

Summer 1981

Nonpayment of Production Royalties under a Producers 88 Lease: A Legislative Prescription to Cure a New Disease

J. M. Morse, III

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

J. M. Morse, III, *Nonpayment of Production Royalties under a Producers 88 Lease: A Legislative Prescription to Cure a New Disease*, 9 Fla. St. U. L. Rev. 447 (2017) .
<http://ir.law.fsu.edu/lr/vol9/iss3/2>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

NONPAYMENT OF PRODUCTION ROYALTIES UNDER A PRODUCERS 88 LEASE: A LEGISLATIVE PRESCRIPTION TO CURE A NEW DISEASE

J.M. MORSE, III*

"Landlord fill the flowing bowl"
-Oxford Song

I. INTRODUCTION

A landowner whose property contains oil, gas, or valuable minerals will rarely seek to exploit those resources himself. Instead he will enter into an agreement with someone with special capabilities to extract them. He will typically lease his mineral rights in exchange for a promise to pay rents and royalties. If the lessee fails to make timely royalty payments, the mineral lessor has traditionally been limited in his remedies. The courts in Louisiana, however, have applied ordinary landlord-tenant law to oil, gas, and mineral leases and have cancelled leases for failure to make timely royalty payments.

This article will explore the availability of the lease cancellation remedy under Florida law. Further, it will outline some alternate remedies and legislation and the underlying basis for them. The reasons and excuses for delays in royalty payments are also examined and criticized. After examination of the relevant provisions of a standard oil, gas, and mineral lease and the factors that can cause delay in royalty payments, this article will review the lessor's traditional remedies and analyze the principles and limitations of the Louisiana approach and the feasibility of extending the Louisiana doctrine to other states. Although this article will focus on Florida law, its method of analysis can be applied to other states' statutes as well.

II. THE STANDARD OIL, GAS, AND MINERAL LEASE

Most oil and gas producers today use the "Producers 88" form lease.¹ Since its origination in Oklahoma in the early 1900's,² the

* Professor of Law, Florida State University.

1. 1 WILLIAMS & MEYERS, *OIL AND GAS LAW*, § 202.1 (1980). For examples of "Producers 88" form lease, see 2 BROWN, *THE LAW OF OIL AND GAS LEASES*, § 18.01 (1973); OAKES, *STANDARD OIL AND GAS FORMS* 6-11 (1952); 6 SUMMERS, *OIL & GAS*, §§ 1147-53 (1967 & Supp. 1980).

2. See Moses, *The Evolution and Development of the Oil and Gas Lease*, Sw. LEGAL FOUNDATION 2ND ANN. INST. ON OIL & GAS L. & TAX., 27-33 (1951); Walker, *Defects and*

"Producers 88" has been revised many times and is now in use in various versions of its original form.³ Although it is not a unique lease agreement, the term "Producers 88" identifies a general type of form lease with certain common provisions that are the product of years of litigation.⁴ The "Producers 88" is comprised of a fixed primary term, an express covenant to pay a one-eighth "royalty," and an "unless" drilling clause.⁵ In addition, it often contains a provision for "shut-in" royalties.⁶

The term "royalty" in this article refers to the landowner's share of production or the money derived from the sale of this share, free of expenses of production⁷ and not the underlying real property interests.⁸ The royalty may be payable in kind, as a fixed share of the oil or gas that is produced, or it may be payable in money, based on the market value of the production.⁹ Although the landowner's share typically is one-eighth of production, it may be any other fractional share as established by the lease agreement.

The "unless" clause of a "Producers 88" lease provides for the termination of the lease *unless* the lessee commences drilling or pays a "delay rental" during the primary term.¹⁰ The lessee may drill or pay the delay rental, but he has no obligation to do either. The only result of non-compliance by the lessee is the automatic termination of the lease on the anniversary date of the rentals. In contrast, an "or" lease allows the lessor to hold the lessee liable for payment of delay rentals during the entire primary term of the

Ambiguities in Oil and Gas Leases, 28 TEX. L. REV. 895, 895-98 (1950).

3. See 1 WILLIAMS & MEYERS, *supra* note 1, at § 202.1; WILLIAMS & MEYERS, *MANUAL OF OIL AND GAS TERMS* 149 (3d ed. 1971) [hereinafter cited as WILLIAMS & MEYERS MANUAL.]

4. 3A SUMMERS, *supra* note 1, at § 571; Walker, *supra* note 2, at 897.

5. *Id.*

6. 6 SUMMERS, *supra* note 1, at § 1148; 3 WILLIAMS & MEYERS, *supra* note 1, at § 631.

7. WILLIAMS & MEYERS MANUAL, *supra* note 3, at 390.

8. The term "royalty" does not have a single, fixed definition because it is interpreted by reference to the instrument in which it is used. It is often used to describe varying property interests that are created by the conveyance or reservation of a royalty interest, as well as to describe the lessor's right to compensation for production. For a discussion of decisions construing the term, see Annot., 90 A.L.R. 770 (1934); Sullivan, *All About Royalties*, 16 ROCKY MTN. MIN. L. INST. 227 (1971).

Generally, "royalty" does not include delay rentals or bonus. BROWN, *supra* note 1, at § 6.00; Annot., 122 A.L.R. 959 (1939).

9. WILLIAMS & MEYERS MANUAL, *supra* note 3, at 390. See Fischl, *Ascertaining the Value or Price of Gas for Purposes of the Royalty Clause*, 21 OKLA. L. REV. 22 (1968); Comment, *The Gas Royalty Clause of an Oil and Gas Lease in Texas*, 11 S. TEX. L.J. 405 (1970).

10. WILLIAMS & MEYERS MANUAL, *supra* note 3, at 487-88. See 6 SUMMERS, *supra* note 1, at §§ 1148-51; 3 WILLIAMS & MEYERS, *supra* note 1, at § 605.

lease.¹¹

A "shut-in royalty" clause authorizes the lessee, when and if a producing well has been drilled, to keep the lease alive by making specified payments.¹² The well must be capable of producing in commercial quantities, but is shut-in for lack of a market. Payment of shut-in royalties will keep the lease alive past the primary term; failure to make timely payment will terminate the lease.¹³

The principal payment obligations under a "Producers 88" lease are production royalties, delay rentals, and shut-in royalties.¹⁴ The lessee who wishes to continue in the lease will rarely fail to make timely payment of delay rentals or shut-in royalties, lest the lease automatically terminate. However, a lessee may desire for various reasons to delay production royalties and the "Producers 88" is silent concerning the definition and consequences of undue delay.

