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become judicially accepted, and whether new jurisdictional tests of "in interstate commerce" lying outside the act's definition will emerge. If so, the FPC will have jurisdiction to the exclusion of state authorities without the necessity of finding burdens on interstate commerce in each case. Such a course would seem to suppress knowledge of the effects of industry practices and rate making upon producers, carriers, and consumers alike, and render litigation in this area less curative, causing proponents and opponents of federal or state power to suffer undisclosed inefficiencies, the ascertainment of which, it is submitted, would be welcomed by all.

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MINERAL LEASE CANCELLATION FOR FAILURE TO PAY PRODUCTION ROYALTY

INTRODUCTION

Recent decisions of the Second Circuit in Bailey v. Meadows¹ and of the Third in Pierce v. Atlantic Refining Co.² cancelling mineral leases because of the lessee's failure to commence payment of production royalty have caused great concern in the Louisiana oil and gas industry. This comment will undertake both a conceptual and practical analysis of this problem.

BACKGROUND

The mineral lease is the instrument used most frequently in the commercial development of Louisiana's oil and gas resources. No special body of legislation governs this unique type of contract. Consequently, development of the law in this field has been left largely to the courts, which have analogically applied the Civil Code articles on predial leases to the mineral lease.³

In addition to the general requirements that a valid contract

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¹ Bailey v. Meadows, 130 So. 2d 501 (La. App. 2d Cir. 1961), writs denied.
² Pierce v. Atlantic Refining Co., 140 So. 2d 19 (La. App. 3d Cir. 1962), writs denied.
refer to a thing certain and result from valid consent, a predial lease must be for a term (less than perpetuity) during which the lessee may enjoy the land, and for a certain and determinate price, which is the rent to be paid under the lease. A mineral lease normally provides for a term varying from three to ten years with extensions beyond the primary term permitted upon the occurrence of certain conditions such as active drilling, constructive production, or actual production. Although the ultimate term may not be definitive in years at the outset, it is made certain and less than perpetuity by these conditions. Rent is likewise determinable only in relation to these conditions, and thus depends upon whether the lease is being maintained by delay rentals, shut-in payments, or production royalty, and in the latter case, the amount of production.

Contract Cancellation — Putting in Default. — Cancellation of a predial lease, according to the Civil Code, is generally governed by the rules relating to dissolution of contracts. Normally, contracts are dissolved by occurrence of either an express or an implied resolutory condition. The express resolutory condition is an express agreement providing for termination upon the occurrence of a stated contingency. It may, but need not necessarily, be the failure of one party to perform his contractual obligations. On the other hand, an implied resolutory condition, which takes effect on failure of either party to fulfill his contractual obligations, is statutorily incorporated into every contract.

5. Id. art. 2780. Should the duration of the term be in perpetuity the contract is not a lease, but rather a contract of rent of lands.
6. Id. art. 2674.
7. Id. arts. 2670, 2671, 2674.
8. When a well (usually gas) is capable of producing but cannot because of unavailability of markets or delays in granting a selling license by the Federal Power Commission, the normal oil and gas lease provides that the lease may be maintained by the payment of shut-in rentals or royalties. These royalties, in lieu of actual production royalties, are considered constructive production royalties.
9. Id. art. 2729 provides for dissolution of the lease for breach of an engagement by either the lessee or lessor "in the manner expressed concerning contracts in general." The article imposes, however, one limitation — the judge may not permit any delay in the dissolution as he may do with contracts in general under article 2047.
10. Id. art. 2026: "They [conditions] are express, when they appear in the contract . . . ."
11. Id. art. 2046: "A resolutory condition is implied in commutative contracts, to take effect, in case either of the parties do not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution with damages, or, if the circumstances of the case permit, demand a specific performance."
The Civil Code distinguishes between express resolutorv conditions which are dependent upon the will or volition of the parties and those which are not. Occurrence of the latter terminates a contract "of right." On the other hand, dissolution grounded on the occurrence of the former, as well as on an implied resolutorv condition, must be demanded judicially and is subject to the court's discretion. It should be noted, however, that in addition to the discretionary control in these cases, the jurisprudence reveals that the courts have exercised a certain amount of control over dissolution resulting from express resolutorv conditions not dependent on the will of the parties as well.

A real distinction, however, is apparently drawn by the jurisprudence between express and implied resolutorv conditions with regard to putting in default. If the resolutorv condition is express, the courts do not require default as a prerequisite to

12. Id. art. 2047: "In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutorv condition is an event, not depending on the will of either party, the contract is dissolved of right; but, in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition." See article 2046 at note 11 supra.

13. Ibid.

14. The Supreme Court in Watson v. Feibel, 139 La. 375, 392, 71 So. 585, 591 (1916) declared: "[N]othing can bring into a stronger light the true spirit and intent of our law . . . than that provision of Article 2047 by which the whole matter of allowing dissolution or not, or of granting further time or not, is left to the judge, so that the dissolution of the contract never does become a matter of absolute right on the part of the creditor." That this principle has been applied to leases is evidenced by the court's statement that "the right to dissolve a lease is subject to judicial control according to circumstances." Rudnick v. Union Producing Co., 200 La. 943, 950, 25 So. 2d 606, 608 (1946); Edwards v. Standard Oil Co. of Louisiana, 175 La. 720, 723, 144 So. 430, 431 (1932). See also Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 372 (1931). But see la. Civ. CODE art. 2729 (1870), which declares that a judge cannot order any delay in the dissolution of a lease.

15. Although persuading the court to allow further time for performance is a greater task in cases of violation of express resolutorv conditions than in cases of violation of implied ones, the Supreme Court is steadfast in upholding judicial control of dissolution even when the contract contains an express condition and automatic termination clause. In Southport Mill v. Ansley, 160 La. 131, 142, 106 So. 720, 723 (1925), the court declared that whether the contract contained an express resolutorv condition or the implied statutory condition the contract is "no more dissolved of right in the one case than in the other." Elaborating, the court continued: "[T]n all other [there are some statutory exceptions] commutative contracts the delinquent party . . . may be given further delay at the discretion of the judge, even though not entitled thereto of right." Id. at 142, 106 So. at 724. Accord, Watson v. Feibel, 139 La. 375, 71 So. 585 (1916); Turner v. Collins, 2 Mart.(N.S.) 605 (1824).

