Louisiana Law Review

Volume 31 | Number 3
April 1971

Mineral Leases - Lessee Draining Other of His Leased Prmises Considered as an Active Breach

James Louis Williams IV

the terms of an agreement. Although only good intentions may motivate the Board, governmental determination of substantive terms would destroy the collective bargaining process since there would be no "bargaining" between the private parties. The collective bargaining process is valuable in maintaining peaceful labor relations. Congress evidently agreed when it made the encouragement of collective bargaining a major policy of the NLRA. The broad remedial power given to the Board to effectuate this policy should not be used to destroy it. Therefore, the Board's remedial power must necessarily be limited so as to encourage bargaining between labor and management.[38]

Edward A. Griffis

MINERAL LEASES—LESSEE DRAINING OTHER OF HIS LEASED PREMISES CONSIDERED AS AN ACTIVE BREACH

Plaintiff-lessors sued their lessee in federal district court[1] seeking an accounting for drainage of oil and gas from beneath their premises caused by lessee's operations on adjoining premises. In the alternative plaintiffs prayed for damages for drainage because of lessee's breach of the implied obligation to protect the leased premises from drainage. Defendant-lessee moved for summary judgment, claiming *inter alia* that plaintiffs' failure to place lessee in default barred their action for damages. The motion was denied as to the necessity of a putting in default. Both parties appealed, and the court of appeals affirmed, holding that the failure of lessors to give notice in this case and under these circumstances would not bar their action for damages because Louisiana courts[2] would characterize lessee's failure to prevent drainage as an active breach of the lease contract. *Williams v. Humble Oil and Refining Co.*, 432 F.2d 165 (5th Cir. 1970), *rehearing denied*, 435 F.2d 772 (5th Cir. 1970).

The question of recovery of damages for drainage was put

38. H. K. Porter v. NLRB, 90 S. Ct. 821, 826 (1970): "It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board nor the courts to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands."

1. Federal jurisdiction was based upon diversity of citizenship under 28 U.S.C. § 1332 (1964).

2. Since there was no federal law governing the case the federal courts were bound to apply the law of the forum state under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

squarely before a Louisiana court in *Breaux v. Pan American Petroleum Corp.*[3] Plaintiff-lessor sued his lessee for damages caused by drainage of the leased premises through the lessee's operations on an adjoining lease. The case was dismissed by the district court on defendant's exception of no cause of action. The Third Circuit affirmed, but on different grounds. After enumerating the elements which a plaintiff would have to allege and prove in order to support a successful action for damages for drainage, the appellate court held that the plaintiff had failed to allege sufficient facts to support such a cause of action.[4] As it is the breach of a contractual duty that is complained of, namely the breach of the implied obligation to protect from drainage, it is logical and legally correct to allow damages, especially when it may be in the best interests of both parties to continue, rather than dissolve,[5] the lease. It is clear, therefore, that the court in *Breaux* intended to recognize the existence of a cause of action[6] for damages for drainage; it cannot seriously be contended that this was not the court's purpose in holding as it did.

There are two common situations in which the lessee is involved in questions of drainage from beneath his leased premises. The first occurs when the lessee holds the lease only upon the tract being drained. Then, the prospect of loss will usually motivate the lessee to take steps to protect himself from drainage, thereby serving both his and his lessor's best interests. The second situation occurs when, as in *Williams*, the lessee owns leases on adjoining tracts, one of which is draining the other. In such instances it is economically advantageous for the lessee

3. 163 So.2d 406 (La. App. 3d Cir. 1964), *cert. denied*, 246 La. 581, 165 So.2d 481 (1964).

4. *Id.* at 415-16. The *Breaux* case is also important for its strong dictum that the implied obligation to protect the leased premises from drainage includes the duty to unitize the leased premises, along with the already recognized duty to drill offset wells. Both of these stem from the broad obligation of the lessee, implied in every mineral lease, to protect its leased premises from drainage.