III. REASONS FOR DELAY OF ROYALTY PAYMENTS

The lessee has an interest in minimizing his expenses until the value of the leasehold is proved. Some expenses need not be incurred unless a producing well is drilled. In order to cut down on those costs, the lessee often will defer final resolution of exact ownership of the royalty interests involved. Until the precise ownership interests have been determined, there often is a delay in the payment of royalties.¹⁵

Defective or clouded titles to the property frequently cause delays. Normally, when a well is drilled on the leased premises, the lessee will have resolved the question of ownership prior to the commencement of drilling operations. He may, however, have been sufficiently satisfied that his leases covered all the interests outstanding, without determining the precise interest owned by each

11. HEMINGWAY, *THE LAW OF OIL AND GAS* § 6.2 (1971). See Moses, *The Evolution of the Oil, Gas and Mineral Lease*, 22 TUL. L. REV. 471 (1948); Williams, *The Delay Rental and Related Clauses of Oil and Gas Leases*, 38 MINN. L. REV. 97 (1954).

12. WILLIAMS & MEYERS MANUAL, *supra* note 3, at 421-22.

13. HEMINGWAY, *supra* note 11, at § 6.5. See Malone, *The Evolution of Shut-in Royalty Law*, 11 BAYLOR L. REV. 19 (1959); Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases*, 23 TUL. L. REV. 374 (1949); Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases: Part II*, 27 TUL. L. REV. 478 (1953); Comment, *Shut-in Gas Well Payment—Royalty or Rental*, 24 LA. L. REV. 384 (1964); Comment, *Constructional and Drafting Problems in Shut-in Royalty Clauses*, 3 U.C.L.A. L. REV. 564 (1956); Annot., 96 A.L.R.2d 345 (1964).

14. The lessee also may obligate himself to make other payments, e.g., overriding royalties or bonus.

15. The discussion of delay-causing factors is based upon the author's personal knowledge and Arata, *Timely Payment of Royalties*, 11 LOY. L. REV. 163, 165-74 (1963).

lessor. He may also have taken protection leases from competing interests. If the well produces in paying quantities, payment of royalties will be delayed until curative work is completed, usually by the examining attorney or the lessee. Not until all curative measures have been completed will the attorney render a final title opinion. A complicated title may require several supplemental opinions and additional curative work before the rendition of the final opinion. Only then does the lessee become willing to pay royalties to the owners. Of course, the greater the complexity of the title, the greater the time required to resolve the question of ownership.

Surveying is another delay-causing factor that is closely related to title examination. Ordinarily the lessee will perform a survey of the well location prior to the commencement of drilling operations. Still, the production unit is not determined until after completion, and often the depth at which the well is completed will materially affect the size of the unit under state law or regulations.¹⁶ Boundary disputes not resolved prior to the date royalties become due may require surveying. Also, the declaration of a unit under the pooling authorization contained in the lease¹⁷ may further complicate the state of title and necessitate additional title opinions and curative work.

The lessee who completes a producing well may still choose to delay payment of royalties until all parties have signed a division order agreeing to their exact interests and who is obligated to

16. Because the cost of drilling a well increases geometrically according to the depth, most state regulatory boards allow the size of the production unit to increase in a related manner. A state may require a well on each 20 acres to a depth of 4000 feet; on each 40 acres to a depth of 8000 feet; and on each 160 acres to a depth of 12,000 feet. Similarly, because profit on gas is less than on oil, the size of gas units at the same depths may be much larger.

17. The lease may contain a pooling clause which authorizes the lessee to "pool" or "unitize" the leased premises with other leases. WILLIAMS & MEYERS MANUAL, *supra* note 3, at 337.

'Unitization' [is] a term frequently used interchangeably with 'pooling' but more properly used to denominate the joint operation of all or some portion of a producing reservoir as distinguished from 'pooling,' which term is used to describe the bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules. Pooling is important in the prevention of drilling of unnecessary and uneconomic wells, which will result in physical and economic waste. Unitization is important where there is separate ownership of portions of the rights in a common producing pool in order that it may be made economically feasible to engage in cycling, pressure maintenance or secondary recovery operations and to explore for minerals at considerable depth.

Id. at 485.

make payments. While division orders are voluntary in most jurisdictions, a small minority of states by statute or judicial decision requires the execution of division orders.¹⁸ A division order is a contract of sale that may authorize the purchaser to pay the owners stated proportions according to their interests.¹⁹ The purchaser prepares the division order after examining title, with the obvious purpose of protecting himself from erroneous payments. If the royalty ownership cannot be precisely determined from the title examination, more curative work may be required. The time required in examining title, performing curative work, and circulating the division order may result in considerable delay in royalty payment. A related factor that can cause initial delay is the establishment of an accounting procedure by which the various royalty interests may be computed and payments disbursed. If the lessee acts with due diligence, most of these delays will be eliminated.

Some delays are the result of administrative problems. Natural gas sold for resale in interstate commerce has been controlled by the Federal Power Commission (hereinafter FPC) pursuant to the Natural Gas Act.²⁰ The producer of natural gas must obtain a certificate of public convenience and necessity from the FPC, as well as approval of the price at which the gas is to be sold, before commencing delivery. Where the purchaser refuses to make payment to the lessee until the certification and rate approval has been received, the lessee may not wish to make royalty payments to the lessor. As with division orders, it is questionable whether the lessee is legally justified in withholding royalties on this ground. Simi-

18. For a general discussion of the purposes of structure of and consequences of signing division orders, see, ROYALTIES AND DIVISION ORDERS 31-36 (G. Hardy ed. 1979).

19. HEMINGWAY, *supra* note 11, at § 7.5 (1971); 3A SUMMERS, *supra* note 1, at § 590 n. 36; WILLIAMS & MEYERS, *supra* note 1, at §§ 701-05; 4 WILLIAMS & MEYERS MANUAL, *supra* note 3, at 124; Comment, *Royalty Division Orders*, 23 LA. L. REV. 571 (1963). See generally, Barbee, *The Lessor's Remedies for Nonpayment of Royalty*, 45 TEX. L. REV. 132 (1966); Bounds, *Division Orders*, SW. LEGAL FOUNDATION 5TH ANN. INST. ON OIL & GAS L. & TAX. 91 (1954); Boyd, *Crude Oil Purchasing—Its Title Opinions and Division Orders*, SW. LEGAL FOUNDATION 18TH ANN. INST. ON OIL & GAS L. & TAX. 233 (1967); Ethridge, *Oil and Gas Division Orders*, 19 MISS. L.J. 127 (1948); Gregg, *Title Examination and Division Orders*, SW. LEGAL FOUNDATION 19TH INST. ON OIL & GAS L. & TAX. 29 (1968); Hooper & Schleier, *Current Use and Effect of Division and Transfer Orders*, 18 S. TEX. L.J. 531 (1977); Rain, *A Further Look at Division Orders and Problems in Accounting and Payment of Proceeds from Oil and Gas*, 8 ROCKY MTN. MIN. L. INST. 69 (1963); Comment, *Royalty Division Orders*, 23 LA. L. REV. 571 (1963).