16. Southport Mill v. Ansley, 160 La. 131, 142, 106 So. 720, 723 (1925): "[T]he only effect of such a clause [express resolutorv condition] in a contract is merely to waive a formal putting in default, such putting in default being otherwise necessary before suing for a dissolution of the contract."
suit to enforce the condition and cancel the contract. Conversely, the majority of Louisiana courts hold that a suit for dissolution and damages based on an implied resolutory condition must be preceded by a putting in default unless there was an “active” breach of the contract. Therefore, whether a putting in default is a prerequisite to dissolution depends on whether the resolutory condition is express or implied, and in the latter case, whether the breach was active or passive. Default is necessary only for dissolution based on a passively breached contract engagement which does not contain an express resolutory condition.

Article 2712 — Summary Eviction — Default. — While the Civil Code provides that leases in general are dissolved in the same manner as ordinary contracts, there are two significant variations. First, the Code provides that while the judge may permit additional time for performance in suits for dissolution of ordinary contracts, he may not do so when suit is brought for cancellation of a lease. Second, articles 2712 and 2713 apparently provide for a summary eviction of the lessee without putting in default for nonpayment of rent when due after notice to quit the premises.
It may be argued that the lessor's right to dissolve the lease without putting the lessee in default under article 2712 is a special remedy for lessors which should take precedence over the general principles governing dissolution. This article may contemplate that putting in default to recover each month's rent as it comes due certainly would be onerous in ordinary situations. Consequently, dissolution without prior default may be permissible, thus making the lessor's right to dissolve the lease under article 2712 equivalent to an express resolutory condition. Compliance with the requirements of the Code of Civil Procedure for summary eviction would seem to be the only prerequisite to assertion of this right to evict the lessee. Therefore, it seems that the general rules concerning active and passive breach of contract are inapplicable in this situation. Par-

property if he fails to pay the rent when it becomes due."

Id. art. 2713: "When the lessor has given notice to the lessee, in the manner directed by law, to quit the property, and the lessee persists in remaining on it, the lessor may have him summoned before a judge or a justice of the peace, and condemned to depart ... ."

The "notice" as "directed by law" is covered in the Code of Civil Procedure in the case of leases with a specific term and the Civil Code in the case of a lease without a term. LA. CODE OF CIVIL PROCEDURE art. 4701: "When a lessee's right of occupancy has ceased because of . . . non-payment of rent . . . and the lessor wishes to obtain possession of the premises, the lessor or his agent shall cause written notice to vacate the premises to be delivered to the lessee. The notice shall allow the lessee not less than five days from the date of its delivery to vacate the leased premises."

If the lease has no definite term, the notice required by law for its termination shall be considered as a notice to vacate under this article. If the lease has a definite term, notice to vacate may be given not more than thirty days before the expiration of the term." LA. CIVIL CODE arts. 2685 and 2687 establishes terms by law for those leases which do not specify any—a month for houses or apartments and a year for "predial estates." Article 2686 provides for ten days' notice to vacate in such situations.

Summary eviction under article 2712 appears to be a special exception to the general mode of terminating leases under article 2729. The possibility of eviction and lease cancellation for nonpayment without prior default under 2712 exists, and not infrequently courts refer to a "peremptory" right to dissolution under this article. Louisiana Oil Refining Corp. v. Cozart, 163 La. 90, 111 So. 610 (1927); Gaar v. Prudhomme, 181 So. 604 (La. App. 2d Cir. 1938). This designation is, however, apparently in reference to the summary eviction procedure available against a delinquent lessee, rather than to the default requirement. Kron v. Watson, 14 La. Ann. 432 (1859); Hennen v. Hayden & Kelly, 5 La. Ann. 713 (1850). As further evidence see note 30 infra for cases brought under article 2712 in which putting in default was required. See Comment, Landlord and Tenant: Summary Ejectment in Louisiana, 21 Tul. L. Rev. 256 (1946).

Suit could be brought to evict the lessee and cancel the lease without requiring formal default, resulting in a situation analogous to that encountered when suit is brought to enforce an express resolutory condition.

Under the provisions of LA. CODE OF CIVIL PROCEDURE arts. 4701-4705, 4731-4735 (1961) a lessee in possession who fails to pay his rent when due may be judicially evicted and have the lease cancelled in less than ten days, thus bypassing the longer period necessary for proceedings via ordinaria when the suit is only for cancellation of the lease.
ticularly the question of default does not seem pertinent when a
lessor seeks possession for nonpayment of rent.

If correct, these conclusions would seem applicable regardless of whether the lessor seeks possession by ordinary proceed-
ings through suit for dissolution or through the summary evic-
tion process. The only material distinction between the two
modes of proceeding is one of time. The codes have provided a
summary eviction procedure in obvious recognition of the fact
that the ordinary landlord desires to recover possession and
make his property economically productive again within the
shortest possible time. If he elects to proceed via ordinaria,
there should be no distinction made in default requirements.

The above observations, however, are based upon an assump-
tion that there is a time appointed for payment of the rent,
either by contract or by custom.27 If no time is appointed, it is
logical to conclude that a demand is necessary to fix a time when
payment is expected. Eviction could be procured in such cases
only upon passage of the date fixed by demand.

Although these conclusions appear compelled by the the-
oretical structure of the Civil Code, the jurisprudence
seemingly is not in accord. The prohibition against discretion-
ary control of dissolution is apparently not observed.28 In addi-
tion, the jurisprudence requires a putting in default as a pre-
requisite to suit by ordinary proceedings for cancellation of both
predial and mineral leases under article 2712 when the obliga-
tion is passively breached.29 Furthermore, putting in default is
required even when summary eviction is sought under article
2712, at least for predial leases.30

27. Civil Code article 2712 obliges the lessee to pay the rent “when it becomes
due.” This due date may be established by agreement of the parties in the lease,
or by impliedly incorporating a customary due date into the lease. Although Civil
Code articles 2685 and 2687 establish the term of a lease when one is not fixed
by the parties, the Code apparently establishes no date for payment of rent
when one is not determined by the parties.