5. Prior to *Breaux*, plaintiffs usually sued for cancellation for breach of the implied obligation. *See, e.g.*, Coyle v. North American Oil Consol., 201 La. 99, 9 So.2d 473 (1942); Swope v. Holmes, 169 La. 17, 124 So. 131 (1929); Hiller v. Humphreys Carbon Co., 165 La. 370, 115 So. 623 (1928); Pipes v. Payne, 156 La. 791, 101 So. 144 (1924). One case was entertained in federal court in which plaintiffs were allowed to sue for damages due from the time of formally placing defendant in default, but damages prior to the date of default were denied. Billeaud Planters, Inc. v. Union Oil Co., 245 F.2d 14 (5th Cir. 1957).

6. It is unclear what prescriptive period will be applied to this action, and from whence it begins to accrue.

to minimize drilling costs by completing one well which will produce from both premises. Thus, in the second situation, there is no economic incentive for the lessee to protect the drained premises.[7] The lessee, in fact, would be tempted to allow self-interest to prevail. A discussion of the consequences flowing from the categorization of a lessee's failure to protect the leased premises from drainage in such situations as either a passive or active breach[8] will illustrate the importance of the court's holding in *Williams*.

An active violation of contract occurs when something is done which is inconsistent with the obligation of the contract; a passive violation consists of failing to do what was covenanted to be done—a mere omission.[9] Damages are due from the moment an active breach takes place,[10] whereas damages accrue for a passive breach only from the time the obligor has been put in default.[11] Since liability theoretically begins when a person knows of his fault, and since the law infers knowledge of fault to the perpetrator of an active breach, the obligee's right to damages begins at the moment of breach. However, one who passively breaches an obligation must be given notice of the impropriety of his actions by the obligee before the right to seek damages arises. The essence of this notion is the awareness of fault.[12]

In the usual lessor-lessee relationship, the lessor is at a technological disadvantage and often does not have the ability to determine whether drainage is occurring until he has suffered substantial damage. The lessor would be without recourse for damages caused by drainage during the interim between the commencement of the drainage and the fulfillment of the requirement of putting in default. To the average lessor this would

7. Hardy, *Drainage of Oil and Gas from Adjoining Tracts—A Further Development*, 6 NAT. RES. J. 45, 51-52 (1966).

8. *See generally The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Mineral Leases*, 25 LA. L. REV. 360 (1965); Walker, *Implied Drilling Obligations in Oil and Gas Leases in Louisiana*, 1 LOYOLA L. REV. 1 (1941); Note, 18 LA. L. REV. 354 (1958).

9. LA. CIV. CODE art. 1931.

10. LA. CIV. CODE art. 1932. *See generally* Sarpy, *The Putting in Default as a Prerequisite to a Suit in Louisiana*, 1 LOYOLA L. REV. 127 (1942); Smith, *The Cloudy Concept of Default*, 12TH INST. ON MINERAL LAW 3 (1965); Note, 18 LA. L. REV. 354 (1958).

11. LA. CIV. CODE art. 1933.

12. *See* Note, 18 LA. L. REV. 354 (1958) for a full discussion of the notion of fault in recovery of damages for breach of contract, in which the author relies upon the writings of Toullier for authority.

involve the loss of a significant amount of money. On the other hand, holding the lessee's conduct to be an active breach means that damages are due from the date the drainage actually began, since the lessee knew, or reasonably should have known, that his own operations were draining the leased premises. This shifts the burden of economic loss to the lessee. However, there is a question whether imposing the burden of ameliorating his lessor's damages due to his own conduct can properly be called a "loss."

Generally, the failure to comply with an implied obligation in a mineral lease has been classified as a passive breach, requiring that the defendant be put in default as a prerequisite to suit for damages or dissolution.[13] For example, it is settled that the lessee's failure to further develop the leased premises is a passive breach.[14] In contrast the courts have held that under certain circumstances a putting in default is not required for failure to pay production royalties. However, it is doubtful whether this is the rule or the exception.[15] It was first held that the failure to pay production royalties was an active breach in the closely related cases of *Bollinger v. Texas Co.*[16] and *Melancon v. Texas Co.*[17] In both cases the lessee's withholding of royalties to force the lessor to consent to the formation of voluntary production units was viewed as coercive conduct amounting to an active breach. In the face of such knowing coercion by the lessee, the court could find no need to make the lessee aware that its actions were improper. The lessee's actions were clearly inconsistent with its obligation under the lease.[18]

---

13. Savoy v. Tidewater Oil Co., 218 F. Supp. 607 (W.D. La. 1963), *aff'd per curiam*, 326 F.2d 757 (5th Cir. 1964); Bollinger v. Republic Petroleum Corp., 194 So.2d 139 (La. App. 1st Cir. 1966); McDonald v. Grande Corp., 148 So.2d 441 (La. App. 3d Cir. 1962).