20. 15 U.S.C. § 717 (1976). Both interstate and intrastate gas sales are now regulated under the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978). The Federal Power Commission has been replaced by the Federal Energy Regulatory Commission.

larly, in most states, oil or gas will not be purchased until the producer has obtained from the oil and gas board or other state regulatory agency a certificate of authority to transport.²¹ Application may be made while the well is being tested to hasten the process.²²

The above are by no means the only factors that can cause delay in royalty payments. They are, however, the reasons most commonly used by the lessee as justification for delay. Obviously, some delay between the time a producing well is completed and the first royalty payments are disbursed is warranted. Title opinions that were current at the time drilling was commenced must be brought up to date. This may necessitate curative action, and an accounting procedure must be established. Thus, a reasonable period of time is required in order to prepare to make the initial royalty payments. How long a delay is necessary and what constitutes legal justification for the delay must be determined on a case by case basis. Much will depend upon the particular circumstances involved. A case by case approach to delay justifications has been developed by the Louisiana courts and will be discussed below in conjunction with their use of the remedy of cancellation.

IV. TRADITIONAL REMEDIES FOR NONPAYMENT

The lease agreement contains the contractual relationship between the lessor and the lessee; it must therefore be considered to determine what contractual remedies may be available to the lessor for nonpayment of royalties. The lease may authorize the lessee to withhold royalty payments for a variety of reasons, including uncertainty of entitlement to royalties, pendency of some dispute of ownership interests, lessor's failure to provide the lessee with the addresses of persons entitled to payments, or lessor's failure to designate an agent to receive payments.²³

Lease clauses do not usually provide the lessor with a satisfactory remedy. The typical "Producers 88" lease omits any statement about the consequences of and remedies for a failure to pay royalties. The lessor may protect himself by including a provision in the lease which provides for forfeiture or automatic termination

21. Florida does not regulate the actual transmission of gas, but new pipelines must be approved after application to the Div. of Interior Resources, Dept. of Natural Resources. Fla. Admin. Code 16C-5.10.

22. Telephone conversation with an attorney and oil and gas producer, Jackson, Mississippi (Nov. 30, 1976). Record on file in Law Library Florida State University.

23. 3 WILLIAMS & MEYERS, *supra* note 1, at § 656.1.

of the lease in the event of nonpayment of royalties,²⁴ but oil and gas leases are most often contracts of adhesion in which small landowners are presented a printed form which they must accept in toto or reject.²⁵ In the absence of specific provisions in the lease which provide remedies for nonpayment of royalty, the lessor is generally limited in his common law remedies to a contract action based on the lease for breach of the express covenant to pay royalty, or a tort action for conversion.²⁶

In most states a lessor may recover damages only for the failure to pay royalties, since few jurisdictions have passed upon the right of cancellation in the absence of some specific provision to that effect in the lease or statute.²⁷ As a result, the lessor can recover only those royalties due at the time of the suit²⁸ and must suffer the further delay and expense inherent in bringing suit. During this time the lessee has the use of the lessor's money and can avoid the costs of litigation by paying the royalties due to date or by settling the suit without incurring attorney's litigation fees.

The lessor may have a conversion remedy when the lease provides that he may take his royalty in kind.²⁹ But if the lease provision requires the lessor to give notice before he is entitled to take his royalties in kind, the failure to give the required notice would preclude maintenance of a suit for conversion.³⁰ In addition, if the lessor is found to have given the lessee the express or implied authority to market his share, this would also preclude recovery on the theory of conversion.³¹ Finally, the lessor's remedy of conversion may be lost by the execution of a division order because such an order is a contract of sale to the purchaser,³² relieving the lessee of his duty to deliver the property in kind.

24. *Id.* at § 656.2.

25. "I am also influenced by the circumstance that mineral leases are usually prepared and written by the lessees . . ." Tate, J., concurring in opinion cancelling the lease in *Pierce v. Atlantic Ref. Co.*, 140 So. 2d 19, 31 (La. Ct. App. 1962).

26. 3 WILLIAMS & MEYERS, *supra* note 1, at §§ 656.5, 656.6; Barbee, *The Lessor's Remedies for Nonpayment of Royalty*, 45 TEX. L. REV. 132 (1966); Turner, *Remedies for Failure to Pay Royalties*, 14 ROCKY MTN. MIN. L. INST. 407 (1968).

27. 3A SUMMERS, *supra* note 1, at § 616. At common law a landlord could not evict his tenant for nonpayment of rents or royalties as those obligations were viewed as independent covenants. KRASNOWIEKI, *CASES AND MATERIALS ON THE OWNERSHIP AND DEVELOPMENT OF LAND* 177 (1965).

28. *American Gypsum Trust v. Georgia-Pacific Corp.*, 539 P.2d 1040 (Utah 1975).

29. 3 WILLIAMS & MEYERS, *supra* note 1, at § 656.6.

30. 3A SUMMERS, *supra* note 1, at § 590.

31. 3 WILLIAMS & MEYERS, *supra* note 1, at § 656.6.

32. *Id.*

The availability of a landlord's lien is recognized in Louisiana,³³ but the remedy may be urged in any jurisdiction where the courts are willing to view the oil, gas, and mineral lease as governed by the jurisprudence applicable to an ordinary lease for a term of years.³⁴ Of course, the lease may expressly provide for a landlord's lien. This lien would extend to all machinery and equipment used in the venture and to the lessee's share of production.

The lessor may be entitled to interest upon the unpaid royalties where the lessee has made active use of the monies due the lessor. Equity requires that one using another's property make due payment.³⁵

These inadequacies in the remedies traditionally available to the lessor allow the lessee effectively to delay payment of royalties until the lessor files suit. Since the lessor's recovery is limited to damages for breach of the covenant to pay royalties, the lessee stands to lose little by delaying payment (and to gain by the use of interest-free money).

V. CANCELLATION OF LEASE FOR NONPAYMENT OF ROYALTIES

In the early cases, the Louisiana courts posed but left unanswered the question of what may constitute justifiable cause for delay, although in dictum it stated that "a reasonable dispute as to those entitled to receive the royalties, or the amount due each" might justify a delay.³⁶ Also unanswered was the question of how long a delay was reasonable. These questions were subsequently resolved in a long series of Louisiana appellate cases.

In answering these questions of justification, courts have emphasized that a determination should be made upon a case by case basis. Each decision rests upon the totality of the circumstances. With this in mind, we can proceed to extract certain basic principles.

The first issue that must be addressed is how long a delay is reasonable? One Louisiana appellate court found that a seven month delay was unreasonable.³⁷ On the other hand, a federal dis-

33. *Tyson v. Surf Oil Co.*, 196 So. 336 (La. 1940); This court-recognized lien has now been codified in The Louisiana Numeral Code, LA. REV. STAT. ANN. § 31:146-148 (1975).