28. See notes 14 and 15 supra and note 77 infra. The integrity of the Civil
Code could be maintained by distinguishing between granting “delay of the dis-
solution” and denying dissolution “according to the circumstances.” However,
no court has yet made this distinction, and in light of the long line of juris-
prudence permitting extensive judicial control of dissolution, it may be doubted
that article 2729 will be given full effect.

29. Pierce v. Atlantic Refining Co., 140 So. 2d 19 (La. App. 3d Cir. 1962);
Bailey v. Meadows, 130 So. 501 (La. App. 2d Cir. 1961); Melancon v. Texas
Co., 230 La. 983, 89 So. 2d 135 (1956); Brown v. Sugar Creek Syndicate, 195
La. 865, 197 So. 583 (1940) assume that default is a prerequisite to suit for
dissolution for a passive violation of article 2712.

30. In Bacas v. Mandot, 3 Orl. App. 324 (1906), a suit for summary eviction
of a predial lease after classifying a delinquent rent payment as a passive breach
The availability of eviction procedures to mineral lessors is a matter which has received little judicial attention, but one recent case has permitted use of the summary proceeding to effect eviction of a gravel lessee. Although the cause for eviction was not failure to pay rent but lapse of the term, the Code of Civil Procedure contemplates that eviction may be had for non-payment of rent as well.

Consequently, it appears that although on the basis of the Code a sound argument may be made that default is not a requisite to suits for lease cancellation for nonpayment of rent at the time due, the jurisprudence requires default in such cases. Additionally, where no time for payment is fixed, even theoretically a demand for performance should be required. Thus, for practical analysis of the problem it must be assumed that article 2712 as interpreted does not free a lessor of the burden of formal default when otherwise required by the jurisprudence.

**MINERAL LEASE RENT PAYMENTS**

Principally there are three types of mineral lease rentals which may be paid in addition to the initial payment (bonus)—delay rentals, shut-in payments, and production royalty.

*Delay Rentals.* — A delay rental is a payment generally due of contract, the court continued: "[F]or the obligee to avail of such passive violation, either by a demand for dissolution or for damages, he must put the obligor in mora." *Id.* at 327; Ricou v. Hart, 47 La. Ann. 1370, 17 So. 878 (1895). See Comment, 2 LA. L. REV. 161, 164 (1939).

31. Sharpe v. Jenkins, 150 So. 2d 353 (La. App. 1st Cir. 1963). Under the Code of Civil Procedure (see note 23 *supra*) summary eviction is available against a lessee in possession of the leased premises. Without belaboring the point, the court in *Sharpe* correctly viewed a mineral lessee (sand and gravel lease) as in possession through his presence on and mineral production from the leased premises. It would not seem to be stretching analogical reasoning to hold that a mineral lessee (oil and gas lease) would similarly by production from the leased premises meet the requirement of possession.

32. See LA. CODE OF CIVIL PROCEDURE art. 4701 (1960), note 23 *supra*.

33. The bonus is the rent for the first year and additionally part of the consideration for the entire primary term. It is in a sense a prepaid rent and is the only rent payment which the lessor is certain to receive.

The author has assumed that the term of a mineral lease is that period for which the lease is maintainable by the payment of delay rentals. Possibly the term is only for the initial year with the lessee having an option to renew the lease for an additional year by making the proper payment of delay rentals. If this is the proper conceptual analysis, cancellation without putting in default would be permitted even in the absence of an automatic cancellation clause, for article 2727 of the Code provides that the lease ceases at the expiration of the "term." This question, although admittedly academic, is apparently solved by the will of the parties expressed in the lease to the effect that the contract is to have a primary term of so many years, but which may be terminated prior to this should the lessee fail to meet the delay rental requirement.
on or before the anniversary date of the lease which permits the lessee to defer drilling for the succeeding year. The delay rental clause of a mineral lease universally contains an automatic termination provision, which terminates the lease upon failure to make timely payment.\textsuperscript{34} Since the termination provision is an express resolutory condition, suit for cancellation requires no precedent putting in default.\textsuperscript{35} Absent an automatic termination provision, the Code and jurisprudence would seem to require that cancellation for failure to pay the rent be governed by the active-passive breach dichotomy outlined above;\textsuperscript{36} however, the express resolutory condition eliminates the necessity for reference to these general concepts.

*Shut-in Rentals.* — A second form of rent, commonly called shut-in royalty or rent,\textsuperscript{37} permits a lessee to maintain the lease after shutting in a gas well capable of production until a market or marketing facilities are obtained. The payment may be termed “royalty” and paid on the basis of a set amount per shut-in well, or the lease may provide for commencement or resumption of delay rentals as the requisite shut-in payment. Though there is no decision in point, reference to the delay rentals in the shut-in payments clause may be deemed to continue in effect the automatic termination provision of the delay rental clause. When the shut-in provision defines the payment as royalty, the jurisprudence, although lacking in specificity, apparently applies the general concepts regarding active and passive breaches.\textsuperscript{38} This, of course, necessitates default unless the failure can in some way be characterized as an active breach of contract.

\textsuperscript{34} Johnson v. Smallenberger, 237 La. 11, 110 So. 2d 119 (1959); Atlantic Refining Co. v. Shell Oil Co., 217 La. 576, 46 So. 2d 967 (1950); Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59 (1937); LeRosen v. North Central Texas Oil Co., 167 La. 1076, 120 So. 882 (1929).

\textsuperscript{35} See note 16 supra.

\textsuperscript{36} LA. CIVIL CODE art. 2729 (1870): “The neglect of the lessor or lessee to fulfill his engagements, may also give cause for a dissolution of the lease, in the manner expressed concerning contracts in general . . . .”

\textsuperscript{37} The synonymous use of “rent” and “royalty” is not with reference to ownership of the proceeds in a contest between royalty owners and parties holding interests from the lessor; rather it has reference to the general classification of royalty as a form of rent due under a mineral lease. Milling v. Collector of Revenue, 220 La. 773, 57 So. 2d 679 (1952) and summary of cases contained therein.