14. Brown v. Sugar Creek Syndicate, 195 La. 865, 197 So. 583 (1940); Hiller v. Humphreys Carbon Co., 165 La. 370, 115 So. 623 (1928); Pipes v. Payne, 156 La. 791, 101 So. 144 (1924). Another example of a passive breach is found in McDonald v. Grande Corp., 148 So.2d 441 (La. App. 3d Cir. 1962). There it was held that the lessee's failure to extricate his lessor from an uneconomic unit at the same time the lessee extricated itself was a passive breach of the obligation of acting in its lessor's best interests. The writer takes exception to the *McDonald* holding, however, and feels that such conduct constituted an active breach, for reasons set forth in the text, *infra*.

15. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Mineral Rights*, 31 LA. L. REV. 263, 269-72 (1971).

16. 232 La. 637, 95 So.2d 132 (1957).

17. 230 La. 593, 89 So.2d 135 (1956).

18. *See* note 9 *supra* and accompanying text. However, from this sound basic idea there has evolved a questionable doctrine that when royalties are not paid for an appreciable length of time without justification the

In the instant case[19] the United States Court of Appeals for the Fifth Circuit held that a lessee actively breaches his obligation to prevent drainage when his operations on adjoining premises drain property which he holds under a different lessor. The case was before the court on appeal from a denial of a motion for summary judgment on the ground that the lessee was not placed in default. Sitting as an *Erie* court[20] the Fifth Circuit was bound to apply what it found to be Louisiana law.[21]

Humble first relied on specific provisions of the lease, citing the clause requiring the lessor to serve notice in writing upon the lessee when the former felt that the latter's conduct was a breach of the lease. Lessee had sixty days after receipt of such notice to comply with the particulars demanded by the lessor and to avoid cancellation of the lease.[22] The court stated as a matter of law[23] that failure to give notice as required by the lease contract was not a bar to suit in this case. Judge Wisdom found that such clauses were inserted in lease contracts for the purpose of protecting the lessee from *forfeiture* of the lease and, as such, were inapplicable to suits for damages caused by drainage. He commented that this was the reason Louisiana courts required strict compliance with such clauses.[24] From this writer's

breach is active in character. *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Mineral Rights*, 31 LA. L. REV. 263, 272 (1971).

19. 432 F.2d 165 (5th Cir. 1970).

20. *See* note 2 *supra*.

21. Although such determinations of state law are not controlling in state courts, they are binding in federal courts unless and until the state's supreme court holds to the contrary. Therefore, the potential acceptance of this case into the federal jurisprudence renders it significant. There is, of course, the possibility that the state courts may adopt this concept also. The case is also worthy of comment in that it reflects a strong tendency toward recognition of the mineral lessee's duty to unitize in order to protect from drainage and states that a lessee's implied duty to prevent or to protect from drainage cannot be precluded by an express offset provision. These aspects of the case are not discussed herein. Williams v. Humble Oil and Refining Co., 432 F.2d 165, 174, 177-78 (5th Cir. 1970).

22. "And in the event the Lessor considers that operations are not being conducted in compliance with this contract, Lessee shall be notified in writing of the facts relied upon as constituting a breach hereof and Lessee shall have sixty (60) days after receipt of such notice to comply with the obligations imposed by virtue of this instrument." *Id.* at 178-79.

23. The district court had held that it would be a matter for the jury to decide, Williams v. Humble Oil and Refining Co., 290 F. Supp. 408 (E.D. La. 1968).

