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## FORFEITURE OF A GRAVEL MINING LEASE IN NEBRASKA FOR BREACH OF AN IMPLIED OBLIGATION TO WORK WITH REASONABLE DILIGENCE

### I. INTRODUCTION

By the terms of a written agreement, the owners of a quarter-section of land in York County, Nebraska, leased the premises for a term of five years, beginning March 1, 1956, to a gravel-plant operator "for the sole purpose and with the exclusive right to excavate and remove gravel to any extent lessee might desire."<sup>1</sup> Designated a "gravel lease," the instrument provided for monthly rentals of ten cents for each cubic yard of gravel removed from the premises. No further consideration for the lease was set out in the instrument.<sup>2</sup>

The lessee died July 13, 1956. From late June, 1956, until early January, 1957, one of the lessee's sons operated the gravel pit. When production ceased that January after about eleven months' operations, royalties of \$1,506.70 had been paid on approximately 15,000 cubic yards of material removed. Operations were resumed on the leased land in March, 1957, but only small amounts of gravel were produced each month thereafter. The lessors refused to accept small rentals tendered for July and August, 1957, and brought suit to declare the lease forfeited, cancel the lease, and quiet title and possession in the lessors. The district court found for the plaintiff lessors and defendant claimants under the lease appealed from a decree of forfeiture. *Held*, the evidence sustained the finding that the defendants failed to exercise reasonable diligence in operation of the pit. In affirming the forfeiture decree, the Nebraska Supreme Court found a covenant "manifestly" implied on the part of the lessees to develop and operate the pit, even though the lease contained no

<sup>1</sup> *George v. Jones*, 168 Neb. 149, 151, 95 N.W.2d 609, 610-11 (1959).

<sup>2</sup> The lessors "received nothing other than the promise to pay royalties as consideration for the lease. . ." Brief for Appellants, p. 5, *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609 (1959). The lessors accepted this statement as fact. Brief for Appellees, pp. 5-7, *George v. Jones*, *supra*. Cf. Record, pp. 7-8, *George v. Jones*, *supra*.

express covenant to work the pit continuously, or in any particular way, or at all.<sup>3</sup>

This case, *George v. Jones*,<sup>4</sup> is not the first consideration by the Nebraska Supreme Court of mineral-lease cancellation,<sup>5</sup> nor is it the first to construe a sand and gravel lease.<sup>6</sup> It is, however, the first Nebraska Supreme Court case expressly dealing with a gravel lease as a mining lease.<sup>7</sup> The purpose here is to discuss cancellation of gravel leases in Nebraska in the light of the decision in the *George* case.

## II. THE MINERAL LEASE

A number of statements of law basic to any consideration of mineral leases appear commonly in the legal literature of mining and provide a framework upon which the *George* case may be more easily considered. Perhaps the first inquiry in this regard

<sup>3</sup> *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609 (1959). The lease, which granted ingress and egress over a selected route, and the right to construct and maintain necessary machinery, buildings, and equipment, was made binding upon the parties and their executors, administrators, heirs, and assigns. *Id.* at 151-52, 95 N.W.2d at 611. The lessors complained that the pit had not been diligently operated since the death of the lessee. *Id.* at 152, 95 N.W.2d at 611. Cf. Record, p. 4, *George v. Jones*, *supra*. But the court appears to base its findings on the seven-month period from February to August, 1957. *George v. Jones*, 168 Neb. 149, 165-66, 95 N.W.2d 609, 618 (1959). Production during this period amounted to 757.5 cubic yards. *Id.* at 154, 95 N.W.2d at 612. Considerable testimony about bad weather, floods, need and markets for gravel, quality of production, and manner of operation is set out in the opinion. *Id.* at 154-60, 95 N.W.2d at 612-15.

<sup>4</sup> 168 Neb. 149, 95 N.W.2d 609 (1959).

<sup>5</sup> See *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958) (oil); *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953) (oil); *Fritsche v. Turner*, 133 Neb. 633, 276 N.W. 403 (1937) (oil); *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652, 192 N.W. 219 (1923) (oil and other minerals); *Clay v. Palmer*, 104 Neb. 476, 177 N.W. 840 (1920) (potash); *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918) (potash).

<sup>6</sup> See *Powell v. Cone*, 100 Neb. 562, 160 N.W. 959 (1916).

<sup>7</sup> The parties in the *George* case regarded the gravel lease as a mining lease, and the court did not consider the matter further. *George v. Jones*, 168 Neb. 149, 162, 95 N.W.2d 609, 616 (1959).

should be directed toward the nature of the mineral involved, since mineral deposits in place<sup>8</sup> are treated in law as realty.<sup>9</sup>

While, among the non-metallic substances, clay, stone, and rock, regardless of exact composition, are generally classified as minerals, the law as to sand and gravel is customarily otherwise.<sup>10</sup> The Nebraska Legislature, for example, has classified sand and gravel as something other than minerals, so far as Nebraska school lands are concerned.<sup>11</sup> Under the circumstances in the *George* case, however, sand and gravel could probably be regarded as minerals since classification of sand and gravel as "mineral" rather than as some other natural resource seems to depend upon individual or statutory intent.<sup>12</sup>

To convert the character of minerals from that of realty to another of personalty, the owner<sup>13</sup> of a mineral deposit must accomplish a severance of the minerals from the body of the deposit.<sup>14</sup> The technical arts of mining and quarrying provide the means of such a conversion through physical separation of the minerals from their natural position.<sup>15</sup> The owner of the land

<sup>8</sup> The term "in place" has a technical meaning in federal mining law. (9th Cir. 1913); cf. 58 C.J.S. *Mines and Minerals* § 3 at 48 (1948). See *Duffield v. San Francisco Chemical Co.*, 205 Fed. 480, 484-85. As to the use of the term in its ordinary sense, see 2 TIFFANY, *REAL PROPERTY* § 587 at 507-09 (3d ed. 1939).

<sup>9</sup> See *Krone v. Lacy*, 168 Neb. 792, 799-800, 97 N.W.2d 528, 533 (1959); 2 TIFFANY, *op. cit. supra* note 8, § 587; 3 LINDLEY, *MINES* § 859b (3d ed. 1914).

<sup>10</sup> See 58 C.J.S. *Mines and Minerals* § 2 at 24 (1948). Cf. *Id.* at 21.

<sup>11</sup> See NEB. REV. STAT. § 72-304 (Reissue 1958).

<sup>12</sup> See *Anchorage Sand & Gravel Co. v. Schubert*, 114 F. Supp. 436 (D. Alaska 1953), *aff'd* 224 F.2d 623 (9th Cir. 1955); *Holloway Gravel Co. v. McKowen*, 200 La. 917, 9 So.2d 228 (1942); *Puget Mill Co. v. Duecy*, 1 Wash.2d 421, 96 P.2d 571 (1939). Cf. 58 C.J.S. *Mines and Minerals* § 2 at 21-22 (1948).

<sup>13</sup> "Before severance of the mineral estate the owner of real property has title not only to the land surface, but to that beneath and above the surface." *Jones v. Brown*, 211 Ark. 164, 167, 199 S.W.2d 973, 974 (1947). As to sovereign rights in certain minerals, see 1 THOMPSON, *REAL PROPERTY* § 88 (rev. perm. ed. 1939).

<sup>14</sup> See, e.g., *Forbes v. Gracey*, 94 U.S. 762 (1877); *Atlas Milling Co. v. Jones*, 115 F.2d 61 (10th Cir. 1940); *Glencoe Sand & Gravel Co. v. Hudson Bros. Commission Co.*, 138 Mo. 439, 40 S.W. 93 (1897).