\textsuperscript{38} Risinger v. Arkansas-Louisiana Gas Co., 198 La. 101, 3 So. 2d 289 (1941); Moses, Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases, 23 Tul. L. REV. 374, 377 (1949) declares that Risinger, in the light of Brown v. Sugar Creek Syndicate, 195 La. 865, 197 So. 583 (1940), supports the proposition that “mere non-payment of royalty [including shut-in royalty] is not ground for cancellation of the lease unless the lease so specifically states.”
Production Royalty. — A third form of rent which may be due under a mineral lease is production royalty — a certain fraction of the production due the lessor which constitutes the consideration for the lease while there is production from the leased property. The normal lease form makes no provision for automatic termination for lack of payment of either initial or subsequent production royalties. Consequently, if cancellation is sought on the grounds of untimely payment, reference must be made to the general concepts of active and passive breaches. The application of these provisions is complicated, however, since the normal lease form makes no provisions for determining the date on which the initial payment is due and an industry custom has not evolved which might be said to have been impliedly incorporated into the lease. This absence of a due date for initial royalty payments has created numerous problems concerning the lessor's right to cancellation for delay in commencing production royalty payments. Foremost are questions concerning determination of when the obligation is breached, and whether failure to pay is an active or passive breach. Reasoning analogically from the treatment accorded delay rentals, shut-in payments and contracts in general, it would seem that in the absence of an express resolutory condition mere inactivity — failure to pay — is a passive breach of contract. However, Bailey v. Meadows and Pierce v. Atlantic Refining Co., decided by the Second and Third Circuits respectively, indicate that this failure may be classified as an active breach, which requires no putting in default precedent to suit for cancellation of the lease. The remainder of this paper is devoted to an analysis of these cases and their ramifications.

Analysis of the Jurisprudence

Melancon v. Texas Co. — The leading case in the area is the Supreme Court decision in Melancon v. Texas Co. In an at-
tempt to force its lessor to agree to an alteration of a voluntary unit, defendant lessee refused to make any royalty payments for fifteen months following production despite the lessor’s repeated inquiry into the delay. The court held that no formal default was required because the lessee’s conduct constituted an active breach of the lease.

Prior jurisprudence had declared that formal default was a requisite to cancellation for nonperformance of a mineral lease obligation without a term (which the obligation to commence payments of royalty certainly is), and that delinquent rent payment in predial leases and failures to pay production royalty in mineral leases were passive breaches requiring a putting in default. Consequently the Supreme Court, with great specificity, explained how the lessee’s failure to pay production royalty in this case was classified as an active breach. The case was distinguished from the prior jurisprudence on the basis that the nonperformance was not the result of negligence or mere inadvertence, but rather it was a wilful, studied, and purposeful nonfeasance designed to harass the lessor economically. Such

41. Temple v. Lindsay, 182 La. 22, 161 So. 8 (1935) (no specified term for performance of obligation to drill — default a prerequisite to suit for dissolution); Pipes v. Payne, 156 La. 791, 101 So. 144 (1924) (no term for drilling additional wells in diligent development clause — default required).
43. Brown v. Sugar Creek Syndicate, 195 La. 865, 894, 197 So. 583, 592 (1940): “In the absence of a demand for payment of the royalties and any provision in the lease giving the lessors the right to cancel the leases for non-payment of royalties, the first ground urged by the plaintiffs [cancellation for non-payment of production royalties] must fail.” (Emphasis added.)
44. 230 La. 593, 606, 89 So. 2d 135, 139 (1956). The court reemphasized its agreement with this conclusion of the trial court: “Defendant’s contention that there was no ‘formal demand,’ that such demand is a necessary preliminary to a refusal to pay, and that in its absence the forfeiture would not be warranted, is not persuasive in the face of the finding of the trial judge, and of our confirmation of his finding, of the defendant’s active violation of its obligations under the lease.” (Emphasis added.) Id. at 615, 89 So. 2d at 142. Though the equitable result reached cannot seriously be questioned, the detrimental effect on the traditional distinction between active and passive breaches — doing something from not doing something — may be one reservation to acceptance of the decision. The court’s conclusion is that doing nothing in bad faith is an active breach. Although it may be logically argued that such conduct is inconsistent with a lessee’s obligations and is therefore an active breach, the Civil Code apparently creates a different remedy for such conduct. The Code does not state that a bad faith breach is an active breach; rather it is addressed to the aspect of damages not characterization of the breach. Article 1934(2) provides that when a contract has been breached in bad faith, the damages are not restricted to those reasonably contemplated by the parties. Seemingly bad faith vel non is not material to the classification of the breach.
conduct was clearly inconsistent with the lessee obligations and consequently was readily classified as an active breach which eliminated the necessity for a putting in default.

*Bailey v. Meadows — Pierce v. Atlantic Refining Co.* — The subsequent *Bailey* and *Pierce* cases, interpreting the Supreme Court decision, concluded that *Melancon* "enunciated a general rule that failure to pay production royalties under an oil and gas lease, for any appreciable length of time, without justification, amounts to an active breach of such lease which entitles the lessor to a cancellation thereof without the necessity of placing the lessee in formal default."456 In *Bailey v. Meadows* the lessee knowingly had not paid initial royalty for nearly two years following production while attempting to effect a unit operating agreement, but there was no evidence of a wilful failure to pay in the *Melancon* sense. In *Pierce v. Atlantic Refining Co.* the delay in payment of seven months following production was apparently again not purposeful but rather resulted solely from negligence.47

*Analysis* — Regardless of the equity of the decisions, the interpretation of *Melancon* in *Bailey* and *Pierce* seems to be in error. The Supreme Court said that a *certain type* of bad faith nonfeasance — refusal to pay rent used as a weapon of economic coercion — is an active breach of the lessee’s obligation. The courts in *Bailey* and *Pierce* state that *any* nonfeasance when for "an appreciable length of time" and "without justification" is an active breach. Certainly the latter principle is not merely a restatement of the former.

