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that the *Gordon* case had not required such a foundation.[21] The federal rule now is that the defendant may compel production merely by making his demand for specific documents containing prior statements which touch the testimony of the government witness.[22] It is interesting to speculate as to whether the Louisiana Supreme Court will further liberalize its views as a result of the *Jencks* decision.

Jerre Lloyd

MINERAL RIGHTS — BREACH OF CONTRACT — DAMAGES

Plaintiff landowners executed a mineral lease with defendant's assignors. The lease contained a clause obligating the lessee to drill offset wells if such were necessary,[1] and also provided that the lessor had to put the lessee in default for any alleged breach of any express or implied obligation of the lease.[2] If the lessee, within sixty days of notice, proceeded to meet the alleged breaches, he was not to be considered in default. Defendant drilled a well on the leased tract, completing it in the "D" sand, the lowest of three productive sands. Subsequently, six wells were drilled by defendant on surrounding tracts. As a consequence of a geological survey conducted by plaintiffs, it was disclosed that one of the adjoining wells was within 660 feet of the leased tract,[3] that the surrounding wells were producing from the "C" sand which underlay plaintiffs' tract, and that they were draining minerals underlying the leased tract. Plaintiffs gave notice of breach, demanding that defendant take steps to prevent drainage from the "C" sand beneath the leased tract. Within forty-two days defendant had recompleted the well on the leased tract in the "C" sand. In a suit to recover damages for failure to drill an offset well and for drainage from beneath

21. 353 U.S. 657 (1957), noted page 345 *supra.*

22. *Ibid.*

1. "In the event a well or wells producing oil in paying quantities should be brought in on adjacent lands not owned by the Lessor and within six hundred sixty (660) feet of said land, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances."

2. "In the event Lessor considers that Lessee has not complied with all its obligations hereunder, both express and implied, Lessor shall notify Lessee in writing, setting out specifically in what respects Lessee has breached this contract. If within sixty (60) days after receipt of such notice, Lessee shall meet or commence to meet the breaches alleged by Lessor Lessee shall not be deemed in default hereunder. The service of said notice and the lapse of sixty (60) days without Lessee meeting or commencing to meet the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder."

3. See note 1 *supra.*

the leased tract, plaintiffs alleged breach of certain express and implied obligations. The district court dismissed the complaint. On appeal, *held*, affirmed. The appellee's operations on adjoining leases did not constitute an active breach of contract exonerating plaintiff from the necessity of putting defendant in default. Further, the complaint stated no cause of action in tort, as contended by plaintiff. Since defendant had complied with plaintiffs' sole notice of default, it could not be held in damages. *Billeaud Planters Co. v. Union Oil Co. of California*, 245 F.2d 14 (5th Cir. 1957)

In those systems of law springing from the Roman Civil Law, the recovery of damages for breach of contract is based upon the notion of fault.[4] According to Toullier, an obligor is always guilty of fault when he has failed to fulfill his obligations without legitimate excuse — without having been impeded from performance by an event which cannot be imputed to him.[5] The problem of fault sufficient to subject a party to liability for damages resolves itself into the question of when an obligor may be deemed "in default" in the juridical sense of the word. A distinction appears to be drawn on the basis of awareness on the part of the obligor that he has been guilty of fault. Thus, the separation is made between active and passive breach of contract.[6] If a person violates a contract by doing something which he is bound not to do, the law presumes knowledge of the improper nature of such an act, and the right to seek damages inures to the benefit of the obligee at the moment of breach.[7] On the other hand, if a party be bound to do something, or to deliver an object, even though a time be specified for performance, the law infers that the parties merely intended that performance be exigible at the will of the obligee.[8] For this reason, the obligee is required to make a demand of performance upon his obligor in order to give him notice that he may be held in damages and thus prevent his being surprised by a demand for damages when he is ignorant of any fault on his part.[9] In the category of passive breach, however, an exception is made if time is considered "of the essence" of the contract, or, in other words, if the obligation may be performed only at a single

4. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS 402 *et seq.* (1833).
5. *Id.* at 404.
6. CODE CIVIL arts. 1145, 1146; LA. CIVIL CODE arts. 1931, 1932 (1870).
7. See note 6 *supra*.
8. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS 408 (1833).
9. Watson v. Feibel, 139 La. 375, 71 So. 585 (1916); Sarpy, *The Putting in Default as a Prerequisite to a Suit in Louisiana*, 1 LOYOLA L. REV. 127 (1942).

moment or period in time.[10] In such a case no putting in default is required.[11] Pervading all, however, is the notion of fault, complemented by the idea that a debtor should be aware of his guilt in order that he be liable for damages.