34. See *Barbee*, *supra* note 19, at 152 (discussing the possibility of a lien under the Uniform Commercial Code).

35. *Lightcap v. Mobil Oil Corp.* 562 P.2d 1, 13-18 (Kan.), *cert. denied*, 434 U.S. 876 (1977).

36. *Melancon v. Texas Co.*, 89 So. 2d 135, 142 (La. 1956).

37. *Pierce v. Atlantic Ref. Co.*, 140 So. 2d 19 (La. Ct. App. 1962).

strict court found that a three month delay was not unreasonably long when the lease did not provide a payment schedule.³⁸ The unreasonableness of the delay is inextricably intertwined with the reasons for the delay. Thus, longer delays are usually justified for initial payments because of the work involved in establishing a payment schedule: doing curative work, executing division orders, setting up accounting procedures, and securing sales of products.

The Louisiana courts have not accepted any actions performed by the lessees for their own benefit as justification for delay. Negotiations not involving the lessor,³⁹ a corporate merger,⁴⁰ the clearing of records,⁴¹ and lease ratifications signed by the lessors⁴² do not justify delaying royalty payments. Nor can the lessees claim that unsigned division orders keep them from tendering royalty payments when, in fact, they did not need to rely upon such division orders in determining the amounts due.⁴³

If there are bona fide disputes, courts have refused to terminate leases even though the payments may be 12 months in arrears. Most of these disputes have involved disagreements about ownership of royalties. Bona fide disputes may arise from the lessor's death,⁴⁴ the state claims of title to submerged lands,⁴⁵ or the complexity of the curative work. In the last instance, the lessee tried to ascertain 40 people's royalty ownership rights in 24,000 acres of land without the cumbersome and unfeasible cooperation of some 40 similarly situated lessors. The court found that an eight month delay was reasonable.⁴⁶

38. *Touchet v. Humble Oil & Ref. Co.*, 191 F. Supp. 291 (W.D. La. 1960). *Cf. Bouterie v. Kleinpeter*, 289 So. 2d 163 (La. Ct. App. 1973) (where lease did not provide a payment schedule, three month delay not appreciable period of time), *writ refused*, 293 So. 2d 169 (La. 1974).

39. *Bailey v. Meadows*, 130 So. 2d 501 (La. Ct. App. 1961).

40. *Pierce v. Atlantic Ref. Co.*, 140 So. 2d 19 (La. Ct. App. 1962).

41. *Fontenot v. Sunray Mid-Continent Oil Co.*, 197 So. 2d 715 (La. Ct. App.), *writs refused*, 199 So. 2d 915 (La. 1967).

42. *Sellers v. Continental Oil Co.*, 168 So. 2d 435 (La. Ct. App. 1964).

43. *Fontenot v. Sunray Mid-Continent Oil Co.*, 197 So. 2d 715 (La. Ct. App. 1967); *Pierce v. Atlantic Ref. Co.*, 140 So. 2d 19 (La. Ct. App. 1962).

44. *Hibbert v. Mudd*, 294 So. 2d 518 (La. 1974) (the lessor died without willing his royalty interests).

45. For cases involving the state claiming title to submerged lands, see *Gonsoulin v. Shell Oil Co.*, 321 F. Supp. 900 (W.D. La.), *aff'd*, 445 F.2d 861 (5th Cir. 1971); *Minvielle v. Shell Oil Co.*, 321 F. Supp. 884 (W.D. La.), *aff'd*, 445 F.2d 862 (5th Cir. 1971); *Cutrer v. Humble Oil & Ref. Co.*, 202 F. Supp. 568 (E.D. La.), *aff'd*, 309 F.2d 752 (5th Cir. 1962), *cert. denied*, 372 U.S. 936 (1963).

46. *Broadhead v. Pan American Petroleum Corp.*, 166 So. 2d 329 (La. Ct. App.) (40 people held royalty interests), *writ refused*, 167 So. 2d 679 (La. 1964).

In addition to disputes concerning ownership of royalty interests, there are disputes concerning amounts of royalty payments. This problem can arise when an oil field has been unitized. Two courts have refused to cancel leases when the lessees were tendering payments based upon the acreage stated in a survey plot or upon voluntary agreements as opposed to tendering payments in accordance with the acreage stated in the Commissioner of Conservation's order.⁴⁷ The problem can also arise out of different interpretations of the lease itself.⁴⁸ In all of these cases the lessee made a good faith effort in *tendering* payments; a dispute as to the amount of royalties due does not, however, justify withholding all payments.

A lessee may also be justified in withholding royalties if nonpayment was unintentional. In one case, the court held that nonpayment of royalties for five months because of a clerical error was justified.⁴⁹ In a later case, the delay was 12 months.⁵⁰ Again the court held that the failure to pay was inadvertent and, therefore, justified. Both cases emphasized the lessee's willingness to pay the amounts due.

Payment delay can in large part be traced to uncertainties of title. The title examination and curative work costs money and time, and the lessee, understandably, hesitates to resolve the question of ownership until necessary. It is difficult, however, to see why the lessor should suffer the delay in payment of royalties caused by the lessee's failure to complete its title examination prior to the time when payments are due.

The reasons discussed above that are interposed by producer-lessees should not excuse a delay in payments. A producer will conduct a preliminary title examination before making a lease offer to the landowner. The results of this examination, in conjunction with the likelihood of profitable production, becomes the very ba-

47. *Bonsall v. Humble Oil & Ref. Co.*, 201 F. Supp. 516 (W.D. La. 1961), *aff'd*, 300 F.2d 150 (5th Cir.), *cert. denied*, 371 U.S. 816 (1962); *Wilson v. Sun Oil Co.*, 265 So. 2d 344 (La. Ct. App. 1972), *aff'd*, 290 So. 2d 844 (La. 1973). See also *Fawvor v. U.S. Oil, Inc.*, 162 So. 2d 602 (La. Ct. App.), *writ refused*, 165 So. 2d 479 (La. 1964).

48. *Midstates Oil Corp. v. Waller*, 207 F.2d 127 (5th Cir. 1953) (interpreting an overriding royalty clause); *Greene v. Carter Oil Co.*, 152 So. 2d 611 (La. Ct. App.) (interpreting the phrase "royalties based on acreage"), *writ refused*, 153 So. 2d 414 (La. 1963).

49. *Hebert v. Sun Oil Co.*, 223 So. 2d 897 (La. Ct. App. 1969). Immediately upon discovery of the error payment was made; also the amount in default was \$13.54 and was exceeded by .07 by inadvertent overpayment of royalties to the lessor on other leases.

50. *Alvord v. Sun Oil Co.*, 271 So. 2d 561 (La. Ct. App. 1972), *writ denied*, 273 So. 2d 299 (La. 1973).

sis of the offer. The payment of bonuses and yearly delay rentals prior to drilling adds further evidence of the producer's acceptance of the state of title.