Not only does the rule announced in *Bailey* and *Pierce* lack precedential foundation in *Melancon*, but also the conduct declared to be an active breach does not properly fit the conceptual mold required for such characterization. Article 1931 of the Civil Code defines an active breach of an obligation as "doing something inconsistent with the obligation"; a passive breach

46. 130 So. 2d 501 (La. App. 2d Cir. 1961).
47. 140 So. 2d 19 (La. App. 3d Cir. 1962).
48. It is noteworthy that the Louisiana federal courts have refused to ascribe to *Melancon* the interpretation given it by *Pierce* and *Bailey*. Bonsall v. Humble Oil & Refining Co., 201 F. Supp. 516 (W.D. La. 1961) (court declared that *Melancon* did not stand for the proposition that fifteen months' delay in production royalty payments was an active breach of the obligation); Touchet v. Humble Oil & Refining Co., 191 F. Supp. 291 (W.D. La. 1960) (default required in dissolution suit grounded in failure to pay production royalties).
is characterized as “not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated or implied from the nature of the contract.” The passive-active breach dichotomy and the corresponding default requirements distinguish activity from inactivity,⁴⁹ or as the Supreme Court describes it, feasance from nonfeasance.⁵⁰ By incorporating nonfeasance intended as economic duress into the active breach category, Melancon somewhat widened the periphery of the active breach concept. The Bailey and Pierce nonfeasance, however, lacking the element of wilful or purposeful nonfeasance, can hardly be considered active in any sense.

Despite the fact that no clear pattern has yet developed from these royalty cases, it seems that what the appellate courts are actually doing is creating an inference of presumption of wilful nonpayment. If payment is not commenced within what the court considers an “appreciable” time, an inference or presumption of wilfulness arises which evidences an active breach of the lease—a view which originates with Melancon but is substantially extended by presumption. That this presumption is rebuttable, however, is evidenced by the second element of the courts’ decisions—justification. The presumption of wilfulness will control only if the lessee is unable to justify the delay.

It seems, however, that mere tardiness of performance should not affect the characterization of the breach; Civil Code article 1931 categorically declares that an obligation is passively violated by not performing it at the time stipulated or implied in the contract. Nor is there any authority to the effect that lack of justification for the delinquency converts a passive breach into an active one.⁵¹ It is wilfulness, not mere tardiness,

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⁴⁹. Noel Estate v. Louisiana Oil Refining Corp., 188 La. 45, 50, 175 So. 744, 746 (1937) : “The word ‘doing’ as it is used in article 1931 of the Code signifies activity, and the words ‘not doing’ signify inactivity or failure to do something.” SAUNDERS, LECTURES ON THE CIVIL CODE 400 (1925) : “The passive violation of contract exists where the defendant simply does nothing.” Sarpy, The Putting in Default as a Prerequisite to Suit in Louisiana, 1 LOYOLA L. REV. 127, 140 (1942) : “A passive breach take place when the obligor simply does nothing where the contract requires him to do something.”

⁵⁰. In Melancon the court described the lessee’s conduct as “studied and purposeful non-feasance.” 230 La. 593, 606, 89 So. 2d 135, 139 (1956).

⁵¹. No case was discovered declaring that justification or lack of it could not alter the characterization of a breach of contract from passive to active; however, this seems to be a necessary conclusion to this writer. The Code clearly distinguishes an active breach from a passive one on the basis of conduct versus no-conduct. Nowhere is there provision incorporating the mental intent of the violating obligor at the time of the violation into the test for distinguishability. It is admitted that when an obligor expressly refuses to perform or wilfully delays in performance this mental attitude permits suit without default, but
which controlled in Melancon. Therefore, wilfulness, not mere tardiness, should be the necessary finding of fact upon which the active breach classification depends.52

Evaluation.—The first problem which arises in connection with the Bailey-Pierce doctrine is what will constitute an “appreciable length of time.” Certainly a period of two years, as in Bailey, seems appreciable. However, the period of seven months involved in Pierce comes close to the area of reasonableness.53 Whether the courts will adopt some arbitrary standard or will determine what is an appreciable length of time on a case-to-case basis according to evidence of justification presented by the lessee is unclear.54

What then constitutes evidence sufficient to justify the appreciable delay? Obviously, the fact that the lessee in Bailey

these are exceptions to the general rule of default when the obligor has merely failed to perform. Southern Sawmill Co. v. Ducote, 120 La. 1052, 46 So. 20 (1908); Abels v. Glover, 15 La. Ann. 247 (1869); McWilliams v. Flanagan, Orl. App. No. 7586 (La. App. Orl. Cir. 1919); Milam-Morgan Co. v. Atlantic Fruit Co, 12 Orl. App. 306 (La. App. Orl. Cir. 1915). Justification should be a pertinent inquiry first, in determining whether the court will consider the obligor’s conduct in fact a breach of contract, and second, in determining whether the court will excuse the breach should one be found; but in neither case does it relate to the classification of the breach.

52. If unjustified delay is declared to be an active breach, the connecting link between the nonperformance and its active breach classification is eliminated and thus serious doubts concerning the proper conceptual characterization of the conduct are raised. The courts in Bailey and Pierce declared that the tardiness without justification itself constituted an active breach of the lease. If the courts are in fact reasoning analogically from the wilful conduct element in Melancon, this should be stated clearly to effect a more accurate conceptual basis for the cases.

53. This writer’s interviews with experienced practitioners indicate that under present custom and practice six months’ delay in the initial payment is not normally unreasonable. This approximate standard permits the normal delays required for final title examination and surveys, negotiation of a production purchase agreement, and circulation of royalty division orders. Though most title investigations and unit surveys are completed prior to drilling, where a unit is created by a Conservation Commission order subsequent curative work and surveying, incapable of anticipation, may be required. Additionally, most purchasers do not pay any of the proceeds of the sale of production until all interest owners have signed and returned a royalty division order, which frequently takes six months to circulate after initial production. Arata, Timely Payment of Royalties, 11 Loyola L. Rev. 163 (1963) contains a thorough discussion of the various possible reasons necessitating delays in payment.

The six-months standard is only a rough approximation, but it seems to this writer that the evidence of a lessee’s ability to pay prior to that time should be strong before cancellation is permitted for a shorter delinquency.