Louisiana has long recognized the existence in mineral leases of implied obligations,[12] among which are the obligation to diligently develop a leased tract for the mutual benefit of the parties[13] and the obligation to protect the lease from drainage by production from adjoining tracts.[14] Today some obligations which were formerly implied are often included as express conditions of the lease.[15] The mere omission to perform obligations of this nature appears to be properly regarded as a passive breach of contract. Thus, when such obligations, express or implied, are made the basis of a suit for damages, courts have required that the lessee be placed in default in order that he be made responsible to the lessor.[16]

It is presently customary in Louisiana mineral lease forms to include a clause requiring the lessor to give notice of an alleged breach of the express or implied obligations of the lease contract.[17] Usually, the lapse of a specified number of days without corrective action on the part of the lessee is regarded as a condition precedent to the bringing of any action for damages based on breach of the lease contract.[18] Although the default

10. See note 9 *supra*; 3 TOULLIER, LE DROIT CIVIL FRANÇAIS 410 (1833).

11. See note 10 *supra*.

12. Thomason v. United Gas Public Service Co., 98 F.2d 526 (5th Cir. 1938), cert. denied, 306 U.S. 632 (1939); Roberts v. United Carbon Co., 78 F.2d 39 (5th Cir. 1935); Romero v. Humble Oil & Refining Co., 93 F. Supp. 117 (E.D. La. 1950), modified, 194 F.2d 383 (5th Cir. 1950); Lindow v. Southern Carbon Co., 5 F. Supp. 818 (W.D. La. 1932); Doiron v. Calcasieu Oil Co., 172 La. 553, 134 So. 742 (1931) (dictum); Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701, 64 So. 684 (1914); Pipes v. Payne, 156 La. 791, 101 So. 144 (1924); Wier v. Grubb, 228 La. 254, 82 So.2d 1 (1955).

13. Thomason v. United Gas Public Service Co., 98 F.2d 526 (5th Cir. 1938), cert. denied, 306 U.S. 632 (1939); Roberts v. United Carbon Co., 78 F.2d 39 (5th Cir. 1935); Romero v. Humble Oil & Refining Co., 93 F. Supp. 117 (E.D. La. 1950), modified, 194 F.2d 383 (5th Cir. 1950); Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701, 64 So. 684 (1914); Pipes v. Payne, 156 La. 791, 101 So. 144 (1924); Wier v. Grubb, 228 La. 254, 82 So.2d 1 (1955).

14. Lindow v. Southern Carbon Co., 5 F. Supp. 818 (W.D. La. 1932); Doiron v. Calcasieu Oil Co., 172 La. 553, 134 So. 742 (1931) (dictum).

15. For example, the obligation to protect from drainage is in part at least reduced to writing in the offset clause in note 1 *supra*. The inclusion of a diligent development clause, though it may express that obligation in the contract, leaves for the court the problem of exactly what diligent development may be in a given case. See OAKES, OIL AND GAS FORMS 25 (1952).

16. Pipes v. Payne, 156 La. 791, 101 So. 144 (1924); Hiller v. Humphreys Carbon Co., 165 La. 370, 115 So. 623 (1928); Walker, *Implied Drilling Obligations in Oil and Gas Leases in Louisiana*, 1 LOYOLA L. REV. 1 (1941).

17. E.g., see note 2 *supra*. See also OAKES, OIL AND GAS FORMS 25, 32 (1952).

18. *Ibid.*

clause of the standard lease form is phrased in broad language, requiring a putting in default for alleged breach of "all its [lessee's] obligations [under the contract], both express and implied,"[19] there is some question as to whether this language includes both active and passive breaches of contract. Certainly, if the language were given its broadest meaning, the lessor would be required to give notice of default for both types of breach.[20] However, two factors must be considered and weighed against such a conclusion. First, mineral leases have developed through the years in response to judicial interpretation and economic progress.[21] Clauses have been added seeking to limit or express what courts have implied in their interpretations.[22] Thus, it might be concluded that the default clause presently included in the standard contract is a response to the judicial requirement that notice is necessary only for recovery of damages for breach of obligations such as those already discussed.[23] Second, the court's language implies that had the plaintiffs proved an active breach, recovery would have been allowed.[24] Thus, it would appear that the insertion of the default clause in the standard lease contract constitutes a reduction to writing of the intent of the parties as to exactly when the lessee is to become liable in damages for passive breach of contract alone, whether the obligation allegedly violated the express or implied.