Once drilling has begun, there are few legitimate reasons for the producer not to resolve any ownership questions. Any surveying that is known to be required, as with the title's examination itself, should be conducted prior to the time that payments become due. Once the producer contracts the expense of drilling, the cost of curative work or surveying pales in comparison. Accounting procedures should be established at the outset. Although the interest involved may vary in quantity and value, if the lessee has completed a comprehensive title examination, the determination of these interests should already have been made and there should be little difficulty in establishing a method of payment. The only exception would be when a state agency with control of oil and mineral resources creates or changes a production unit and the lessee must conduct a unit survey as unit operator. Even this action normally results from an application by the lessee, who should know the state of the title to the land described in the unit he proposed.

Courts in five states have expressly rejected a remedy of lease cancellation for nonpayment of production royalties.⁵¹ A lessor may, however, cancel for the lessee's breach of the implied covenant to market.⁵² In *Cannon v. Cassidy*⁵³ the lessor sought to cancel the lease for nonpayment by utilizing a theory that the implied covenant to market carries a two-pronged obligation: sale of the products and payment to the lessor of his share of the proceeds.⁵⁴ The Oklahoma Supreme Court rejected the lessor's claim.⁵⁵

51. *Davis v. Chautauqua Oil & Gas Co.*, 96 P. 47 (Kan. 1908); *Kelley v. Ivyton Oil & Gas Co.*, 265 S.W. 309 (Ky. 1924); *Wagoner Oil & Gas Co. v. Marlow*, 278 P. 294 (Okla. 1929); *Morris v. First Nat'l Bank*, 249 S.W.2d 269 (Tex. Civ. App. 1952); *Castle Brook Carbon Black Co. v. Ferrell*, 85 S.E. 544 (W. Va. 1915).

52. In *Strange v. Hicks*, 188 P. 347, 350 (Okla. 1920), the court observed that a lease may be cancelled "in case diligence is not exercised to operate the lease" in accordance with the "implied agreement."

53. 542 P.2d 514 (Okla. 1975).

54. 1 BROWN, *supra* note 1, at § 6.02. For a thorough discussion of the theory of cancellation under an implied covenant to market, see Brown, *Royalty Clauses in Oil and Gas Leases: Their Nature, Construction and Remedies for Breach Thereof* in PROBLEMS ARISING UNDER THE OIL & GAS LEASE 258, 298-304, (Mosburg ed. 1978), and under a fiduciary theory, *id.* at 304-308, though no cases are cited cancelling a lease based upon the theories alone.

55. 542 P.2d at 517.

VI. CANCELLATION IN LOUISIANA

A. *Judicial Decisions*

Louisiana has been the only jurisdiction to recognize, by judicial decision,⁵⁶ the lessor's remedy of cancellation for nonpayment of royalties when there had not been an express forfeiture provision in the lease.⁵⁷ The companion cases, *Melancon v. The Texas Co.*⁵⁸ and *Bollinger v. The Texas Co.*,⁵⁹ established the cancellation remedy and provided authority for a long line of subsequent decisions that have delineated its boundaries. In *Melancon*, the Louisiana Supreme Court ordered an oil and gas lease cancelled due to a failure to pay royalties for a period of fifteen months. The lease contained the usual one-eighth production royalty provision, an "unless" drilling clause, and a shut-in royalty provision. The Texas Company, assignee of the lease, maintained the lease in effect for a period of time through the payment of the stipulated delay rentals. In October, 1951, The Texas Company executed a unit declaration to cover a unitized area of 40 acres comprised of the property of Melancon and adjacent property owners, including Donald Bollinger.⁶⁰ A producing well was completed in August, 1952, and on September 8, 1952, the well was opened for production and the produced gas and distillate were sold until the well was shut-in on October 31, 1952. At no time during the period of production did The Texas Company tender or make payment of production royalties. In November, 1952, and again in August, 1953, The Texas Company tendered checks in payment of the stipulated shut-in

56. *Bollinger v. Texas Co.*, 95 So. 2d 132 (La. 1957); *Melancon v. Texas Co.*, 89 So. 2d 135 (La. 1956); *Fontenot v. Sunray Mid-Continent Oil Co.*, 197 So. 2d 715 (La. Ct. App.), *writs refused*, 199 So. 2d 915 (La. 1967); *Sellers v. Continental Oil Co.*, 168 So. 2d 435 (La. Ct. App. 1964); *Pierce v. Atlantic Ref. Co.*, 140 So. 2d 19 (La. Ct. App. 1962); *Bailey v. Meadows*, 130 So. 2d 501 (La. Ct. App. 1961). *But see*, *Hebert v. Sun Oil Co.*, 223 So. 2d 897 (La. Ct. App.), *writ refused*, 227 So. 2d 147 (La. 1969); *Bollinger v. Republic Petroleum Corp.*, 194 So. 2d 139 (La. Ct. App. 1966), *writs refused*, 196 So. 2d 276 (La. 1967); *Melancon v. Republic Petroleum Corp.*, 194 So. 2d 144 (La. Ct. App. 1966), *writs refused*, 196 So. 2d 277 (La. 1967); *Mire v. Hawkins*, 177 So. 2d 795 (La. Ct. App. 1965), *aff'd*, 186 So. 2d 591 (La. 1966). *See also*, *Jumonville, Recent Jurisprudence*, 1968 LA. MIN. L. INST., 169-176, for an excellent discussion and comparison of the lease cancellation cases and *McCollam, Louisiana Mineral Law: A Current Survey*, 4 NAT. RESOURCES LAW. 291 (1971).

57. 3 WILLIAMS & MEYERS, *supra* note 1, at § 656.3. The majority of states limit the lessor to the traditional remedies discussed in Part III; 3A SUMMERS, *supra* note 1, at § 616.

58. 89 So. 2d 135 (La. 1956).

59. 95 So. 2d 132 (La. 1957).

60. The lease contained a pooling clause authorizing the lessee to declare a unit of up to 40 acres in size. 89 So. 2d at 137 n.2. The Texas Company declared a 40 acre unit but later wanted Melancon to agree to a larger acreage unit. *Id.* at 138.

royalty, but Melancon did not cash them. On several occasions after October, 1952, The Texas Company sought to have Melancon agree to a modification of the lease to provide for a larger unit, but he refused, asserting that he had not been paid the full amount of production royalties due under the lease. Finally, in November, 1963, Melancon notified The Texas Company that because of its failure to discharge its lease obligations, including nonpayment of accrued royalties, the lease had been cancelled. Thereafter, production royalties were tendered, but Melancon refused to accept them, choosing instead to institute an action to cancel the lease. The trial court found that the failure to pay royalties "within a reasonable time in accordance to customs of the trade amounted to a failure of consideration,"⁶¹ and ordered the lease cancelled. On appeal, the Louisiana Supreme Court affirmed.⁶²

In its decision, the Louisiana Supreme Court applied two principles of Louisiana law. First, royalties mentioned in oil and gas leases are regarded as rents: "In the system of interpretation of oil and gas contracts which this Court has followed for many years, the lessor's royalty under the usual oil and gas lease is placed in the rent category. Such a characterization is well fixed in our law."⁶³

The second principle is that "in constructing mineral leases, . . . 'the codal provisions applicable to ordinary leases must be applied.'"⁶⁴ Following these principles, the court applied landlord-tenant law in reaching its decision.