54. The Third Circuit in the recent case of Fawvor v. United States Oil of Louisiana, Inc., Docket No. 1085 (La. App. 3d Cir. 1964), in which the court denied the demand of the lessor for cancellation because of an “appreciable” delay without justification in the payment of production royalty where the circumstances indicated the delay probably resulted from the lessor’s own conduct, strongly suggests that the court is involved in a careful case-to-case evaluation of the length of the delay and its justification or lack of it.
delayed commencement of royalty payments because of his dispute concerning drilling costs with the unit operator was not considered sufficient justification. Further, the internal delays caused by a corporate merger in Pierce were apparently unacceptable as justification. Thus, the conclusion appears inevitable that the courts will look with disfavor upon any delays resulting from business activities of interest to the lessee only. As the only judicial holdings concerning justification thus far are negative, it is difficult to say exactly what might constitute sufficient evidence to justify a delay. However, it does seem that causes such as complex title problems in computation of unit participation, negotiation of purchase contracts, and proceedings before or compliance with regulations of administrative bodies should be acceptable.

Decisions discussing this problem in cases dealing with delinquent rents in the related fields of delay rentals and shut-in payments suggest a rough standard. Good faith on the part of the lessee is an absolute requisite, and the reasonableness of his conduct under the circumstances must be shown clearly. When the breach is unintentional, the courts apparently distinguish between unilateral error or mistake and mutual mistake or acquiescence in the lessee's mistake by the lessor or error by a third party. If the error is in the latter group the equities may be more nearly equal, and thus the court is more likely to sustain the defense by the lessee of justifiable failure to pay.

55. Melancon gives the only positive indication of what conduct may be considered sufficient justification. "A justifiable cause for delay in such payment might arise when there is a reasonable dispute as to those entitled to receive the royalties, or the amount due each." 230 La. 597, 614, 89 So.2d 135, 142 (1956).


57. See note 56 supra.

58. Unilateral mistake or error resulted in cancellation of the lease in the following cases. Atlantic Refining Co. v. Shell Oil Co., 217 La. 576, 46 So.2d 907 (1950); Andrus v. Tidewater Oil Co., 189 La. 142, 179 So. 61 (1938); Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59 (1937); LeRosen v. North Central Texas Oil Co., 167 La. 1076, 120 So. 862 (1929). In Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So.2d 34 (1948) cancellation was denied because of mutual mistakes by lessee and lessor. In Davis v. Laster, 242 La. 735, 138 So.2d 558 (1950); Risinger v. Arkansas Louisiana Gas Co., 198 La. 101, 3 So.2d 289 (1941); and Dellinger v. Smith, 142 La. 1009, 77 So. 947 (1918), cancellation was refused on the basis of the lessor's acquiescence in the lessee's conduct. The court in Gloyd v. Midwest Refining Co., 62 F.2d 483 (10th Cir. 1933) denied cancellation because the error was caused by a third person not within the lessee's control.

59. Equity has frequently been called upon to explain the court's refusal to cancel leases. In Lee v. Abernathy, 19 So.2d 670, 673 (La. App. 2d Cir. 1944), the court said that "it would be extremely inequitable in view of all the facts and circumstances of the case, to adjudge the lease null and void because of the
However, if the lessee's error is unilateral, only in those cases when cancellation would be an extremely unjust remedy will the defense be sustained. If it is conceded that such a synthesis offers no concrete solutions whether certain conduct is or is not justifiable, but it does indicate the different degrees of proof of justification which may be required in each situation.

It appears that if the present trend is continued, a mineral lessee may be faced with an inference or presumption that delay of even a few months in commencing payment of production royalties is wilful and thus may be required to bear the burden of proving the delay justifiable. There is perhaps some analogy to be made between the courts' approach under the Bailey-Pierce doctrine and the evidentiary rule of res ipsa loquitur in tort cases; when a lessor proves that commencement of royalty payments has been delayed for an "appreciable" length of time it is incumbent upon the lessee to demonstrate that the delay was justifiable. Perhaps the underlying theory is the same as in tort cases — evidence as to the cause of the delay is principally in his possession and control.

THE DEFAULT REQUIREMENT

Both the Bailey and Pierce decisions appear to be strong attempts on the part of the appellate courts to avoid the default requirement. A sound argument can be made for the proposition that under the facts of both cases putting in default could have been found, thus avoiding the present question. If avoidance

brief delay in paying the rentals." Similar declarations are found in Rudnick v. Union Producing Co., 209 La. 943, 25 So. 2d 906 (1946), and in Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 932 (1931). The most recent Supreme Court declaration on the subject supports this liberal approach. "There is ample authority for the proposition that considerations of equity may prevent a forfeiture of a mineral lease where the failure of the lessee to pay the . . . rentals . . . is the result of a mistake on his part, and where the circumstances are such that the mistake is a pardonable one . . .", Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So. 2d 34. Davis v. Laster, 242 La. 735, 755, 138 So. 2d 558, 565 (1962).

60. Lee v. Abernathy, 19 So. 2d 670 (La. App. 2d Cir. 1944).

61. Following their lead in declaring the judicial ascertainment and retention of producing lease acreage clauses inapplicable in cases of mere failure timely to pay delay rentals, Talley v. Lawborn, 150 La. 25, 90 So. 427 (1922), or failure to drill within the term of the lease, Producers Oil & Gas Co. v. Continental Securities Corp., 185 La. 564, 177 So. 668 (1937), the Supreme Court in Melancon concluded that the judicial ascertainment clause and the productive acreage provision are equitable provisions for the exclusive benefit of the lessee and consequently can apply only to a "bonafide dispute as to which there is a real disagreement in good faith between the parties" and not to mere negligent failures to perform. 230 La. 593, 624, 89 So. 2d 135, 146 (1958).

62. In both Bailey and Pierce notice of a desire for payment had reached the lessee, but in neither case was the notice held to have been a putting in default.
of the default requirement was a motivating force in these decisions, however, one may question the propriety of eliminating the default requirement in instances when the date for performance is not contractually established.

As previously noted, it is the fact that there is no time fixed for the initial royalty payment in most present lease forms which makes these royalty cases unique. Assuming that summary eviction procedures might be available to a mineral lessor, it seems that a demand fixing a time for performance would still be necessary to give the lessor the right to evict his lessee. The same is also true if cancellation is sought under general contract law for occurrence of the implied resolutory condition as a result of breach of an obligation of the lease by mere failure to perform. The simple fact is that there is no appointed time for fulfillment of the rental obligation and some sort of demand should be required.

There was some discussion of the possibility of establishing a due date for the initial royalty payment by custom of the industry in the Pierce case. However, because factors effecting the delay between completion and commencement of royalties vary so widely, there seems little possibility of establishing the due date by an industry custom.