<sup>15</sup> On mining in general, see e.g., Behre & Arbiter, "Distinctive Features of the Mineral Industries," *ECONOMICS OF THE MINERAL INDUSTRIES* 43 (1959); STOCES, *INTRODUCTION TO MINING* (1st English ed. 1954); LEWIS, *ELEMENTS OF MINING* (2d ed. 1941).

often delegates this extraction of the minerals to another, a delegation commonly classified, according to the type of right granted, as: (1) "Simple permission to mine;"<sup>16</sup> (2) a "right to mine;"<sup>17</sup> or (3) a "mining lease" of the property.<sup>18</sup> The conventional mining or mineral lease has been distinguished from the ordinary lease largely by the fact that it exempts the lessee from liability for the "waste" occasioned by proper removal of the minerals.<sup>19</sup>

The methods provided by a mineral lease for the payment of rent differ.<sup>20</sup> Under some mineral leases rent commonly takes the form of a share of the product removed,<sup>21</sup> while in others rent is regarded as a share of the gross profit realized by the lessee.<sup>22</sup> Such a lease is generally recognized "as a conveyance of an interest in the mining property."<sup>23</sup>

<sup>16</sup> "Simple permission" to extract minerals should probably be considered a grant of a "license to mine." See 2 TIFFANY, *op. cit. supra* note 8, § 588 at 511. But see 3 LINDLEY, *op. cit. supra* note 9, § 859a.

<sup>17</sup> A "right to mine," not coupled with an interest in the minerals mined until after extraction is considered a profit à prendre. See 2 TIFFANY, *op. cit. supra* note 8, § 588 at 511. Cf. 3 LINDLEY, *op. cit. supra* note 9, § 860.

<sup>18</sup> As to mining leases in general, see 2 TIFFANY, *op. cit. supra* note 8, § 588; 1 THOMPSON, *op. cit. supra* note 13, §§ 85-106; MORRISON, MINING RIGHTS 359-79 (16th ed. 1936); 3 LINDLEY, *op. cit. supra* note 9, § 861; Cf. "Uranium Mining Lease," 27 ROCKY MT. L. REV. 425 (1955). As to mining leases in Nebraska, see *Clay v. Palmer*, 104 Neb. 476, 177 N.W. 840 (1920); *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918). As to the use of the term "lease," see, e.g., *People ex rel. Hargrave v. Phillips*, 394 Ill. 119, 67 N.E.2d 281 (1946).

<sup>19</sup> *Clay v. Palmer*, 104 Neb. 476, 177 N.W. 840 (1920), citing *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918).

<sup>20</sup> As to rents under mineral leases, see, e.g., *Miller v. Carr*, 137 Fla. 114, 188 So. 103 (1939).

<sup>21</sup> See, e.g., *Wright v. Brush*, 115 F.2d 265, 267 (10th Cir. 1940), where a "royalty" to a lessor of a share of the product produced is distinguished from other types of royalties, including an "overriding royalty" on the working interest of the lessee.

<sup>22</sup> See *Homestake Exploration Corp. v. Schoregge*, 81 Mont. 604, 264 Pac. 388, 392 (1928).

<sup>23</sup> 58 C.J.S. *Mines and Minerals* § 164 (1948). Cf. *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918); NEB. REV. STAT. § 76-201 (Reissue 1958). See also *Shoaff v. Gage*, 163 F. Supp. 179 (D. Neb. 1958); 36 AM. JUR. *Mines and Minerals* § 45 (1941); Shokes, "Possible Treatment in Nebraska of a Lessee's Interest Under an Oil and Gas Lease," 31 NEB. L. REV. 374 (1952).

## III. LOSING THE MINERAL LEASE

Although there is considerable confusion surrounding the circumstances under which a mineral lessee loses his rights, it is possible to abstract from the cases and from leading secondary authorities a consistent doctrinal pattern in the field.<sup>24</sup> Putting aside cases in which the lease expires through the ending of the term,<sup>25</sup> and those in which a surrender is made,<sup>26</sup> the major concern in this area is a failure on the part of the lessee to work the premises as fully as the lessor would like. Assuming then a judicial finding that the lessee did not develop or operate a mineral lease according to his duty in the premises, the following general, though not universal, pattern can be set out:

1. *Abandonment*

A tenant may be found to have abandoned his lease as a matter of fact, and such intentional conduct is distinguishable from a breach of an obligation which would result in forfeiture.<sup>27</sup> If a mining lease of minerals in place were regarded as a sale of a possessory interest in real property, as sometimes occurs,<sup>28</sup> abandonment could not result from non-user.<sup>29</sup> Abandonment of a non-possessory or incorporeal interest in personal property is possible and can be treated as a surrender by operation of law.<sup>30</sup>

<sup>24</sup> It has been said that, generally, the ordinary rules of landlord and tenant are similar to the rules applicable to mining leases. See 58 C.J.S. *Mines and Minerals* § 173 at 368 (1948). The rule is not always reliable, as will be seen.

<sup>25</sup> Unless extended or renewed, expiration of the term of the lease concludes the estate conveyed by the instrument. See 1 TIFFANY, *op. cit. supra* note 8, § 147.

<sup>26</sup> Surrender of the lease by agreement between the parties or by mutual consent will also conclude the estate. See 1 TIFFANY, *op. cit. supra* note 8, § 150; 58 C.J.S. *Mines and Minerals* § 173 at 370-71 (1948).

<sup>27</sup> See 36 AM. JUR. *Mines and Minerals* § 58 (1941). Cf. *Hummel v. McFadden*, 395 Pa. 543, 150 A.2d 856 (1959); *Brown v. Wilmore Coal Co.*, 153 Fed. 143 (3d Cir. 1907); *Cleveland Stone Co. v. Hollingworth*, 63 S.E. 586, 262 N.W. 171 (1935). See also 58 C.J.S. *Mines and Minerals* § 173 at 371-72 (1948).

<sup>28</sup> See 36 AM. JUR. *Mines and Minerals* § 43 (1941).

<sup>29</sup> *Id.* § 58. Cf. *Hummel v. McFadden*, 395 Pa. 543, 150 A.2d 856 (1959).

<sup>30</sup> See 58 C.J.S. *Mines and Minerals* § 173 at 371 (1948). But see, e.g., *Ellis v. Brown*, 177 F.2d 677, 680 (6th Cir. 1949).

## 2. *Special limitation*

The estate of the lessee may be characterized as existing under the "special limitation" of the operating duty, breach of which works an "automatic termination" of the estate.<sup>31</sup>

## 3. *Conditions*

While an estate on special limitation is concluded by force of the limitation itself, an estate on condition creates an optional right in the person benefited by the condition and does not come to an end until that person exercises his option by making an entry or claim.<sup>32</sup> An estate on condition may appear in one of several forms:<sup>33</sup>

a. *Condition precedent.* A condition precedent to the vesting of an estate, failure of which concludes the prospect or possibility of commencement of the term conveyed by a lease is a well-recognized form of condition.<sup>34</sup>

b. *Condition precedent to continuance of an estate.* Conditions precedent are usually thought of as controlling future possession, and if a mineral lessee's duty to develop or work the leased premises is regarded as a condition precedent to continuance of his estate in the minerals, breach of that duty might so conclude his rights to the minerals.<sup>35</sup>

<sup>31</sup> See 1 TIFFANY, *op. cit. supra* note 8, § 185. An automatic termination on occurrence of a specified event is usually referred to as an estate on special limitation. *Id.* § 217. But, an "estate for years subject to a rent cannot, however, ordinarily be regarded as one on special limitation, if it is to terminate on the contingency of a default in some matter by the lessee, even though it is expressly provided that the lease shall be 'void' on such default, such a provision being regarded as a condition, and not as a limitation." *Id.* § 219 at 382-83. *But see* Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N.W.2d 150 (1953), where the court treats an "unless" clause in an oil lease as a special limitation, citing RESTATEMENT, PROPERTY § 23 (1936). *Accord*, Long v. Magnolia Petroleum Co., 166 Neb. 410, 413, 89 N.W.2d 245, 253 (1958). See also Foster, "Nebraska Landlord and Tenant," 4 NEB. L. BULL. 317, 348 (1926). The illustrations to the RESTATEMENT, *supra*, do not, however, include the case of an estate for years subject to rent.