24. "On the other hand, an action for damages threatens no such harsh consequences as termination of the lessee's interest. There is less reason to insist upon notice and demand. Indeed, in the ordinary drainage action notice to the lessee would be superfluous. The harm has already been committed, and no action by the lessee to repair the breach could adversely affect the lessor's right to compensation for past harm. In many cases the fact of injury is already known to the lessee, who has superior

examination of the Louisiana jurisprudence there appears to be little reason for applying the demand clause in cases for cancellation because of drainage and not applying it in cases seeking damages for drainage. Although the Texas jurisprudence might support this distinction,[25] it is at best unclear whether such a differentiation exists in Louisiana. Nevertheless, having asserted this distinction, the court easily disposed of two cases relied upon by Humble in stating that since they were cancellation cases, notice should have been given.[26]

Humble next urged that *Billeaud Planters, Inc. v. Union Oil Co. of California*[27] required a putting in default in cases such as *Williams*. To this contention the court replied that in *Billeaud* the lease itself unambiguously stated that if the lessor felt the lessee was violating *any express or implied obligation* that notice was a prerequisite to suit for *any* cause under the lease. Therefore, the language in *Billeaud* declaring the breach of the obligation to prevent drainage to be passive was not actually necessary to the disposition of the case and was mere dictum.[28] Ac-

knowledge of his own operations, long before it becomes known to the lessor. The lessor's inability to give notice of that which he does not know should not in all fairness bar him forever from recovery for damages already incurred. The oil industry was undoubtedly conscious of these considerations when the standard form notice provision in the instant lease was drafted." Williams v. Humble Oil and Refining Co., 432 F.2d 165, 179-80 (5th Cir. 1970).

25. Texas Oil and Gas Corp. v. Vela, 429 S.W.2d 866 (Tex. 1968); Shell Oil Co. v. Stansbury, 401 S.W.2d 623 (Tex. Civ. App. 1966), *error refused*, 410 S.W.2d 187 (Tex. 1966).

26. Williams v. Humble Oil and Refining Co., 432 F.2d 165, 180 (5th Cir. 1970). The two cases might have been distinguished upon another ground. Bollinger v. Republic Petroleum Corp., 194 So.2d 139 (La. App. 1st Cir. 1966) (action for cancellation for failure to pay shut-in royalties) and Vance v. Hurley, 215 La. 805, 41 So.2d 724 (1949) (action for cancellation based on agreement to pay remaining portion of production payment at end of three-year period) were not cases involving damages for drainage by the lessee.

27. 245 F.2d 14 (5th Cir. 1957).

28. There does seem to be credence in this statement by the court. The *Billeaud* court, after stating that in Louisiana the contract between the parties is the law of the case so long as it is not *contra bonos mores* or violative of a prohibitive law, stated, "Hence, before appellants could claim the right to damages for drainage whether by virtue of a breach of appellee's express or implied obligations they were by their own contract terms required as a prerequisite to the recovery of damages 'to notify Lessee in writing, setting out specifically in what respects lessee ha[d] breached this contract.' The conditions of the contract are clear and unambiguous and are to be construed as the parties must be supposed to have understood them at the time of its execution. Our plain duty is confined strictly to the ascertainment of the rights and obligations of the contracting parties as they have defined them for themselves." *Id.* at 18. The *Williams* court felt that it was sufficient for the disposition of the *Billeaud* case that the parties *intended to require notice as a prerequisite to an action for damages.*

cordingly, it held that the different language in the *Billeaud* and *Williams* leases permitted different results.

Assuming the incorrectness of Judge Wisdom's holding that default clauses are inapplicable in suits for damages, another justification for not applying the notice clause lies in his reading of the *Billeaud* case. By finding that the express language in that lease, requiring notice and demand for breach of *both* express and implied obligations, was the actual basis for decision in that case, Judge Wisdom implied that absent such specific language the general law of putting in default as a prerequisite for damages would control as to implied obligations. Similarly, it could be argued that unless the notice clause specifically provides otherwise, the requirement of putting in default would apply only to cases of *non-performance* classified as *passive* breaches.