The general law concerning dissolution of contracts affords only two possibilities other than the approach taken by the courts in Bailey and Pierce by which the necessity for default could have been averted. The Civil Code provides in article 1933(1) that formal default is unnecessary if the contract is one in which time is of the essence. It is difficult to see how the commencement of production royalties could be termed an obligation in which time is of the essence. There is no due date for performance which might indicate that the parties regarded time as being of the essence. Further, even if a due date were

63. Judge Frugé, in Pierce, discusses the industry custom of paying production royalty monthly, and intimates that such a custom applied to the initial payment would give the lessee one month following production to commence payments. Judge Tate, concurring in Pierce, states that "under the literal terms of the lease, the producer owed the landowner his royalties as rent for the use of his resources from the moment the oil was produced or that the producer realized the proceeds of production." 140 So. 2d 19, 30 (La. App. 3d Cir. 1962).

64. LA. CIVIL CODE art. 1933(1) (1870): "When the thing to be given or done by the contract was of such a nature, that it could only be given or done within a certain time, which has elapsed, or under circumstances which no longer exist, the debtor need not be put in legal delay to entitle the creditor to damages." As interpreted by the jurisprudence, the article is applicable to suits for dissolution as well. See note 65 infra.
fixed, the jurisprudence does not regard this as automatically classifying the obligation as one in which time is of the essence.\textsuperscript{65}

A second possible approach which might avoid the necessity for default is found in two early opinions by Justice Provosty\textsuperscript{68} in which he declared that when an obligee no longer desires performance of an obligation not performed within the time stipulated, the failure does not require him to call upon the obligor to perform as a prerequisite to cancellation.\textsuperscript{67} A formal demand would be necessary only as a prerequisite to recovery of future damages resulting from the delay in performance.\textsuperscript{68} However, the Louisiana jurisprudence does not appear to support Justice Provosty's position.\textsuperscript{69} Even so, there is normally no due date for performance of the obligation under discussion. There seems to be general agreement that when no time for performance has been stipulated by contract and cannot be implied by custom, a formal default is a prerequisite to suit for dissolution.\textsuperscript{70} The fact that no time for performance has been stipulated is viewed

\textsuperscript{65} Although there are a few cases to the contrary (Kinsell & Locke, Inc. v. Kohlmann, 12 La. App. 573, 126 So. 257 (Orl. Cir. 1930); Shelby Mills, Inc. v. Sheed Nami, 1 La. App. 116 (Orl. Cir. 1924)), the majority position holds that expiration of a term fixed in the contract for performance does not automatically put the delinquent obligor in default. Erwin v. Fenwick, 6 Mart. (N.S.) 229 (1827) (leading case). French doctrinal writings are in accord with \textit{Erwin}. 2 \textsc{Colin et Capitant, Droit Civil Francais} n° 97 (8th ed. 1935); 3 \textsc{Toullier, Le droit civil francais} n° 244 (1846): "[I]n French jurisprudence, the expiration of the time fixed by the contract did not in general suffice, and still does not suffice today in order to put the debtor in default." Similarly, the common law requirements for demand of performance are not waived by fixing a date for performance unless the contract is one where "time is of the essence." \textsc{Restatement, Contracts} § 276 (1932).

\textsuperscript{66} Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 791, 44 So. 481 (1907); Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906).

\textsuperscript{67} As said in Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 791, 807, 44 So. 481, 503 (1907): "Our law enforces no such fanciful notion as that, after a contractor has violated his contract by not performing it 'at the time stipulated,' the contractee who no longer desires to have the contract performed must call upon him to perform, and that if this is not done the time for performance continues to run indefinitely."

\textsuperscript{68} 2 \textsc{Planion, Civil Law Treatise (An English Translation by the Louisiana State Law Institute)} Bo. 1318 (1959); 2 \textsc{Colin et Capitant, Droit Civil Francais} n° 99 (8th ed. 1935). Since the Civil Code gives the court discretion in most cases to dissolve the contract or allow more time for performance (article 2047), requiring a demand for performance—apparently the sine qua non to maintenance of a suit for dissolution—seems to be a wasted and superfluous act.

\textsuperscript{69} See note 18 \textit{supra} and \textit{Pierce, Bailey, and Melancon}.

\textsuperscript{70} Temple v. Lindsay, 182 La. 22, 161 So. 8 (1935); 2 \textsc{Colin et Capitant, Droit Civil Francais} n° 97 (8th ed. 1935); 3 \textsc{Toullier, Le droit civil francais} n°° 241-251 (1846). Toullier's research indicates that in Roman law as well, default was a prerequisite to suit when the contract fixed no time for performance. \textit{Id.} n° 241.
as evidence of an intent that the obligation be performed at the will of the debtor; until demand is made the creditor is presumed to have suffered no loss.\textsuperscript{71}

It thus appears that the courts in \textit{Bailey} and \textit{Pierce} could not have avoided the requirement of formal default by any means other than by stretching the active breach concept. Furthermore, these two decisions, which permit dissolution without default even though no date for performance was specified in the lease, are out of harmony with the structure of the Civil Code and the jurisprudence.

\textbf{EVALUATION OF CANCELLATION AS A REMEDY}

In all common law jurisdictions, save South Dakota where the remedy is governed by statute, cancellation for mere failure to pay production royalties is not permitted.\textsuperscript{72} Damages for breach of the lease covenants are considered a sufficient remedy.\textsuperscript{73}

While Louisiana law makes provision for such damages, it does not limit the remedies available to the lessor in the same manner as the common law.\textsuperscript{74} In the absence of special agreement dissolution may be sought as a remedy for failure to fulfill the obligations of a contract;\textsuperscript{75} however, as previous analysis has indicated, the circumstances under which it may be granted vary. Nevertheless, two principles adopted by Louisiana courts should permit them to temper the use of the remedy of cancellation of mineral leases to avoid injustice. First, when an obligor is willing and able to perform his obligation even though after maturity, the courts do not favor annulment of contracts.\textsuperscript{76} Sec-