<sup>32</sup> See 1 TIFFANY, *op. cit. supra* note 8, § 188.

<sup>33</sup> *Id.* § 185.

<sup>34</sup> *Id.* §§ 185-86.

<sup>35</sup> *Id.* § 185 at 299. Cf., e.g., SUMMERS, OIL AND GAS § 300 (perm. ed. 1959).

c. *Condition subsequent.* The condition subsequent is the most common form of condition employed to control a lessee's activity under most forms of leases.<sup>36</sup> The remedy available to the grantor of an estate on condition subsequent ordinarily depends upon the express form of the condition, that is, the presence or absence of a forfeiture or re-entry clause:

(i) *Condition subsequent without an express forfeiture clause.* In the absence of a clause in the lease expressly stipulating the right to forfeit, the breach of even an express condition does not necessarily sustain a claim of forfeiture for breach.<sup>37</sup>

(ii) *Condition subsequent with an express forfeiture clause.* Where a lease contains an express forfeiture clause, a breach of a condition subsequent will entitle the lessor to declare a forfeiture and seek cancellation of the lease, provided the condition is included within the reach of the forfeiture clause.<sup>38</sup>

#### 4. *Covenant*

Where the lessee's duty to operate is contained in a covenant, standing alone, breach of the covenanted obligation gives the lessor a right to an action for damages, or perhaps an action in equity for specific performance, but the lessee does not lose his lease.<sup>39</sup>

#### 5. *Covenant coupled with a condition*

Where a covenant provides for a lessee's duty in the premises and that covenant is coupled with a condition subsequent, especially a condition subsequent in the form which includes a right to forfeit or to re-enter, the lessor may proceed toward cancellation of the lease in the event of breach by the lessee.<sup>40</sup>

<sup>36</sup> See 1 TIFFANY, *op. cit. supra* note 8, § 187.

<sup>37</sup> *Id.* §§ 152, 187. Where a forfeiture clause provides expressly for certain designated grounds permitting forfeiture, other grounds will not suffice. *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922). Cf. *Chesnut v. Master Laboratories*, 148 Neb. 378, 27 N.W.2d 541 (1947); 58 C.J.S. *Mines and Minerals* § 173 (1948).

<sup>38</sup> See 1 TIFFANY, *op. cit. supra* note 8, §§ 152, 187-88; 58 C.J.S. *Mines and Minerals* § 173 at 369 (1948). See also note 37 *supra*.

<sup>39</sup> See 1 TIFFANY, *op. cit. supra* note 8, § 188 at 302-03. Cf. 51 C.J.S. *Landlord and Tenant* § 104 at 683 (1947).

<sup>40</sup> See 1 TIFFANY, *op. cit. supra* note 8, 188 at 302-03.

#### IV. FORFEITURE FOR BREACH OF AN IMPLIED OBLIGATION TO DEVELOP OR WORK A MINERAL LEASE

The question of what remedy is available to a lessor, where his lessee's failure to develop or work a mineral lease constitutes a breach only of an implied obligation, remains. An obligation to develop or work a mine under a mineral lease, if not expressly provided by covenant or condition, is imposed upon the lessee by necessary implication to protect the lessor where the lease provides for royalties on the product mined as the only consideration for the lease.<sup>41</sup> It would seem that the obligation to develop or work a mineral lease with reasonable diligence would provide the lessor with an action for damages for breach as in the case of an express covenant standing alone, where that obligation is merely implied (whether regarded as an implied covenant or as an implied condition). Furthermore, the lessor would be thought limited to his action for damages under the doctrinal pattern set out earlier—at least in the absence of an express forfeiture clause.<sup>42</sup> Such is the law of landlord and tenant,<sup>43</sup> but so far as mineral leases are concerned the authorities are in conflict.<sup>44</sup> Forfeiture is a generally recognized remedy for breach of the implied obligation to develop or work a mineral lease,<sup>45</sup> although there is some authority against this view.<sup>46</sup> One writer has suggested a careful rationalization of the prevailing doctrine of forfeiture in other terms:<sup>47</sup>

By some decisions, if the rent is, by the terms of the lease, entirely dependent on the extraction of ore, a covenant on the

<sup>41</sup> See 58 C.J.S. *Mines and Minerals* § 183 (1948); 36 AM. JUR. *Mines and Minerals* § 52 at 316 (1941). The absence of a fixed periodic rent in lieu of production may lead to this implied obligation. See *Frierson v. International Agricultural Corp.*, 24 Tenn. App. 616, 148 S.W.2d 27 (1940). Cf. 36 AM. JUR. *Mines and Minerals* § 60 (1941). But see, e.g., *Killebrew v. Murray*, 151 Ky. 345, 151 S.W. 662 (1912).

<sup>42</sup> See notes 37, 39-40 *supra* and accompanying text. As to conditions implied in law, especially in connection with various statutory provisions, see 1 TIFFANY, *op. cit. supra* note 8, § 189.

<sup>43</sup> See 51 C.J.S. *Landlord and Tenant* § 104 (1947).

<sup>44</sup> The mineral lease cases are collected in Annot., 60 A.L.R. 901, 922-26 (1929). Cf. materials cited in note 45 *infra*, and the cases there cited.

<sup>45</sup> See MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES §§ 159-60; 216-23 (2d ed. 1940); 58 C.J.S. *Mines and Minerals* § 184 at 394 (1948); and note 44 *supra*.

<sup>46</sup> *Ibid.* See also, e.g., *Continental Fuel Co., v. Haden*, 182 Ky. 8, 106 S.W. 8 (1918).

<sup>47</sup> 2 TIFFANY, *op. cit. supra* note 8, § 588 at 514-15.

part of the lessee is to be implied that he will work the claim or mine with reasonable diligence, and occasionally it has even been decided that, although there is no express provision to that effect, the lessor may assert a forfeiture for failure to work. It would, however, be more in accord with principle to base the rights of the lessor in such case, as to resumption of possession, upon the theory that the failure to work involves an offer to relinquish possession which the lessor may accept, thereby effecting a surrender by operation of law, or upon the theory that a promise to work the mine is to be implied, and that upon the lessee's repudiation of that promise the other party may rescind and recover the consideration for the promise, that is, the possession of the land.

The distinction suggested is based on principle and does not go to the question of the necessity of forfeiture as a remedy. Doubtless the exact form of the obligation—condition or covenant, express or implied—is of less importance than the nature of the remedy applied in case of breach, at least so far as the parties to the lease are concerned. Loss of a lease of any kind may be such a drastic penalty to apply to a lessee in many cases that it merits further consideration here. A number of Nebraska cases and statutes are available and supply an opening for analysis.

## V. LOSING A MINERAL LEASE IN NEBRASKA

### A. CASES

Loss of a mineral lease in Nebraska appellate cases has involved, prior to the *George* case, a question of abandonment.<sup>48</sup> In *Clay v. Palmer*,<sup>49</sup> evidence was found sufficient to deny abandonment of a potash lease. The court said in dictum:<sup>50</sup>

In such an instrument it is implied that the refusal or neglect of the lessee to work the deposits, if continued for such a length of time as to indicate that the enterprise was wholly abandoned, would work a forfeiture of the lease.

In *Lincoln Land Co. v. Commonwealth Oil Co.*,<sup>51</sup> an oil and gas lease (by its terms a mining lease) was cancelled where the defendant lessee violated an agreement to drill or pay rentals, removed its rigging, and surrendered possession of the property.

<sup>48</sup> See *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953); *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652, 192 N.W. 219 (1923); *Clay v. Palmer*, 104 Neb. 476, 177 N.W. 840 (1920). But see *Fritsche v. Turner*, 133 Neb. 633, 276 N.W. 403 (1937) (cancellation by express terms of a lease).