The *Williams* court analogized the situation facing it to cases where failures to pay production royalties were seen as active breaches because they were actions inconsistent with the obligations imposed by the lease contracts.[29] The court reasoned that when the lessee is causing drainage from that portion of the lessor's premises upon which it owns the lease, it is not merely failing to protect against drainage, but is *acting* with knowledge (or in circumstances in which a reasonably prudent operator would have knowledge) in a manner inconsistent with its obligation to protect from drainage.[30] Additionally, it was found necessary to take the question of whether the lessee's actions constituted an active or passive breach out of the hands of the jury[31] to avoid the possibility of arbitrary decision-making.[32]

In denying the petition for rehearing[33] the court reiterated its stand upon the *Billeaud* case and the cases finding active breaches for failure to pay production royalties. Humble also alleged in its petition for rehearing that the *Breaux* case stood for the proposition that a lessor has no greater rights against

29. 432 F.2d 165, 181-82 (5th Cir. 1970).
30. *Id.*
31. *See* note 23 *supra.*
32. Williams v. Humble Oil & Refining Co., 432 F.2d 165, 181 (5th Cir. 1970). Undoubtedly some will argue that the classification of this action by Humble as an active breach is arbitrary decision-making of the highest order.
33. 435 F.2d 772 (5th Cir. 1970).

its own lessee who is draining the former's leased premises than it does against a third party, and, therefore, placing the lessee in default is necessary in both situations. The court of appeals found that the *Breaux* case was not concerned with whether an active or passive breach had taken place, but with whether there is a cause of action for damages caused by drainage; and, if so, whether the nature of the cause of action is different where there is a common lessee on the draining and drained tracts. Consequently, the court's statement in *Breaux* that the lessor had no greater rights against his lessee when the lessee was the one responsible for the drainage was correct,[34] but was concerned with the allegations of the measure of damages a lessor could recover rather than with the need of a putting in default.[35]

In considering the impact of this decision, it should be noted that the concept of active breach applies only in situations where a lessee, by his own operations on adjoining premises, drains oil and gas from his adjacent lessor's premises. The need of putting a lessee in default for the failure to protect from or to prevent drainage occasioned by a third person has not been abrogated. In holding the action of the lessee to be an active breach, the *Williams* court emphasized that Humble itself had caused the drainage. By this means the court justified its statement that the lessee was actually doing something inconsistent with its obligation, rather than merely failing to do something the contract had bound it to do.[36]

From a practical standpoint, it would seem that this decision is desirable. When a lessee is producing from the premises adjoining those it has under lease from a different lessor, he has full control of that operation. The lessee's superior technical resources and economic advantage would certainly indicate that he should be aware that drainage is occurring. A lessee in the *Williams* type situation should not be allowed to contend that his only fault was a passive omission to act.[37] In these situations

34. For a criticism of this concept, *see* Hardy, *Drainage of Oil and Gas from Adjoining Tracts—A Further Development*, 6 NAT. RES J. 45 (1966); *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Mineral Leases*, 25 LA. L. REV. 360, 360-68 (1965).

35. Williams v. Humble Oil & Refining Co., 435 F.2d 772 (5th Cir. 1970).

36. Williams v. Humble Oil & Refining Co., 432 F.2d 165, 181-82 (5th Cir. 1970).

37. Note, 18 LA. L. REV. 354, 359-60 (1958). *See also* notes 8-11 *supra* and accompanying text.

the temptation of the lessee to minimize his costs and exact a greater profit by not acting to prevent drainage from the other premises is tremendous.[38] The average lessor is in a vastly inferior position concerning access to technical data and the facilities to decipher its meaning. To require a putting in default by the lessor under the circumstances presented in *Williams* would place upon him a burden of keeping constant vigil on the operations on adjoining tracts—a burden properly borne by the lessee. The interests of lessees are admittedly prejudiced by allowing damages to be computed from the moment the lessee had, or should have had, knowledge that his operations were causing drainage, rather than from the time the lessor could ascertain the fact and make a demand upon the lessee. However, it does not seem unfair that the lessee's burden may thereby be increased; had he performed his duty initially, the burden would not exist.[39]

Had the court accepted Humble's contention that its operations constituted a mere passive breach, it would be difficult to conceive of a situation where an active breach could be found. Humble's argument that a failure to prevent and to protect from drainage constituted a mere omission and, therefore, a passive breach would have been correct if a third party caused the drainage. However, Humble's actual or constructive knowledge that its own operations caused the drainage prevented acceptance of its contention. An analogy to the situations in the *Bollinger* and *Melancon* cases illustrates this fact. Whether a lessee refuses to pay royalties in an attempt to coerce his lessor into some action, or drains his lessor's tract by operations on adjoining premises, he is acting with actual or constructive knowledge of the impropriety of his act. To say that a putting in default is required, therefore, would be to require that the lessor do a "vain and useless thing";[40] the lessee is already aware of his breach.