The Louisiana statutes provided that the failure to pay rent entitled the (landlord) lessor to expel the (tenant) lessee from the leasehold.⁶⁵ Although the lease did not specify a time deadline for payment of royalties, the court held that the payments were to be made on a monthly basis, according to the accepted custom on ordinary leaseholds in the state. Since the court found no justified cause for the delay in payment, it agreed with the trial judge's conclusion that a fifteen month delay violated the contract and warranted cancellation of the lease.⁶⁶

61. *Id.* at 139 (quoting the trial court opinion).

62. *Id.* at 148.

63. *Id.* at 142.

64. *Id.* (quoting *Coyle v. North Am. Oil Consol.*, 9 So. 2d 473, 478 (La. 1942)).

65. 89 So. 2d at 142. See LA. CIV. CODE ANN. art. 2710 (1952), which provides that "[t]he lessee is bound . . . [t]o pay the rent at the terms agreed on," and LA. CIV. CODE ANN. art. 2712 (1952), which provides that "[t]he lessee may be expelled from the property if he fails to pay the rent when it becomes due."

66. 89 So. 2d at 143.

Bollinger also sought to cancel his lease for nonpayment of production royalties. His land was adjacent to Melancon's, and portions of both leaseholds were unitized under unit declarations made by The Texas Company pursuant to the terms of the leases. The producing well was located on one of these units, entitling each lessor to production royalties on the gas and distillates produced therefrom. The Texas Company had made monthly shut-in royalty payments as required by the lease and contended that these payments should be deemed to satisfy its obligation to pay production royalties since the payments made were more than the amount of royalties due. In *Bollinger* the court rejected this contention and ordered the lease cancelled, stating:

*A Lessee must comply with his lease terms. Whether production payments are larger or smaller than 'shut-in' payments, they must be paid on accurate computations and as such. Plaintiff had the right to be paid in accordance with the method provided by the terms of the lease—not at the whim or caprice of the defendant.*⁶⁷

Melancon and *Bollinger* hold that a lessor has the right to cancel an oil, gas, or mineral lease when the lessee had delayed payment for an unreasonable time without a valid reason.⁶⁸ Moreover, the decisions recognize the covenant to pay shut-in royalties as an independent obligation of the lessee, satisfaction of which does not fulfill the obligation to pay production royalties.

The courts and commentators recognize that not every case of nonpayment requires cancellation if justifiable reasons for nonpayment exist. Such reasons include: bona fide disputes concerning the rights of the parties under the lease or to the title, action by the plaintiff causing the delay, and action by the plaintiff showing that a tender would be futile.⁶⁹

The post-*Melancon-Bollinger* cases have established guidelines for terminating oil and gas leases.⁷⁰ The lessor must bring an ac-

67. 95 So. 2d at 137 (emphasis in original).

68. For a more detailed analysis of these cases, see Arata, *Timely Payment of Royalties*, 11 LOY. L. REV. 163 (1963); 28 LA. L. REV. 504 (1968); 39 TUL. L. REV. 524 (1965); 24 LA. L. REV. 618 (1964); 4 U.C.L.A. L. REV. 485 (1957).

69. See generally WILLIAMS, MAXWELL & MEYERS, *CASES ON OIL AND GAS*, 333, 334 (1974).

70. For a precis of the areas of good faith dispute for which the court would not declare a forfeiture, see HEMINGWAY, *supra* note 11, at § 7.1 (Supp. 1979); 3 WILLIAMS & MEYERS, *supra* note 1, at § 656.3.

tion for this remedy because the lease does not automatically terminate.⁷¹ Once the lessor notifies the lessee of his intentions to seek termination, the lessee is no longer obligated to tender royalty payments.⁷² The courts then have to decide whether the delay is unreasonable in light of all the surrounding circumstances.⁷³ If it is, the court may terminate the lease wholly or partially and, by applying ordinary landlord-tenant law, eject the lessee and put the lessor in possession.

B. The Louisiana Mineral Code

The Louisiana legislature on January 1, 1975 passed a comprehensive mineral code.⁷⁴ The oil companies desired to eliminate the

71. *Bourgeois v. Exxon Corp.*, 300 So. 2d 632 (La. Ct. App.), *writ denied*, 303 So. 2d 181 (La. 1974).

72. *Harris v. J.C. Trahan, Drilling Contractor, Inc.*, 168 So. 2d 881 (La. Ct. App. 1964).

73. See text Section III *supra*.

74. Louisiana has since enacted its cancellation remedy into statute, LA. REV. STAT. ANN. §§ 31:137-143 (1975).

Id. at § 31.140 (1975):

If the lessee fails to pay royalties due or fails to inform the lessor of a reasonable cause for failure to pay in response to the required notice, the court may award as damages double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney's fee regardless of the cause for the original failure to pay royalties. *The court may also dissolve the lease in its discretion.* (emphasis added)

In *Arceneaux v. Hawkins*, 376 So. 2d 362 (La. Ct. App. 1979), the court held that if a lessee, after receiving notice of the lessor's intent to cancel the lease, responds with written reasons for nonpayment and later tenders royalties, the court should evaluate the reasonableness of the delay. If found reasonable, the lessor is entitled only to interest on the unpaid royalties. If the delay is unreasonable, however, the lessor may receive double royalties, plus interest and attorney's fees, and the lease may be cancelled "if the facts so justify." *Id.* at 366.

North Dakota has recently passed a similar statute:

The obligation arising under an oil and gas lease to pay oil or gas royalties to the mineral owner or his assignee, or to deliver oil or gas to a purchaser to the credit of such mineral owner or his assignee, or to pay the market value thereof is of the essence in the lease contract, and breach of such obligation may constitute grounds for the cancellation of such lease in such cases where it is determined by the court that the equities of the lease require cancellation. This section shall not apply when mineral owners or their assignees elect to take their proportionate share of production in kind, or in the event of a dispute of title existing which would effect distribution of royalty payments.

N.D. CENT. CODE § 47-16-39.1 (1978) (emphasis added). The only case to date construing this statute is *West v. Alpar Resources, Inc.*, 298 N.W.2d 484 (N.D. 1980). A disagreement arose between the parties over the price of the gas upon which the lessor's royalties would be calculated. The court refused to cancel the lease under the North Dakota statute, finding that a genuine dispute existed that justified the delay. Further, the lessor's acceptance of royalty payments, although made with a reservation of a claim for additional amounts based on his interpretation of the lease, was inconsistent with a request for cancellation.

uncertainties of the case by case method of settling cancellation claims. The royalty owners also needed a certain spur to apply to speed payments.