<sup>49</sup> 104 Neb. 476, 177 N.W. 840 (1920).

<sup>50</sup> *Id.* at 484, 177 N.W. at 843.

<sup>51</sup> 109 Neb. 652, 192 N.W. 219 (1923).

Under express terms of the lease, nonperformance for two years was a ground of forfeiture by the lessor. *Held*, the lease was terminated or abandoned by the lessee's failure to prospect, produce, or pay rentals over a period in excess of ten years. This case has been criticized as a case in which "the term of the lease simply has expired by operation of the express provisions of the instrument," rather than one constituting a true example of abandonment.<sup>52</sup> The pertinent language is, however, quoted with approval in *Valentine Oil Co. v. Powers*.<sup>53</sup> Although the law is not clear, abandonment and forfeiture are not synonymous; abandonment is regarded as a voluntary act dependent upon the intent of the lessee while forfeiture is thought to be coercive.<sup>54</sup> Indeed, abandonment as a requisite of forfeiture was denied in the *George* case, while forfeiture as a remedy in case of breach of an implied covenant to work a gravel lease or to market the product was expressly approved.<sup>55</sup>

The implied obligation is an established feature of the law of solid-mineral leases,<sup>56</sup> and is also a familiar problem in the law of oil and gas leases,<sup>57</sup> but the Nebraska oil and gas cases have so far involved expiration according to express terms of particular leases.<sup>58</sup> The Nebraska Supreme Court has distinguished "termination" from "forfeiture,"<sup>59</sup> and a series of Ne-

<sup>52</sup> MERRILL, *op. cit. supra* note 45, § 8 at 30.

<sup>53</sup> 157 Neb. 71, 84, 59 N.W.2d 150, 159 (1953).

<sup>54</sup> *Coleman v. Mountain Mesa Uranium Corp.*, 257 F.2d 382, 383-84 (10th Cir. 1958). Cf. *Hummel v. McFadden*, 395 Pa. 543, 556-57, 150 A.2d 856, 862 (1959); 36 AM. JUR. *Mines and Minerals* § 58 (1941).

<sup>55</sup> *George v. Jones*, 168 Neb. 149, 162-64, 95 N.W.2d 609, 616-17 (1959).

<sup>56</sup> See *Carter v. Certain-Teed Products Corp.*, 102 F. Supp. 280, 290-91 (N.D. Iowa 1952), *remanded to modify on another point*, 200 F.2d 754 (8th Cir. 1953); MERRILL, *op. cit. supra* note 45, § 218, n. 10 at 456-57. Cf. Annot. 60 A.L.R. 901 (1929). But see *United Feldspar and Minerals Corp. v. Bumpus*, 142 Me. 230, 49 A.2d 473 (1946).

<sup>57</sup> See MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES (2d ed. 1940); 2-3 SUMMERS, *op. cit. supra* note 35, §§ 391-510; BROWN, OIL AND GAS LEASES §§ 16.01-.04 (1958); GLASSMIRE, OIL AND GAS LEASES AND ROYALTIES §§ 65-66 (2d ed. 1938). Cf. 3 LINDLEY, *op. cit. supra* note 9, § 862.

<sup>58</sup> See *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958); *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953); *Fritsche v. Turner*, 133 Neb. 633, 276 N.W. 403 (1937); *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652, 192 N.W. 219 (1923).

<sup>59</sup> *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 424, 89 N.W.2d 245, 254 (1958), quoting *Kugel v. Young*, 132 Colo. 529, 537, 291 P.2d 695, 700 (1956).

braska decisions involving delay rental "unless" clauses in oil and gas leases has resulted in "automatic termination" of leases where a lessee violated express stipulations of his lease.<sup>60</sup> Recently, however, in *Long v. Magnolia Petroleum Co.*,<sup>61</sup> the same court held that, in the absence of an express forfeiture clause, an oil and gas lease would not terminate automatically during the primary term of the lease on the failure of the lessee to produce oil in paying quantities.

## B. STATUTES

The *Long* case arose under the Nebraska statutes providing for cancellation of a recorded oil, gas, or mineral lease.<sup>62</sup> A lessor claiming forfeiture of such a lease by his lessee may bring an action in equity to cancel the lease and quiet title to the mineral rights in the lessor, however, whether the lease is recorded or not.<sup>63</sup>

If an oil, gas, or other mineral lease has been recorded in the county in which the leased land is located, a means of recordation of surrender or forfeiture has been provided.<sup>64</sup> These statutes

<sup>60</sup> *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953); *Fritsche v. Turner*, 133 Neb. 633, 276 N.W. 403 (1937); *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652, 192 N.W. 219 (1923). But see *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958).

<sup>61</sup> 166 Neb. 410, 89 N.W.2d 245 (1958). This case involved, *inter alia*, construction of a production requirement in the habendum clause of an oil and gas lease. The court stressed that the lessee had been beset by technical difficulties in operation of a well; that production had not entirely ceased; and that the lessee had developed the premises in good faith and with reasonable diligence during the primary term of the lease.

<sup>62</sup> The present Nebraska statutes, *infra* notes 63-64, are not the first on the subject. See NEB. COMP. STAT. (1929) §§ 57-207—09, which provided for forfeiture of oil, gas, or other mineral leases in event of the lessee's default in certain obligations. For a discussion of these sections, which were repealed by Neb. Laws c. 70, § 1 (1939), see MERRILL, *op. cit. supra* note 57, § 215 at 450-53.

<sup>63</sup> NEB. REV. STAT. §§ 25-21,112—20 (Reissue 1956). See also *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 415, 89 N.W.2d 245, 249 (1958).

<sup>64</sup> As to written surrender of the lease, see NEB. REV. STAT. § 57-201 (Supp. 1957). Affidavits of forfeiture are provided. *Id.* § 57-204(2). As to form and contents of the affidavit, see *Id.* § 57-202. It has been made the duty of the lessee to execute and record a surrender of the lease when the lease shall "become forfeited." *Id.* § 57-201. Provision is made for notice to the lessee if the lessee fails or neglects to execute and record a surrender. *Id.* § 57-202. In the event of such

have been criticized at superfluous,<sup>65</sup> a criticism partially substantiated by *Fritsche v. Turner*,<sup>66</sup> which involved a lease containing express provisions similar to the statutory procedure. The court passed over this and did not apply or construe the method.<sup>67</sup>

A Kansas statute comparable to the Nebraska statute just discussed has been applied and construed in a number of cases.<sup>68</sup> In one of these, *Christiansen v. Virginia Drilling Co.*,<sup>69</sup> the Kansas Supreme Court considered the applicability of the Kansas statute to implied covenants. *Held*, the Kansas statute was applicable only to a breach of express terms of the lease, on the ground that there has been no breach of an implied covenant until judicially determined.

Leases of Nebraska lands<sup>70</sup> may be declared forfeited by the Board of Educational Lands and Funds on default of the lessee

neglect, the lessor may proceed by affidavit of forfeiture, *Id.* § 57-203, and provision is also made for a case of a claim of non-forfeiture by the lessee in answer to the affidavit of forfeiture. *Id.* § 57-204(1). Also, in the case of such refusal to execute and record a surrender, the lessor may, as an alternative, elect to bring suit to obtain the surrender as he could without the benefit of the statutes. NEB. REV. STAT. § 57-205 (Reissue 1952).

<sup>65</sup> See Weaver, "Oil and Gas Leases in Nebraska," 21 NEB. L. REV. 104, 107-08 (1942).