Another rationale exists for relieving the lessor of the burden of placing his lessee in default. Under Civil Code article 1933 (1)[41]

---

38. *See* note 7 *supra* and accompanying text.

39. Hardy, *Drainage of Oil and Gas from Adjoining Tracts—A Further Development*, 6 NAT. RES. J. 45 (1966).

40. Voss v. Roach, 35 So.2d 142 (La. App. 2d Cir. 1948).

41. "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 certain circumstances, which no longer exist, the debtor need not be put in legal delay to entitle the creditor to damages."

the creditor need not put his debtor in default when the contract is of such a nature that it could be performed only under certain circumstances, which no longer exist, or at a particular time, which has elapsed. This article contemplates a situation where action at a precise time is required. If steps are not taken at the moment drainage begins, there is no way the lessor can be protected against drainage which has already occurred, and he should, therefore, be entitled to recover for past drainage.[42]

The situations in the *Williams*, *Bollinger*, and *Melancon* cases may be compared to those where Louisiana courts have held that a refusal to perform or a denial of the existence of an obligation were active breaches.[43] If Humble were causing drainage, it refused to perform its obligation to prevent and to protect from drainage. Such conduct also seems to amount, at least, to an implied denial of the existence of the obligation; the lessee would be clearly at fault. If Humble were draining its lessor's premises, that act is equivalent to doing something inconsistent with its obligations both to prevent drainage and to protect the leased premises. Therefore, this action would seem to fall squarely within the scope of article 1931.[44]

It is safe to assume that the court's decision was not compelled merely by a reading of prior jurisprudence, but was instead an attempt to provide the lessor with a more effective remedy to protect his lease from drainage by his own lessee. If the decision stands, it will cause operators to adopt a more cautious attitude when drilling on premises adjoining other property upon which they also own leases. This does not mean that drilling and exploration will be hampered. A lessee can still defend any failure to drill offset wells by asserting the economic infeasibility of such operations. In such cases the remedy of the

---

LA. CIV. CODE art. 1933(1). *See* Chattanooga Car & Foundry Co. v. Lefebvre, 113 La. 487, 37 So. 38 (1904); Williams Lumber Co. v. Stewart Gast & Bros., 21 So.2d 773 (La. App. Orl. Cir. 1945).

42. *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Mineral Rights*, 25 LA. L. REV. 360, 365 n.11 (1965). However, this approach might also indicate that failure to protect from drainage caused by third parties is an active breach.

43. Stockelback v. Bradley, 159 La. 336, 105 So. 363 (1925); Johnson v. Levy, 122 La. 118, 47 So. 422 (1908); Southern Sawmill Co. v. Ducote, 120 La. 1052, 46 So. 20 (1908); Jones v. Whittington, 171 So.2d 764 (La. App. 2d Cir. 1965), *cert. denied*, 247 La. 624, 172 So.2d 703 (1965).

44. *See* note 9 *supra* and accompanying text.

lessor would be to demand that his lessee unitize the drained acreage or to seek unitization himself.[45]

In response to this decision, lessees may attempt to amend the default clause of the standard lease forms to require notice as a prerequisite to suits seeking either damages or cancellation for active or passive breaches of express or implied obligations. The *Williams* court indicated approval of this approach by citing the *Billeaud* case as standing for the proposition that the parties could insert such a clause in the lease contract. Although the Civil Code states that no default is necessary when an active breach has occurred,[46] the parties can by their own contract make the law that will bind them so long as the contract is not *contra bonos mores* or violative of some prohibitive law.[47] However, enforcement of such a provision would place the lessor in the same position which some thought he occupied prior to the decision in *Williams*. The lessor would be returned to his disadvantaged economic and technical posture in a situation in which the temptations are strong for the lessee to permit economic self-interest to overcome his obligation to administer the lease for the mutual benefit of both parties. The use of such a clause is questionable in view of the fact that most lessors are not equipped to perceive the subtleties of such a contractual provision.