The Mineral Code seeks to fill both needs. First, to limit cancellation to carefully defined areas: to instances amounting to fraud or willful refusal to pay or to instances, where after due notice of nonpayment to the lessee, the remedies in damages are found in the court's discretion to be inadequate. Second, to provide in all other instances a certain, well defined, and effective remedy, short of cancellation for the lessor. The Mineral Code provides for a penalty of double the amount of damages plus attorney's fees in cases where termination is not justified. This allows the lessor to sue where previously litigation would not have been cost-effective because of the expense of litigation and the ability to recover only payments due plus interest.⁷⁵

VII. APPLICATION OF THE CANCELLATION REMEDY IN FLORIDA

Recognition of the remedy of cancelling a lease for nonpayment of royalties depends upon three factors: (1) identifying royalties as rent, (2) availability of landlord-tenant law providing for termination of the lessee's possessory interest for nonpayment of rent, and (3) willingness to apply ordinary landlord-tenant lease law principles to oil, gas, and mineral leases. The following discussion examines relevant statutory and case law in Florida to determine the possible availability of the cancellation remedy. The principles can be applied to determine the feasibility of pursuing this remedy in other states as well.

The loose and sometimes inaccurate use of the term "royalty" has generated volumes of litigation over the precise interest described thereby on oil, gas, and mineral leases.⁷⁶ In applying these principles to Florida law, as in the Louisiana cases, royalties are the consideration paid the lessor based on the production of a mine or well.⁷⁷

Royalty is generally considered as rent when paid in consideration for the use of the land.⁷⁸ Both "rent" and "royalty" describe

75. For a thorough analysis of the entire Louisiana Mineral Code, see McCollum, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 732 (1976). The section on remedies for nonpayment of royalties are analyzed *id.* at 815-821.

76. See, e.g., cases collected in Annot., 4 A.L.R.2d 492 (1949).

77. 1 WILLIAMS & MEYERS, *supra* note 1, at § 301.

78. See, e.g., *Atlantic Oil Co. v. County of Los Angeles*, 446 P.2d 1006 (Cal. 1968); *State*

the compensation which the lessee pays to the lessor for the rights and privileges granted under the lease. The Florida Supreme Court has stated this rule in dictum, acknowledging that "the authorities in general are uniform in holding that the terms 'rents' and 'royalties' are synonymous."⁷⁹ The court continued discussing this concept for a full page. Thus, despite the lapse of forty years since *Miller v. Carr*, it is arguable that Florida courts would probably regard royalties as rents in construing oil, gas, and mineral leases today.

The general rule is that nonpayment of rent, in the absence of a lease provision or statute so providing, does not operate as a forfeiture of the lease nor confer upon the lessor a right of re-entry.⁸⁰ Even where the lease provides for forfeiture upon nonpayment of rent, courts have often exercised their equity powers to grant relief from forfeiture where adequate recovery can be had through damages.⁸¹ Although landlord-tenant statutes providing summary remedies for nonpayment of rent are in force in most jurisdictions, the remedies do not always include a landlord's right to evict a tenant.

The Florida statute applying to non-residential leases,⁸² however, expressly provides for removal of the lessee for nonpayment of rent.⁸³ The lessor is granted the right to immediately enter and take possession of the premises if the lessee fails to pay the rent when due,⁸⁴ and a summary procedure is available whereby the lessor may regain possession when the lessee holds over after defaulting.⁸⁵ Case law generally holds that the lessor must make demand for rent before instituting proceedings for possession.⁸⁶ These statutory provisions suggest that the oil, gas, and mineral lessor has available the cancellation remedy for nonpayment of royalties.

v. Royal Mineral Ass'n, 156 N.W. 128, 129 (Minn. 1916) (holding that royalties on the portion of minerals produced or removed from the land are rents); *Smith v. Pocahontas Fuel Co.*, 13 S.E.2d 301 (Va. 1941); *Saylor v. Howard*, 18 S.W.2d 279 (Ky. 1929).

79. *Miller v. Carr*, 188 So. 103, 106 (Fla. 1939).

80. "The mere fact that a consideration recited in the lease is not paid does not render the lease void or without consideration, since the lessor has a right of action for the recovery of the consideration." 3 THOMPSON, REAL PROPERTY, § 1051 (1980).

81. Annot., 31 A.L.R.2d 321 (1953); Annot., 16 A.L.R. 437 (1922).

82. Part I, FLA. STAT. ch. 83 (1979) ought to apply to oil, gas and mineral leases. Section 83.001 states: "This part applies to *non-residential tenancies* and all tenancies not governed by [the Florida Residential Landlord and Tenant Act.]" (emphasis added).

Obviously, the key is to characterize the interest created as a "tenancy." See text, Part IV, *infra*.

83. FLA. STAT. § 83.20 (1979).

84. *Id.* at § 83.05.

85. *Id.* at § 83.21.

86. See, e.g., *Baker v. Clifford-Mathew Inv. Co.*, 128 So. 827 (Fla. 1930).

Some commentators and authorities are of the opinion that oil and gas leases are *sui generis* and not susceptible to being construed under ordinary landlord-tenant concepts.⁸⁷ The common factor motivating the oil and gas lessor and any other non-residential lessor is the desire to receive payments or rents for the productive use of his land. Because of this, an oil and gas lessor should have no less effective remedies than his non-residential counterpart. The oil company lessee can neither complain of economic coercion nor invoke humanitarian principles as a bar to eviction as is usual in a residential landlord-tenant case.

The *Miller v. Carr* cases⁸⁸ are the only Florida Supreme Court decisions analyzing the law of oil and gas leases. In *Miller I*, Alonzo A. Carr orally promised Pearl and William Miller that he would leave her one-half the royalties from oil leases on his property in Pennsylvania if they would take care of him for the rest of his life. They agreed, but he died, failing to mention the royalties in his will. The Millers brought suit against E.H. Carr, the executor of the decedent's estate, for one-half of the royalties from the property in Pennsylvania.⁸⁹

The Florida Supreme Court had to decide whether the term "royalty," as used by Alonzo Carr, referred to a real or a personal property interest in determining whether the Statute of Frauds would apply to the conveyance. The court concluded that the royalty interests became personal property interests once the oil was severed from the land. It affirmed a demurrer to the complaint without prejudice to amend, stating that the plaintiffs only had a claim to royalties in oil severed from the land prior to Alonzo Carr's death.⁹⁰

The Millers amended their complaint, alleging that the oil and gas lease executed by Alonzo Carr was a "constructive severance of the oil 'in place.'"⁹¹ In *Miller II*, the lower court again sustained the defendant's demurrer. The Florida Supreme Court affirmed: "As we construe the lease, it was a contract for the use of the royalty for the purposes therein specified. It passed the right to produce oil from the land and nothing more."⁹² But since the lease

87. For a discussion of this viewpoint, see 4 U.C.L.A. L. REV. 485 (1957), a note on the *Melancon* decision.

88. 193 So. 45 (Fla. 1940); 188 So. 103 (Fla. 1939).