<sup>66</sup> 133 Neb. 633, 637, 276 N.W. 403, 405 (1937). One writer, discussing this case, said: "The lease provided that if any annual rental was not paid within 30 days after becoming due, the lease could be cancelled by the filing of an affidavit of nonpayment by the bank designated as the depository for such rental payments. In an action in which, *inter alia*, the lessor sought cancellation of this lease for failure of the lessee to drill or pay the rental, the court held that the 'unless' clause is to be strictly construed in favor of the lessor and against the lessee; that in such a lease contract time is of the essence; and that failure of the lessee to pay the rental on the date stipulated automatically terminated the lease contract, even though the lease provided for cancellation in such event in another manner." Shokes, *supra* note 23, n. 8 at 375-76.

<sup>67</sup> See note 66 *supra*. "So the parties making the lease were liable and the lease was subject to cancellation. The district court ignored this, probably because the lease itself provided, as shown in our statement of the facts, for cancellation by another method. . ." *Fritsche v. Turner*, 133 Neb. 633, 637, 276 N.W. 403, 405 (1937).

<sup>68</sup> See KAN. GEN. STAT. ANN. §§ 55-201 — 06 (1949) and cases there noted. Cf. *Id.* §§ 55-201 — 02; -205 — 6 (Supp. 1959).

<sup>69</sup> 170 Kan. 355, 226 P.2d 263 (1951).

<sup>70</sup> See NEB. CONST. art. III, § 20; NEB. REV. STAT. c. 72, arts. 2-3, 5, 9 (Reissue 1958), as amended, Neb. Laws c. 333, § 1 (1959). Cf. *Briggs v. Neville*, 103 Neb. 1, 170 N.W. 188 (1918). The term "lease" appears

in any of several particulars,<sup>71</sup> including failure "to perform any of the covenants of the lease."<sup>72</sup> In cases involving defaults other than failure to pay rentals, the Nebraska statute on educational lands provides for notice, showing of cause, and a hearing.<sup>73</sup>

### C. APPLICATION

None of the cases and statutes so far discussed received any application or construction by the court in the *George* case.<sup>74</sup> Discussion of Nebraska materials was perhaps unnecessary in the *George* case, so far as the decision was concerned, but it is submitted that the absence of such discussion has produced an inconsistency in Nebraska law at a time when some clarification of our mineral law was both possible and desirable.

## VI. FORFEITURE OF GRAVEL LEASES IN NEBRASKA

The result reached in the *George* case, as suggested earlier, is generally accepted in the law of mineral leases.<sup>75</sup> The decided weight of authority in the field of oil and gas law is in accord,<sup>76</sup> and two oil and gas cases are cited in the *George* case, but each

to be used interchangeably with "permit" in NEB. REV. STAT. c. 72, art. 3 (Reissue 1958). As to mineral leasing on school and saline lands, see, in the order cited, Nebraska Enabling Act § 7, 13 Stat. 49 (1864); *Ivanhoe Mining Co. v. Consolidated Mining Co.*, 102 U.S. 167, 175 (1880); Ely & Wheatley, "Mineral Titles and Tenure," *ECONOMICS OF THE MINERAL INDUSTRIES* 81, 91-92 (1959); Pre-emption Act § 10, 5 Stat. 456 (1841); 73 C.J.S. *Public Lands* § 91 (1951); 44 Stat. 1026 (1927); 48 Stat. 1185 (1934); *State v. McMullen*, 119 Neb. 739, 230 N.W. 677 (1930); NEB. REV. STAT. § 72-301 (Reissue 1958).

<sup>71</sup> NEB. REV. STAT. § 72-235 (Reissue 1958). Forfeiture of leases of saline lands is provided in case of default in rental payments. *Id.* § 72-503. For other statutory provisions in this area, see *Id.* §§ 72-303 — 05, 901, 905; Neb. Laws c. 333, § 1 (1959).

<sup>72</sup> NEB. REV. STAT. § 72-235 (Reissue 1958).

<sup>73</sup> *Ibid.*

<sup>74</sup> *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609 (1959), did not involve school land. The lease was evidently not recorded. See Record, *George v. Jones*, *supra*. Although not discussed, NEB. REV. STAT. §§ 25-21,112 — 20 (Reissue 1956) would apparently apply. See *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 415, 89 N.W.2d 245, 249 (1958).

<sup>75</sup> See notes 39-41 and 44 *supra*.

<sup>76</sup> See MERRILL, *op. cit. supra* note 57, §§ 160, 221; 3 LINDLEY, *op. cit. supra* note 9, § 862 at 2147; and materials there cited and in note 45 *supra*.

is treated as mining authority.<sup>77</sup> Are the oil and gas cases necessarily applicable to a case involving sand and gravel? Professor Merrill has pointed out that:<sup>78</sup>

. . . [T]he peculiar nature of oil and gas and the conditions under which oil and gas leases have been drawn and executed have played havoc with the traditional rules of the law of landlord and tenant. In spite of the general hostility of the law toward forfeitures . . . a decided preponderance of the cases hold that forfeiture of the lease is a proper remedy for the breach of the implied covenants, either concurrently with the recovery of damages, or as an alternative to that remedy, depending upon the situation presented, or, in some cases, as the exclusive remedy.

It would seem that the "peculiar nature of oil and gas" and the conditions under which oil and gas leases are drawn, which have led to the general application of forfeiture as a remedy in oil and gas cases, should at least caution against the use of oil and gas lease cases as controlling in cases involving sand and gravel leases. But any necessity for such caution has been denied by an interesting argument advanced by the Supreme Court of Arkansas.<sup>79</sup>

The case of *Morley v. Berg*, Ark., 235 S.W.2d 873 (opinion delivered January 15, 1951), involved the removal of gravel; and we there cited the oil and gas case of *Mansfield Gas Co. v. Alexander*, 97 Ark. 167, 133 S.W. 837. So the holdings in the oil and gas cases apply to a case like this one, where there is a grant, or lease of premises, for mining and removal of minerals, and with the promise by the grantee to pay royalty.

If the *George* case is to be regarded as accepting this last argument by implication,<sup>80</sup> the Nebraska oil and gas case of *Long v. Magnolia Petroleum Co.*<sup>81</sup> suggests an unexplained contradiction in Nebraska case law. Although the *Long* case, as indicated elsewhere,<sup>82</sup> turned on express language of the lease involved,

<sup>77</sup> *Mansfield Gas Co. v. Alexander*, 97 Ark. 167 133 S.W. 837 (1911); *Phillips v. Hamilton* 17 Wyo. 41, 95 Pac. 846 (1908). Similar treatment is accorded these cases, however, in Annot., 60 A.L.R. 901, 902-03, 908, 922-23 (1929), an annotation cited by the court in *George v. Jones*, 168 Neb. 149, 163, 95 N.W.2d 609, 616 (1959).

<sup>78</sup> MERRILL, *op. cit. supra* note 57, § 160 at 362-63.

<sup>79</sup> *Mooney v. Gantt*, 219 Ark. 485, 488-89, 243 S.W.2d 9, 11 (1951). See also *Cotner v. Mundy*, 92 Okla. 268, 219 Pac. 321 (1923), cited in *George v. Jones*, 168 Neb. 149, 162, 95 N.W.2d 609, 616 (1959); and note 45 *supra*.

<sup>80</sup> The idea is not discussed in the *George* case, but see notes 77 and 79 *supra*, and accompanying text.

<sup>81</sup> 166 Neb. 410, 89 N.W.2d 245 (1958). This case was not cited to the court in the *George* case by attorneys for either side. Briefs, *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609 (1959). Cf. note 61 *supra*.

<sup>82</sup> See note 61 *supra*, and accompanying text.

the Nebraska court, quoting with approval from a Kansas case,<sup>83</sup> said:<sup>84</sup>

We find nothing in the contract providing for a forfeiture or cancellation of the lease for the failure of the lessees to produce oil and gas in paying quantities during the primary term of the lease. The failure of lessees to produce or failure, alone, of production in paying quantities during the primary term of the lease did not result in a defeasance ipso facto. To hold otherwise would be to read into the lease express provisions which did not exist, and this we cannot do.