It is suggested that the courts use article 1901 of the Civil Code,[48] requiring that all contracts be performed in good faith, to prohibit such a provision. In the decisions in which Louisiana courts have found refusal to pay production royalties for the purpose of coercing particular action on the part of the lessor, the conduct of the lessee can be equated to bad faith.[49] In a situation in which the lessee is draining his lessor's property with actual or constructive knowledge of that fact, it is but a small extension of the *Williams* concept to find that such conduct amounts to bad faith within the meaning of article 1901. Clearly, it would be against public policy to permit a party to contract away his right to receive performance in good faith. It should

45. LA. R.S. 30:6(F) (1950), which provides that any interested party can seek unitization.

46. LA. CIV. CODE art. 1932.

47. *Id.* arts. 1895, 1901, 1945.

48. *Id.* art. 1901: "Agreements legally entered into . . . must be performed with good faith."

49. Bollinger v. Texas Co., 232 La. 637, 95 So.2d 132 (1957); Melancon v. Texas Co., 230 La. 593, 89 So.2d 135 (1956).

be pointed out that when article 1901 speaks of "bad faith" it is altogether different from that sort of conduct which is labeled "fraud."[50] Although the lessee's bad faith in such a situation does not amount to fraud, this does not mean that he is not at fault. This suggests another reason to forbid such provisions. If the lessor cannot contract away his right to receive performance in good faith, *a fortiori*, the lessee cannot contract away his fault and thereby vitiate his duty to perform his obligation in good faith. This course of reasoning would thus permit courts to avoid attempts to circumvent the *Williams* decision by contract. It is urged that they do so.

An equitable solution to the problem may be the adoption of a scheme of compensatory royalties comparable to that contained in paragraph five of the Louisiana state lease form.[51] It

50. *See* 2 PLANIOL, CIVIL LAW TREATISE 1060-69 (La. St. L. Inst. transl. 1959).
51. Louisiana State Lease Form Revised (1966):

5. The obligations set forth in this Article are applicable only to wells drilled on (1) property which is not owned by Lessor or (2) property in which Lessor has no interest, and which in either instance is not part of a pooled unit containing all or any portion of the leased property. Such property is hereinafter described in this Article as "adjoining property."

(a) If at any time during or after the primary term there is completed on adjoining property a well located within six hundred and sixty (660) feet of the leased premises (or within any spacing or pooling unit distance greater than 660 feet established by the Commissioner of Conservation) and such well produces oil, gas, or other liquid or gaseous hydrocarbons in paying quantities for twenty (20) days (which need not be consecutive) during any period of thirty (30) days, or produces its monthly allowable during such thirty (30) day period, rebuttable presumptions will arise: (1) that the leased premises are thereby being drained; (2) that the leased premises are not being reasonably protected from drainage by any well or wells on the leased premises or land pooled therewith; and (3) that an offsetting well on the leased premises would be economically feasible. If Lessee is the operator of or has a working interest in the adjoining property, Lessee will begin operations for the drilling of a well on the leased premises upon expiration of ninety (90) days after the end of the above thirty (30) day period. In all other cases Lessee shall be required to begin operations only upon expiration of ninety (90) days after receipt of written notice from the Board of the expiration of the above thirty (30) day period. No offset well shall be necessary if, on or before the maturity date of the offset obligation or any deferred maturity date as hereinafter provided, any of the stated presumptions is rebutted or a unit for the well in question embracing all or part of the leased premises is formed by agreement with the Board or by order of the Commissioner of Conservation.

In lieu of commencing operations for an offset well as above provided, Lessee may, at Lessee's option, commence compensatory payments equal to the royalties herein provided, computed on one-half (½) of the oil, gas, or other liquid or gaseous hydrocarbons produced by the well in question on and after the date operations would have otherwise been commenced, value to be determined in accordance with the provisions of Article 6 of this lease. Such payments may be com-

provides that if any well is drilled and is producing on adjoining property within six hundred-sixty feet of the leased premises, rebuttable presumptions arise that (1) the leased premises are being drained, (2) the leased premises are not being reasonably protected from drainage by well(s) on the leased premises or land pooled therewith, and (3) that drilling a well on the leased premises to offset the drainage would be economically feasible. The lessee has the affirmative duty to begin an offset well when it is the operator on adjoining premises, but may avoid drilling