\textsuperscript{71} See note 71 supra.
\textsuperscript{72} 3 WILLIAMS & MEYERS, OIL AND GAS LAW § 656.3 (1962).
\textsuperscript{74} LA. CIVIL CODE art. 1934 (1870): \textquotedblleft Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived . . . .\textquotedblright When the obligation breached was to pay money, damages due are the legal interest.
\textsuperscript{75} Id. art. 1926: \textquotedblleft On the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract . . . .\textquotedblright
\textsuperscript{76} As stated in Hemsing v. Wiener-Loeb Grocery Co., 157 La. 189, 192, 102 So. 303, 304 (1924): \textquotedblleft Our law does not contemplate that a contract shall be annulled by one party, where the other party is able and willing to perform his
ond, as indicated earlier, cancellation for occurrence of the implied resolutory condition is expressly made subject to judicial discretion by the Civil Code and the jurisprudence.\textsuperscript{77}

Certainly a lessor should not have the burden of placing his lessee in formal default to collect each and every royalty payment as it becomes due. However, cancellation of a lease into which the lessee may have invested hundreds of thousands of dollars for failure to make the initial royalty payment as a result of mere neglect seems to be an unnecessarily harsh remedy, particularly when the lessee is ready, willing and able to make payment.

Obviously, the courts are struggling with a problem which the provisions of our Civil Code were not designed to meet. It is desirable that mineral lessees commence payment of production royalties with all due expedition. Therefore, some legal spur to assure such diligence is necessary. Louisiana courts seem to have found the only available remedy in cancellation. The fact that the only damages recoverable for nonpayment of money take the form of interest may have had considerable influence in this regard.\textsuperscript{78} Nevertheless, it is suggested that cancellation is an unjust remedy except in those instances such as Melancon when the refusal is deliberate, in bad faith, and for a purpose such as coercing action by the lessor.

**CONCLUSIONS**

Developments in this area may take one of several courses. The Supreme Court may continue to deny writs in similar cases, permitting propagation of the Bailey-Pierce doctrine. It is submitted that this is undesirable. As already suggested, the fiction

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\textsuperscript{77} LA. CIVIL CODE art. 2047 (1870); Rudnick v. Union Producing Co., 209 La. 943, 25 So. 2d 506 (1946); Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 372 (1931). The necessity for judicial intervention is evident from the fact that the amount or degree of non-performance justifying resolution is an objective quality which no party to the contract can measure without bias. The Code additionally provides that where judicial action is necessary to dissolve the contract, the court, in its discretion, may grant further time for performance. However, article 2729 theoretically restricts the judge's discretion in the field of leases by declaring that the judge cannot order a delay in dissolution when either the lessee or lessor is guilty of "neglect . . . to fulfill his engagements." For a discussion of article 2046 and the implied resolutory condition, see Comment, 12 TUL. L. REV. 376 (1937). See notes 11-15 supra.

\textsuperscript{78} LA. CIVIL CODE art. 1935 (1870): "The damages due for delay in the performance of an obligation to pay money are called interest."
utilized in these decisions is out of harmony with the structure of our codes and the prior jurisprudence.

A second development may take place by action within the industry. As has been the case in the past, the industry may react to the courts’ action by drafting lease forms incorporating a formula for determining the due date of the initial production royalties. This solution has been adopted in the new state lease form which specifically provides for a 120-day term running from the commencement of production and spells out requirements for putting in default for failure to pay production royalty, both initial and subsequent.79 From discussions with industry personnel and practitioners, it is the writer's opinion that in an effort to protect lessees' interests from more adverse decisions in this area, standard lease forms in the near future will include a term within which the initial production royalty payment is due and will specifically require default as a prerequisite to enforce contractual remedies or to cancel the lease contract.

The possibility of such a solution raises questions regarding its effectiveness. Fixing a term for initial production royalty payment would secure for the industry a period during which cancellation could not in the ordinary course of affairs be granted. On the other hand, a fixed date would tie the hands of the lessee in those cases where serious problems are encountered resulting in an extended period before initial payment can be made. Thus care will be necessary in drafting to assure that payment may be made after the specified term with appropriate penalties to avoid cancellation. A poorly worded clause of this kind could be interpreted as an express resolutory condition.

Creating a term may also affect the applicability of summary eviction to this lease obligation. If the time for payment is fixed, summary eviction may be available to the lessor. Again, care in drafting may avoid undesired results for the lessee.

79. The seventh paragraph of clause six in the newest state lease form incorporates the entirely new concept of a due date for the initial payment of production royalties. Payment shall be made to the state within 120 days after commencement of production, with subsequent rentals due on the 25th day of each month for the oil production from the previous month, and the 25th day of the second month following the production or processing of gas. Delinquency results in a 6% interest rate, which is stipulated to be in lieu of the state's right to cancel for nonpayment of royalties. In any case the lessee is not to be considered in default until written notice is made by the lessor and no payment is made within 60 days of such notice.
Of course, it is also possible that insertion of clauses of this type may not be satisfactory to lessors in many instances. Lessors' attorneys may find the prospect of interest as the sole compensation for failure to commence or continue payment of production royalties unacceptable. Therefore, the industry may be forced to accept some penalty more stringent than mere interest.

A third possible course is for the legislature to promulgate statutes governing the problem. In this writer's opinion, if a delay is unreasonable under the circumstances, the best solution would be to provide special damages (e.g., treble damages) for the delay. The guiding principle should be to encourage greater alertness on the part of the lessee to make royalty payments promptly, yet at the same time eliminate the severity of cancellation as the appropriate remedy. Although such legislation would definitely appear to be remedial in nature, there is always the possibility that it would be held inapplicable to previously executed contracts. Therefore, the problem may not die with enactment of legislation.

John J. Graham

DEPTH BRACKET ALLOWABLE DETERMINATION AND PRORATION OF OIL PRODUCTION IN LOUISIANA*

Proration of Production

The basic purpose of the Louisiana Conservation Act is to prevent both above and below ground waste of valuable mineral resources. The act recognizes that waste below ground can occur as the result of insufficient reservoir control which permits dissipation of the natural forces that aid in lifting oil and gas to the surface or withdrawal of petroleum unevenly from the reservoir formation, thus seriously reducing the amount recoverable from a given pool.1 Above ground waste is defined as "inefficient storing of oil and the producing of oil or gas from

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1. LA. R.S. 30:3(1) (a) (1950).