Another Nebraska case, *Chesnut v. Master Laboratories*,<sup>85</sup> involving a non-mineral lease, directly supports this view, citing a West Virginia case in which a mining lease was so construed.<sup>86</sup> The court said in the *Chesnut* case:<sup>87</sup>

Forfeitures of estate under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach.

If then, in view of these cases, the lease is entirely silent, as in the *George* case, both as to forfeiture and as to an obligation to develop or to work the premises with reasonable diligence, cancellation is seen to be a most extraordinary remedy.<sup>88</sup> The language and tenor of these earlier cases require at least an examination of the necessity of forfeiture in cases involving breach of an implied obligation to work a gravel lease. If enforcement of forfeiture as a remedy is a matter of discretion on the part of a court of equity,<sup>89</sup> and to be avoided unless clearly necessary,<sup>90</sup> is there not a less drastic remedy available?

<sup>83</sup> *Baker v. Huffman*, 176 Kan. 554, 557, 271 P.2d 276, 278 (1954).

<sup>84</sup> *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 423, 89 N.W.2d 245, 256 (1958). Compare *Pearson v. Ellithorpe*, 48 N.D. 332, 184 N.W. 672 (1921), where the court applied the same principles, but appeared influenced by a small minimum royalty provision.

<sup>85</sup> 148 Neb. 378, 27 N.W.2d 541 (1957).

<sup>86</sup> *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922).

<sup>87</sup> *Chesnut v. Master Laboratories*, 148 Neb. 378, 390, 27 N.W.2d 541, 549 (1959). This case also was not cited to the court in the *George* case by attorneys for either side. Briefs, *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609 (1959).

<sup>88</sup> The court in the *George* case recognized forfeitures as odious in law and disfavored unless clearly necessary. *George v. Jones*, 168 Neb. 149, 162, 95 N.W.2d 609, 616 (1959). Cf. Annot., 60 A.L.R. 901, 922-26 (1929).

<sup>89</sup> See *Christiansen v. Virginia Drilling Co.*, 170 Kan. 355, 226 P.2d 263 (1951). See also 19 AM. JUR. *Equity* §§ 84-87 (1939).

<sup>90</sup> See note 88 *supra*.

## VII. REMEDIES ALTERNATIVE TO FORFEITURE

The plaintiff in the *George* case relied upon forfeiture alone as the remedy available where his damages at law would be inadequate.<sup>91</sup> It is true that ascertainment of damages in such cases is problematical at best,<sup>92</sup> but in view of the court's conclusion "that the capability of the gravel pit is no mystery, nor is it an unknown quantity,"<sup>93</sup> it does not necessarily follow that the remedy of damages is wholly inadequate.<sup>94</sup> If the mineral involved is a solid mineral "in place" within a well-defined deposit, and damages are now more reliably ascertainable in oil and gas cases,<sup>95</sup> should not geological and engineering testimony in sand and gravel cases be even more reliable where the mineral is not of a "fluid" nature?<sup>96</sup> Are damages at law "wholly inadequate" where measured by the stipulated royalty on the amount which should reasonably have been produced but was not?<sup>97</sup> But even if damages at law are thought to be inadequate or too difficult to determine, forfeiture is still not the only available alternative.

## VIII. THE ALTERNATIVE DECREE

Remedies alternative to forfeiture where damages are not readily capable of measurement are recognized and such relief may even be equitably more desirable.<sup>98</sup> Chief among these is the alternative decree, a remedy requiring further supervision of the parties by the court, described by Professor Merrill as:<sup>99</sup>

. . . [R]equiring the lessee to do those things necessary to fulfill his obligations under the implied covenant, within a time

<sup>91</sup> Brief for Appellees, p. 22, *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609 (1959). The lessees did not discuss the question. Brief for Appellants, *George v. Jones*, *supra*.

<sup>92</sup> See MERRILL, *op. cit. supra* note 57, § 157. Cf. Annot., 1915B L.R.A. 561. See also *Michelsen v. Dwyer*, 158 Neb. 427, 63 N.W.2d 513 (1954).

<sup>93</sup> *George v. Jones*, 168 Neb. 149, 165, 95 N.W.2d 609, 617 (1959).

<sup>94</sup> See 19 AM. JUR. *Equity* § 125 (1939); MERRILL, *op. cit. supra* note 57, § 158.

<sup>95</sup> *Ibid.*

<sup>96</sup> As to measure of damages, see Annot., 60 A.L.R. 901, 935-36 (1929).

<sup>97</sup> When production is obtained, the lessor gains an additional royalty on what might be considered the same material measured previously by damages at law. But see the materials cited in note 92 *supra*.

<sup>98</sup> See 19 AM. JUR. *Equity* §§ 86-87; MERRILL, *op. cit. supra* note 57, §§ 168, 172. Cf. MERRILL, *supra*, §§ 173-75. See also *Id.* § 166 and *Id.* § 170 (Supp. 1959).

<sup>99</sup> MERRILL, *op. cit. supra* note 57, § 168 at 378-79.

fixed by the court, the lease to be forfeited and cancelled, in default of such performance. It will be noted that this is not true specific performance of a contract, since the lessee is not absolutely required to carry out the implied covenants. . . .

If the remedy of an alternative decree, which is said to have originated in a case involving a mining lease,<sup>100</sup> is receiving increasing application in oil and gas cases<sup>101</sup> where calculation of damages is obviously most difficult,<sup>102</sup> such a remedy ought to commend itself also to solid mineral cases.<sup>103</sup> An alternative decree protects the lessor's interest as well as public and private interests in the development of minerals in land<sup>104</sup> while also relieving the lessee from an extraordinary penalty most odious where not clearly stipulated,<sup>105</sup> especially if it is really the lessee's desire to work the premises for the mutual benefit of both parties.<sup>106</sup>

#### IX. OBSERVATIONS ON GRAVEL LEASES IN NEBRASKA

The Nebraska attorney accustomed to the ordinary law of landlord and tenant<sup>107</sup> should, as indicated by the *George* case, give careful consideration to the doctrine of implied obligations as developed in mineral law if called upon to draft a sand and

<sup>100</sup> *Price v. Nicholas*, 19 Fed. Cas. 1320 (No. 11415) (C.C. W.D. Va. 1878). See MERRILL, *op. cit. supra* note 57, § 169 at 379.

<sup>101</sup> See MERRILL, *op. cit. supra* note 57, § 171 at 384.

<sup>102</sup> *Id.* § 157.

<sup>103</sup> Especially if oil and gas cases are now precedent in Nebraska cases involving solid minerals. See note 80 *supra*.

<sup>104</sup> See, e.g., Annot., 11 L.R.A. (N.S.) 417, 418 (1908).

<sup>105</sup> See, e.g., *Johnson v. Everidge*, 308 S.W.2d 433 (Ky. App. 1957). Cf. *Chesnut v. Master Laboratories*, 148 Neb. 378, 27 N.W.2d 541 (1947).

<sup>106</sup> See *Miller v. Mauney*, 150 Ark. 161, 234 S.W. 498 (1921), where the court observed: ". . . In other words, the lessees under such a contract will not be allowed to speculate upon the chance of being able at some indefinite and unreasonable time in the future to begin and to continue the work of exploration and development required of him under the covenants of his contract." *Id.* at 169, 234 S.W. at 501.