menced on or before sixty (60) days after the date operations would otherwise have been commenced, but shall include any accrued compensatory payments. Thereafter, payments shall be due monthly in accordance with Article 6(i). Lessee shall not be in default in either commencing compensatory payments or in making further payments as above provided if despite due diligence Lessee is unable timely to obtain the production information on which such payments are to be based. In any such case, however, Lessee must on or before the due date of the payments, notify the Board in writing of Lessee's inability to make such payment, the reasons therefor, and Lessee's intent to make such payment at the earliest reasonable time. Compensatory payments may be continued, at Lessee's discretion, for not more than one year from the date on which offset operations would otherwise have been commenced. At the end of that time, or within 30 days from the end of any lesser period for which payments are made, Lessee shall comply with this offset obligation if the producing well continues to produce in paying quantities or to produce its allowable and the other conditions making this obligation operative are existent. The right to make compensatory payments is intended to permit Lessee to evaluate further the producing well, and the making of such payments shall not of itself be sufficient to maintain this lease in force and effect; however, the making of any such payments shall not prejudice Lessee's right to rebut any of the above enumerated presumptions.

(b) In addition to the specific offset drilling obligation above provided, Lessee agrees to drill any and all wells necessary to protect the leased premises from drainage of oil, gas, or other liquid or gaseous hydrocarbons by a well or wells on adjoining property or to take any other steps reasonably necessary to protect the leased premises against such drainage, including, but not limited to, obtaining the formation of appropriate drilling or production units. If Lessee is the operator of or has a working interest in any well on adjoining property Lessee shall be obligated to begin operations for the drilling of a well on the leased premises or to take such other steps as may be reasonably necessary to protect the leased premises upon expiration of ninety (90) days from the time Lessee knows or reasonably should know that drainage is occurring. In all other cases, Lessee shall be obligated to begin such operations or take such other steps only upon the expiration of ninety (90) days after receipt of written notice from the Board.

(c) In those instances in which notice is expressly required under paragraph (a) or (b), above, damages, if due, shall be computed only from the date on which notice is received or, if Lessee commences compensatory payments, the date on which such payments are discontinued. In those instances in which there is no requirement of notice under (a) or (b), above, damages, if due, shall be computed from the time Lessee knew or reasonably should have known drainage was occurring. Written notice containing a demand for performance shall be necessary as a prerequisite to any action for cancellation of the lease by Lessor for nonperformance of any obligations of Lessee to protect the leased premises against drainage.

by paying compensatory royalties to its lessor computed on one-half the production of the presumed draining well. Making such payments merely permits the lessee to evaluate further the producing well and will not alone be sufficient to continue the lease in force; however, the lessee's right to rebut the above presumptions is not prejudiced by compensatory royalty payments. In addition to the specific offset obligation outlined above, the lessee also has the general obligation either to drill an offset well, form a drilling or production unit, or take any other action reasonably necessary to prevent drainage. Further, if the lessee is the operator, or has a working interest in any well on adjoining property, he has ninety days from the time he knows or reasonably should know drainage is occurring to drill an offset well or to take other action reasonably necessary to protect the leased premises from drainage. Should he fail to act within ninety days, damages are computed from the time the lessee knows or should know drainage is occurring.

The equities in such a plan are apparent. In the specific offset provision it is the lessee who has the burden of ascertaining whether drainage is in fact occurring—a task he is well-equipped to handle. By paying the compensatory royalties, the lessee buys time during which he can conduct the necessary tests to determine what future course of action is required. At the same time the lessor is saved from having to act as watchdog on the adjoining premises while being reimbursed in case his premises are actually being drained. In the case of operations not covered by the express offset provision the same result as that of the *Williams* case is achieved.

The *Williams* decision places the lessor closer to parity with the lessee; still, adequate defenses and protections are available to prevent the latter from being treated unjustly. For this reason, it is hoped that *Williams* will stand and that Louisiana courts will see fit to affirm the proposition that it correctly states the law of Louisiana.

James Louis Williams, IV

CRIMINAL JUSTICE: DOUBLE JEOPARDY—ABOLITION OF THE DUAL SOVEREIGNTY THEORY OF CITY-STATE PROSECUTIONS

A group of looters removed a canvas mural from the City Hall of St. Petersburg, Florida. When the mural was recovered