Louisiana courts have refused to consider as tortious conduct the drainage by one operator of fugacious minerals from an adjoining tract.[25] Such drainage by adjoining wells has nevertheless given rise to the obligation of the lessee of the unde-

19. See note 2 *supra.*

20. This interpretation was given to the broad language of the default clause by Hunter, J., in the lower court decision of the instant case: "Plaintiffs' first argument against the effect of Paragraph 12 is based on the assumption that there was an active violation of the contract, and that the defense is dependent upon the law found in Louisiana Statutes Annotated — Civil Code Articles 1932 and 1933. However, these articles are not controlling when there is a positive contract provision to the contrary. They have no application where there is an express agreement that notice must be given at a specific time and in a specific manner." Billeaud Planters, Inc. v. Union Oil Co. of Cal., 144 F. Supp. 564, 571 (W.D. La. 1956).

21. For a general discussion of the evolution of the oil, gas, and mineral lease, see Moses, *The Evolution of the Oil, Gas and Mineral Lease*, 22 TUL. L. REV. 471 (1948). Compare the 1853 lease set out therein with present lease forms.

22. Moses, *The Evolution of the Oil, Gas and Mineral Lease*, 22 TUL. L. REV. 471 (1948).

23. See note 16 *supra.*

24. See note 34 *infra.*

25. Louisiana Gas & Fuel Co. v. White Bros., 157 La. 728, 103 So. 23 (1925); Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919).

veloped tract to protect it from depletion.[26] However, Louisiana courts have not considered the problem posed by the instant case in which drainage on one tract of land is caused by the lessee of both that land and the adjoining tract. Those jurisdictions which have considered this problem have unanimously held that in such a situation the lessee is not at liberty to deplete his lessor's land.[27] In one recent case,[28] the Mississippi Supreme Court held that although oil normally belongs to the person reducing it to possession, when a producer is under a duty not to destroy or deplete the lands of his lessor, he is not free to impair the value of the undeveloped lease. Further, the court pointed out that this responsibility is separable from the duty to drill offset wells and that even though a lessee be absolved from compliance with that obligation, he is not relieved of responsibility for substantial drainage by him.

In order to achieve a clear understanding of the instant case, three factual aspects must be emphasized: first, it was clear that defendant was in default of his obligation to drill offset wells; second, defendant had not developed the tract beyond production from a single well producing from the "D" sand although it appears unquestionable that production was possible from other sands; third, the six wells *drilled by defendant* on adjoining tracts drained minerals from the "C" sand underlying the leased tract. Plaintiffs complained of defendant's failure to drill offset wells as expressly required by the contract and also relied on implied covenants (a) to properly develop the lease; (b) to protect from drainage; (c) to pay for all drainage by lessee whether by wells on or off the leased tract. On appeal, complainants assigned as error the failure of the trial court to find that it was excused from putting defendants in default for the reasons that the activities on the adjoining leases constituted an active breach of contract, or alternatively

26. See note 14 *supra.*

27. Geary v. Adams Oil & Gas Co., 31 F. Supp. 830 (E.D. Ill. 1940); Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286, 289 (1921); Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163 (1937); Federal Oil Co. v. Brower, 36 Cal.2d 367, 224 P.2d 4 (1950); R. R. Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App.2d 246, 158 P.2d 754 (1945); Hughes v. Busseyville Oil & Gas Co., 180 Ky. 545, 203 S.W. 515 (1918); Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So.2d 344 (1950); Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So.2d 176 (1954); Indian Territory Illuminating Oil Co. v. Haynes Drilling Co., 180 Okla. 419, 69 P.2d 624 (1937); Carper v. United Fuel Co., 78 W.Va. 433, 89 S.E. 12 (1916); Barnard v. Monongahela Oil & Gas Co., 216 Pa. 362, 65 Atl. 801 (1907); Kleppner v. Lemon, 197 Pa. 430, 47 Atl. 353 (1900).

28. Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So.2d 176 (1954). See also Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So.2d 344 (1950).

that the complaint stated a cause of action in tort.[29] It appears that on the basis of prior Louisiana jurisprudence the delictual claim was properly rejected.[30] Further, the court appears to have correctly characterized as passive the breaches of contract by defendant in not drilling offset wells, developing the lease, and protecting it from drainage.[31] On the other hand, it would appear that the lessee is bound, as in any contract, not to do anything inconsistent with its obligations to do.[32] Where the lessee has omitted to accomplish its positive obligations, while wilfully draining from a productive sand underlying the leased tract, he is in a rather poor position to contend that the only fault on his part is passive omission to act. Thus, it is certainly not illogical to assert that the default of obligations to do, coupled with the knowing depletion of sands beneath the leased tract, is an active breach of the lease contract. Nevertheless, relying on a sole case involving liquidated damages for delay in performance of a construction contract[33] and a quotation of Article 1931, the court dismissed this argument in the most summary manner.[34] In this it is felt that the court erred. In a situation in which a third party is producing from adjoining lands, the lessee may properly be held only to its obligations to accomplish positive action in development and protection of the lease. However, where production from the adjoining lands is fully within control of the lessee, it would appear that drainage from the undeveloped tract is not merely an omission but action inconsistent with the express and implied obligations to

29. Additional assignments of error were made, contending that appellants had no knowledge of the breach until after the drainage complained of had already occurred; and that appellee had superior knowledge of the breach and did not act in good faith in discharging its obligations under the lease. Billeaud Planters v. Union Oil Co. of California, 245 F.2d 14, 18 (W.D. La. 1957).

30. See note 16 *supra*.

31. The obligation to drill offset wells was an express obligation of the contract, and therefore notice of default was required under Paragraph 12. The latter two obligations were implied obligations of the contract, also covered by Paragraph 12. Default would have been required for recovery of damages by reason of alleged breach of either of those two obligations even if the lease were silent in this regard. See note 16 *supra*.

32. LA. CIVIL CODE arts. 1931, 1932 (1870).

33. Godchaux v. Hyde, 126 La. 187, 52 So. 269 (1910).

34. "The facts, as we have detailed them above, clearly show that appellee's breach consisted solely of its failure or omission to do that which it had bound itself to do, *i.e.*, to drill an offset well, and it is the codal law of Louisiana that an omission or failure to act is not an active, but only a passive breach of contract. Art. 1931 LSA—Civil Code of 1870; Godchaux v. Hyde, 126 La. 187, 52 So. 269. And under Article 1933 of the LSA—Civil Code, 'When the breach has been passive only, damages are due from the time that the debtor has been put in default.'" Billeaud Planters v. Union Oil Co. of California, 245 F.2d 14, 18 (5th Cir. 1957).

develop the leased tract. It can hardly be denied that in this instance the lessee was aware that it was depleting the reserves underlying the leased tract. Protection from liability could have been achieved by compliance with the obligations of the lease contract. It seems inconsistent with civilian ideas of fault as a basis of recovery to state that the lessee was in need of notice of its transgression.

The practical effect of this decision is to make it incumbent on every lessor not only to seek production data concerning wells on his own land, but to procure the geological information available concerning surrounding tracts of land on which his lessee drills. True, such a burden may exist in any similar situation in which a *third* party leases the adjoining tract. However, it may be noted that in such an instance, it is more than likely that the lessee of the undeveloped tract would be diligent in operating his lease because drainage by a *third* party injures not only his lessor but himself as well. Where, however, the lessee of the undeveloped tract controls both leases, such is not the case, and it seems that the imposition of this burden on the landowner, who is usually in a vastly inferior economic position, is somewhat unreasonable.

George W. Hardy, III

REAL ACTIONS — THE ACTION TO ESTABLISH TITLE — BURDEN OF PROOF WHEN NEITHER PARTY IS IN POSSESSION

Prior to 1908, there were three main real actions[1] in Louisiana law — the petitory, possessory, and jactitory actions. The selection of the proper action depended on the rights asserted by the plaintiff as well as the factual situation. When ownership was at issue and the individual out of possession was asserting his ownership rights against the one in possession, the petitory action lay.[2] When possession was at issue, the possessory or

1. Article 4 of the Louisiana Code of Practice defines a real action as "that which relates to claims made on immovable property, or to the immovable rights to which they are subjected. The object of this action is the ownership or the possession of such property; and they are therefore subdivided into petitory and possessory actions."

Article 41 states: "A real action lies against him who, without having contracted any obligations toward the plaintiff, is nevertheless bound towards him, as possessor of the immovable property of which that plaintiff claims the ownership or the possession, or on which he claims to exercise some immovable right."

2. "The petitory action is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person having