<sup>107</sup> See *Chesnut v. Master Laboratories*, 148 Neb. 378, 27 N.W.2d 541 (1947). Cf. 1 TIFFANY, *op. cit. supra* note 8, § 188 at 302; 3A THOMPSON, REAL PROPERTY § 1325 (repl. 1959); 32 AM. JUR. *Landlord and Tenant* §§ 847-48 (1941); 51 C.J.S. *Landlord and Tenant* § 104 (1947).

gravel lease.<sup>108</sup> He should provide against forfeiture during the customarily inactive season<sup>109</sup> and give consideration to express forfeiture and obligation provisions as a guard against implication of unwanted covenants and conditions.<sup>110</sup>

There are other means by which an attorney for the lessor under a sand and gravel lease may provide for diligent operation, some of which have varying tax consequences.<sup>111</sup> The lessor may compel operation by requiring a heavy fixed rent in lieu of royalties during periods of non-operation;<sup>112</sup> by setting such a consideration for the lease in lieu of royalties and whether the mine is worked or not, that the lessee can be expected to work the mine to pay the rent;<sup>113</sup> or by requiring a minimum periodic production, subject to royalties, from the property.<sup>114</sup>

If a Nebraska gravel lease does not contain express provisions regarding development, operation, and forfeiture, it will be subject to the rules approved in the *George* case, and the court will be justified in applying rules applicable to other types of percent-

<sup>108</sup> There are a number of cases involving sand and gravel leases. See, e.g., *Thompson v. Clark*, 221 Ark. 955, 257 S.W.2d 42 (1953); *Mooney v. Gantt*, 219 Ark. 485, 243 S.W.2d 9 (1951); *Morley v. Berg*, 218 Ark. 195, 235 S.W.2d 873 (1951); *Irving v. Ort*, 146 N.E.2d 107 (Ind. App. 1957); *Fifield v. Biesanz*, 167 Minn. 399, 209 N.W. 259 (1926); *Alexander v. Grove Stone & Gravel Co.*, 237 N.C. 251, 74 S.E.2d 538 (1953); *Hurwitz v. Carolina Sand & Gravel Co.*, 191 N.C. 630, 132 S.E. 671 (1923). See also the general discussion in 36 AM. JUR. *Mines and Minerals* § 59 at 321 (1941).

<sup>109</sup> For a definition of the "active season" in sand and gravel operations, See *In re Grooms' Estate*, 204 Iowa 746, 755, 216 N.W. 78, 82 (1927).

<sup>110</sup> See 58 C.J.S. *Mines and Minerals* § 184 at 394 (1948). Cf. "Uranium Mining Lease," 27 ROCKY MT. L. REV. 425, 440-45 (1955). There are a number of ways in which obligations of the lessee can be expressed. Perhaps most common are provisions for continuous operation such as in *Zelleken v. Lynch*, 80 Kan. 746, 104 Pac. 563 (1909), and for operation in a workmanlike manner, as in *Goodykoontz v. White Star Mining Co.*, 94 W. Va. 654, 119 S.E. 862 (1923).

<sup>111</sup> See SULLIVAN, HANDBOOK OF OIL AND GAS LAW § 245 (1955).

<sup>112</sup> See, e.g., *Hummel v. McFadden*, 395 Pa. 543, 150 A.2d 856 (1959). Delay rentals and advance royalties are beyond the scope of this comment, but as to oil and gas leases in Nebraska, however, see NEB. REV. STAT. § 57-219 (Reissue 1952).

<sup>113</sup> See *Jegon v. Vivian*, L.R. 6 Ch. 742, 17 Eng. Rul. Cas. 843, 8 Mor. Min. Rep. 628 (1871).

<sup>114</sup> See *McKnight v. Kreutz*, 51 Pa. 232, 6 Mor. Min. Rep. 305 (1866).

age leases, especially mineral leases dependent upon operation alone for compensation to the lessor.<sup>115</sup>

The sand and gravel lease has characteristics similar to those of mining leases, oil and gas leases, and other types of percentage leases.<sup>116</sup> The classification itself presents the outstanding feature distinguishing one type of percentage lease from another, that is, the subject-matter of the lease involved. The importance of effective testimony, including that of expert witnesses, and of relevant evidence regarding diligence of operation need not be limited to the issue of reasonable diligence,<sup>117</sup> because any effort to distinguish a sand and gravel case from the many other mineral lease cases supporting drastic remedies in the lessor's favor will depend upon such testimony.<sup>118</sup> This is because the standards of diligence felt necessary under other mineral leases, and especially in oil and gas cases, arise in part from the nature of the mineral involved.<sup>119</sup> It is submitted that even the standards applied in cases involving other solid minerals ought not be applied automatically to sand and gravel cases, especially if the nature of the mineral substance is such that radically different methods of extraction are necessarily employed.<sup>120</sup>

#### X. GRAVEL MINING IN NEBRASKA

The suggestion, just made, that sand and gravel exploitation ought not be categorized automatically with other forms of mineral recovery, thereby receiving identical treatment, requires further examination. What are some of the characteristics peculiar to the sand and gravel industry in Nebraska which might differentiate it from mining practices in other localities? Are these differences such that a different standard of diligence might be applied?

By way of introduction, it should be noted that, although Nebraska is one of the few Great Plains states which does not

<sup>115</sup> The attorney for the lessee in such a case will find himself faced with an impressive array of cases supporting drastic remedies in the lessor's favor. See the materials cited in note 56 *supra*.

<sup>116</sup> See notes 7 and 18-23 *supra*, and accompanying text.

<sup>117</sup> As to what constitutes reasonable diligence, see, *e.g.*, 60 A.L.R. 901, 909-17 (1929); 58 C.J.S. *Mines and Minerals* § 183(b) (1948).

<sup>118</sup> See notes 56 and 76 *supra*, and 120 *infra*, and accompanying text.

<sup>119</sup> See note 76 *supra*.

<sup>120</sup> As to manner and extent of operation in general, see Annot., 60 A.L.R. 901, 909-21 (1929).

figure in American metal mining, natural resources are not at all lacking in the state.<sup>121</sup> There has been increasing development of non-metals within the state during recent years. Oil and gas discovery and production has expanded greatly, but exploitation of other non-metals in Nebraska has been, and will continue to be a significant part of state industry, particularly in the field of rock products and other building materials.<sup>122</sup> Deposits of sand and gravel are of such extent and quality that exhaustion of deposits now producing will only require regular development of future sources on new properties nearby.<sup>123</sup> Such a widely distributed resource lying at shallow depth<sup>124</sup> lends itself well to exploitation by surface methods of mining.<sup>125</sup>

Herein lies the first major distinction between gravel mining in Nebraska and many other mining operations elsewhere. A mineral deposit dipping steeply away from the surface or lying at considerable depth requires underground mining practices, but surface methods are more economical when the deposit is relatively shallow and stratified roughly parallel to the surface.<sup>126</sup> High production costs in underground mining limit the amount

<sup>121</sup> See, e.g., Lugn, "A review of the Natural Resources of Nebraska," NEBRASKA ON THE MARCH (June, 1952).

<sup>122</sup> See Mullen, "Mineral Production in Nebraska in 1959," U.S. Bur. Mines Mineral Industry Surveys, Area Report D-98 (Preliminary 1960). Among the non-fuels, sand and gravel, followed by stone, are Nebraska's most important resources. In 1959, preliminary records show that 10,800,000 tons of sand and gravel, valued at \$3,200,000 and 3,700,000 tons of stone, valued at \$4,900,000, were produced in Nebraska. *Id.* at 2.

<sup>123</sup> Nebraska sand and gravel deposits are of unusually good quality and extend over much of the state, especially in the Platte River valley. See Condra, "The Sand and Gravel Resources and Industries of Nebraska," 3 NEBRASKA GEOLOGICAL SURVEY 1 (1911).

<sup>124</sup> Sand and gravel in the Platte River Valley, for example, underlies some of the most valuable agricultural land in Nebraska—just below the river-related water table which has made extensive irrigation in the valley passible. See *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N.W. 97 (1939).

<sup>125</sup> Underground mining methods have been practiced occasionally in Nebraska—notably southeast of Peru in Nemaha County (coal), and southwest of Springfield in Sarpy County (limestone)—but open-cut quarrying for stone and hydraulic dredging of sand and gravel have been found most feasible in the state. See Condra, *supra* note 123; Mullen, "The Mineral Industry of Nebraska," 3 MINERALS YEAR-BOOK (1957) 665-75 (1959). Cf. Pepperberg, "Coal in Nebraska," 3 NEBRASKA GEOLOGICAL SURVEY 275 (1911).

