 2. In September of 2011, Alliance partially assigned its interest in the Bohlen Lease and other oil and gas leases to Defendant Anadarko E & P Onshore LLC ("*Alliance*").

174. *Id.*, at pp. 2-3.

175. *Id.*, at p. 2 (emphasis added). This provision is quoted inaccurately and incompletely in the Decision.

176. *Id.*, at p. 3. This provision is quoted inaccurately and incompletely in the Decision.

177. *Id.*, at pp. 3-4 (emphasis added).

178. *Id.*, at p. 3.

179. *Id.*, at p. 4. The Decision itself merely confirms that a delay rental payment was made in 2006, not precisely when it was made.

180. *Id.*, at p. 2.

181. *Id.*, at p. 3.

182. *Id.*, at p. 4.

183. *Id.* (emphasis added). It is by no means certain that Alliance characterized these payments as *delay rental* payments, as the court suggests.

184. *Id.*, at pp. 1-2 (emphasis added).

185. *Id.*, at p. 5.

186. *Id.*

187. *Id.* (emphasis added).

188. *Id.*, at pp. 6-7 (emphasis added).

189. *Id.*, at p. 7.

190. *Id.*, at pp. 8-9 (footnotes omitted; emphasis added).

191. At one point the court cited two cases that addressed the issue of what constitutes sufficient production to maintain a lease. In *Tedrow v. Shaffer*, 23 Ohio App. 343, 155 N.E. 510 (4th Dist. Ct. App. 1926) ("*Tedrow*"), Ohio's Fourth District Court of Appeals held that

> [u]nder oil and gas lease for ten years and as much longer as oil and gas are found in paying quantities, where only 36 barrels were produced in 8 years and on day lease expired only few gallons were produced for first time in 7 years, lessors were entitled to terminate lease at end of 10-year period.

*Id*, at syllabus ¶ 4. In *Moore v. Adams*, 2008-Ohio-5953, 2008 Ohio App. LEXIS 4998 (5th Dist. Ct. App. 2008) ("*Moore*"), Ohio's Fifth District Court of Appeals held that the failure to produce gas for over six years from a potentially productive well that required repairs violated the terms of the habendum clause of the lease in question.

192. *Id.*, at p. 10.

193. *Id.*

194. *Id.*, at p. 11.

195. *Id.*, at p. 13.

196. *Id.*, at pp. 1-2 (emphasis added).

197. *Beer v. Griffith*, 61 Ohio St. 2d 119, 399 N.E.2d 1227 (1980) ("Beer").

198. *Bohlen*, *supra*, at p. 11.

199. *Id.*, at p.12 (emphasis added).

200. *Id.*, including fn. 16.

201. *Id.* (emphasis in original).

202. Paragraph 17 of the Bohlen Lease provides:

> In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be a *condition precedent* to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of said notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.
>
> (Emphasis in original).

203. Although the court provides no citation for this case, it is presumably referring to *Cameron v. Hess Corporation*, Case No. 2:12-CV-00168 (S.D. Ohio 2013).

204. *Bohlen*, *supra*, at p. 13.