<sup>126</sup> See YOUNG, ELEMENTS OF MINING 401 (4th ed. 1946).

of material which can be removed and require a high yield per ton, while open-cut mining is typified by low per-ton yields, extensive removal of overburden, and large quantities of material processed.<sup>127</sup> While underground mines are less affected by inclement weather, they are more susceptible to caving and flooding, especially if left idle, and in such cases can be reopened only at considerable expense, if at all.<sup>128</sup> Although subsidence of the surface can be a problem in underground mining districts,<sup>129</sup> open-cut mining entirely destroys the pre-existing surface.<sup>130</sup> While all mining results in a substantial depletion or "wasting" of realty,<sup>131</sup> underground mineral deposits form a part of the realty of the surface landowner which may be separated from the fee title of the surface property owner.<sup>132</sup> Since gravel exploitation in Nebraska is a surface operation, the doctrine of separate estates is of little use, and in this special case the destruction of the pre-existing surface may be beneficial.<sup>133</sup> In any event, underground and surface mining have little in common.

Just as underground mining is distinguishable from surface mining, so hydraulic dredging of sand and gravel, as practiced

<sup>127</sup> See LEWIS, *op. cit. supra* note 15, at 219-22; YOUNG, *op. cit. supra* note 126, at 401. An idea of the expensive nature of underground mining may be gained from EATON, PRACTICAL MINE DEVELOPMENT AND EQUIPMENT (1934). Cf. 1-2 PEELE, MINING ENGINEERS' HANDBOOK §§ 3-27 (3d ed. 1941); VON BERNEWITZ, HANDBOOK FOR PROSPECTORS AND OPERATORS OF SMALL MINES 125-47 (4th ed. 1943).

<sup>128</sup> See Behre & Arbiter, *supra* note 15, at 76-77. See also RICKARD, A HISTORY OF AMERICAN MINING 60-62 (1932).

<sup>129</sup> See 58 C.J.S. *Mines and Minerals* § 278 (1948).

<sup>130</sup> If the material mined occurs directly at the surface, the pit is considered a quarry; if the material sought occurs below the surface and the overburden is stripped away, the operation should be termed open-cut, open-cast, open-pit, or strip mining. 1 STOCES, *op. cit. supra* note 15, at 471-74. The distinction becomes important when necessary to consider disposition of waste over-burden. See, e.g., Northern Illinois Coal Corp. v. Medill, 397 Ill. 98, 72 N.E.2d 844 (1947).

<sup>131</sup> "The removal of minerals, whether held in solution upon the land or resting in the soil and subsurface, is the removal of a component part of the real estate itself." Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288, 295, 167 N.W. 75, 77 (1918). See also Behre & Arbiter, *supra* note 15, 77-78.

<sup>132</sup> See 2 TIFFANY, *op. cit. supra* note 8, § 585, n. 24 (Supp. 1959).

<sup>133</sup> As abandoned sand-pits are valued as recreational areas in Nebraska, an owner of the surface estate may benefit from destruction of the pre-existing surface. See Merritt v. Ash Grove Lime & Portland

in Nebraska,<sup>134</sup> is distinguishable from other types of surface mining. Although it has been said that the same general rules of law apply to quarries that govern other types of mining,<sup>135</sup> sand and gravel exploitation in Nebraska<sup>136</sup> is as distinct from mining and quarrying in the usual sense as is placer mining, to some forms of which it resembles,<sup>137</sup> and herein lies the second major distinction in this area. A Nebraska gravel plant is not a quarry or placer operation.

When, lastly, differences in price per unit, markets, transportation facilities, and available reserves are noted,<sup>138</sup> it is evident that the gravel lessee's attorney can introduce considerable testimony reflecting upon the applicability of many if not most of the cases permitting drastic remedies in case of breach of implied obligations, as well as upon the issue of what constitutes reasonably diligent operation.

## XI. CONCLUSION

Because of the character and location of Nebraska gravel deposits,<sup>139</sup> gravel leases have become an important part of mineral recovery in the state. As Interstate and Defense Highway construction in Nebraska extends westward from Grand Island

Cement Co., 136 Neb. 52, 285 N.W. 97 (1939). Cf. the lease in *Powell v. Cone*, 100 Neb. 562, 160 N.W. 958 (1916). See also *Persons*, "Rewards of Land Rehabilitation," 61 ROCK PRODUCTS 62 (April 1958).

<sup>134</sup> See, e.g., 50 ROCK PRODUCTS 88, 89-91 (October 1947).

<sup>135</sup> 1 THOMPSON, *op. cit. supra* note 13, § 85 at 100-01.

<sup>136</sup> See the materials cited *supra* notes 125 and 134.

<sup>137</sup> Hydraulic mining by means of pumps and dredges should not be confused with hydraulic placer mining by means of nozzles. As to the latter, see *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. 753, 756 (D. Calif. 1884); BOWIE, HYDRAULIC MINING (4th ed. 1891). Cf. Spooner, "Sand and Gravel: Three Methods of Recovery," 52 ROCK PRODUCTS 82 (March 1949). Compare U.S. Bur. Mines Inform. Circ. Numbers 6826 (1935); 6875 (1936); 6879 (1936) on dredging methods of sand and gravel production, and Condra, *supra* note 123, with YOUNG, *op. cit. supra* note 126, at 468-81. See also 54 NEBRASKA BLUEPRINT 12-13, 40 (No. 4, January 1955). An exhaustive discussion and bibliography of the sand and gravel industry is found in LADOO & MYERS, NONMETALLIC MINERALS 453-70 (2d ed. 1951).

<sup>138</sup> See, e.g., *Hummel v. McFadden*, 395 Pa. 543, 150 A.2d 856 (1959). See also Knowlton, "Growing Pains for Sand and Gravel Ready Mix Industries," 59 ROCK PRODUCTS 58 (November 1956).

<sup>139</sup> See notes 123-24 *supra*.

through the Platte River valley,<sup>140</sup> many small sand and gravel leases can be expected to appear and compete with established producers to supply aggregates for the highway, following the pattern already established in the eastern area of the state. An orderly development of the law applicable to mineral leases in Nebraska is therefore a desirable goal; additional analysis of some of the problems outlined herein would lend to that development.

It is suggested that if forfeiture is to be commonly applied upon breach of obligations implied in mineral leases, some thought ought to be given to the usual requirement of notice pre-requisite to forfeiture, a matter not discussed in the *George* case.<sup>141</sup> The language of earlier opinions, left unexplained, marks the *George* case as the broad introduction of a stringent rule to Nebraska mineral law. It is to be hoped that the rule can be equitably tempered according to the circumstances of individual cases. Primarily, consideration of the alternative decree in the light of the ordinary rules of real property and landlord and tenant would be a forward step away from automatic application of an often inequitable remedy otherwise unfavored in Nebraska law.

*Don H. Sherwood, '61*

<sup>140</sup> See 38 NEB. L. REV. 398 (1959). See also 58 NEBRASKA BLUE-PRINT 12-13, 36 (No. 6, March 1960).

<sup>141</sup> It is, however, alleged in plaintiffs' petition that the defendants were "repeatedly warned" of their obligations. *George v. Jones*, 168 Neb. 149, 152, 95 N.W.2d 609, 611 (1959). As to the requirement of notice, see MERRILL, *op. cit. supra* note 57, § 192; 58 C.J.S. *Mines and Minerals* § 184(3) (1948). Cf. *Cotner v. Mundy*, 92 Okla. 268, 219 Pac. 321 (1927). See also *Cannon v. Wilbur*, 30 Neb. 777, 47 N.W. 85 (1890), and NEB. REV. STAT. § 57-202 (Supp. 1957); NEB. REV. STAT. § 72-305 (Reissue 1958).