89. 188 So. at 104.

90. *Id.* at 107-08.

91. 193 So. at 47.

92. *Id.* at 47.

was made in Pennsylvania, the court was applying that state's law; the remainder of the opinion was a quote from a Pennsylvania Superior Court case. Thus, the above quote does not comment on the state of the law in Florida, although it may indicate a bias.

In *Miller I*, the Florida Supreme Court said that mineral leases are to be governed by the rules applied to ordinary leases. Further, that "[i]f the lessee failed to pay for the one-eighth of the oil or gas as rent or royalty, then the right of eviction accrued to the [lessor]."⁹³ Although this was dictum, it indicated a willingness to apply general lease law to oil, gas, and mineral leases and suggested recognition of the lessor's lease cancellation remedy for nonpayment of rents or royalties. This comment was not affected by the decision in *Miller II*.

Furthermore, Florida courts have been willing to apply general lease law to turpentine leases, which are analogous to oil and gas leases.⁹⁴ Both types of leases convey the right of access to property for purposes of removing part of the realty. The nature of the lessor's interest are similar, for in both situations the lessor's goal is to receive royalties. The Florida courts' willingness to apply general lease law to turpentine leases should logically extend to oil, gas, and mineral leases.

Florida has not been alone in analogizing landlord-tenant law to oil and gas leases. In *Renner v. Huntington-Hawthorne Oil & Gas Co.*,⁹⁵ the lease by its terms terminated once production fell below a specified level. The producer continued in possession and continued to pay royalties on the actual well output even though production had fallen below that level. The lessor brought an action to quiet title. The California Supreme Court held that acceptance of royalties after termination of the lease resulted in a tenancy from month to month, which could be terminated by proper written notice to quit.

Applicable principles of leasehold law also include any relevant landlord-tenant statutes.⁹⁶ The Florida Supreme Court has stated that the Florida statute allowing the lessor to terminate the lessee's right to possession for nonpayment of rent "should be read into every contract calling for payment of rent though not set out

93. 188 So. at 107.

94. See *Maddox Grocery Co. v. St. Joseph Land & Dev. Co.*, 24 F.2d 295 (5th Cir. 1928) (turpentine lessor may obtain landlord's lien for nonpayment of rents under Florida landlord-tenant statute); *Fletcher v. Moriarty*, 56 So. 437 (Fla. 1911).

95. 244 P.2d 895 (Cal. 1952).

96. See *Maddox Grocery Co. v. St. Joseph Land & Dev. Co.*, *supra*.

in haec verba."⁹⁷ Thus, the statute should apply to oil and gas leases even though the leases may not specifically use the term "rent."

Granting the lessor the right to cancel the lease creates a potential for inequity to the lessee.⁹⁸ For instance, the payment may be only a day late, the lessee may have a valid excuse, or there may be a bona fide dispute. If the lessor could freely cancel, the lessee would stand to lose a sizeable investment in drilling and production costs. The statute allowing evictions by landlords does not preclude courts in Florida from granting equitable relief to tenants.⁹⁹ The Florida courts like those in Louisiana,¹⁰⁰ too, will be able to balance the lessor's financial interests with the reasonableness of the lessee's default in royalty payments.

VIII. OTHER NONPAYMENT REMEDIES

Short of cancellation, a remedy that would go a long way toward rectifying the problem of delinquent royalty payments is to allow the lessor prejudgment interest costs and attorney fees. Florida's landlord-tenant statute provides for these elements of recovery.¹⁰¹ Oil and gas leases, however, vary from most ordinary leases in that the payment amount is not a fixed amount, though it is fixed as to percentage. By claiming that the amount is in dispute, a lessee might avoid prejudgment interest on an unliquidated sum. This problem was addressed in *Lippert v. Angle*,¹⁰² an action to recover oil and gas royalties. The lessee had refused to pay, pending resolution of a dispute over the lessor's acceptance of a division order. The Supreme Court of Kansas characterized the division order the lessor refused to execute as, in reality, a rewrite of the underlying lease. The court affirmed an award of prejudgment interest on an

97. *Baker v. Clifford-Mathew Inv. Co.*, 128 So. 827, 830 (Fla. 1930). See also, *Ardell v. Milner*, 166 So. 2d 714, 716 (Fla. 3d Dist. Ct. App. 1964).

98. For a thorough discussion of the equities of both parties and the reasons motivating the Louisiana Law Institute and the legislature to place strict limits on cancellation and at the same time allow double damages, prejudgment interest and attorneys' fees to the lessor, see the reporter's comments following LA. REV. STAT. ANN. § 31:137.

99. *Nevens Drug Co. v. Bunch*, 63 So. 2d 329 (Fla. 1953).

100. Louisiana courts do not declare a forfeiture in all cases of royalty payment delay: *Broadhead v. Pan American Petroleum Corp.*, 166 So. 2d 329 (La. Ct. App. 1964); *Fawvor v. United States Oil of Louisiana, Inc.*, 162 So. 2d 602 (La. Ct. App. 1964). The court also began granting partial cancellation even though there was an unjustified failure to pay. *Sellers v. Continental Oil Co.*, 168 So. 2d 435 (La. Ct. App. 1964).

101. *Rader v. Prather*, 130 So. 15, 17 (Fla. 1930).

102. 508 P.2d 920 (Kan. 1973).

unliquidated sum (the disputed division order determined the amount of payment) as "proper because the royalties were 'due and withheld by an unreasonable and vexatious delay of payment.'" ¹⁰³ Adoption of this simple remedy would alleviate the present situation under which the lessee effectively has nothing to lose by unreasonably delaying payment.

The Kansas court held that interest was recoverable where the lessee has used or invested the money due the lessor. ¹⁰⁴ The court discussed the rule against allowing interest for unliquidated damages but held that such interest could be granted in the court's discretion on equitable principles ¹⁰⁵ for that portion of the royalties which were arrived at by an arbitration proceeding and could be said to be "liquidated."

IX. CONCLUSION

Cancellation for nonpayment makes the remedies available to the lessor potent and gives the lessor the leverage necessary to deal with the superior bargaining power of the lessee by forcing the lessee to make a good faith effort to pay royalties without unreasonable delay. In most instances, the lessee has the power to control the factors that cause delay in payment. Recognition of the remedy of cancellation would shift the burden caused by delay from the shoulders of the lessor to the lessee.

The foregoing analysis demonstrates that the cancellation remedy should be available in Florida. Even where cancellation is not warranted by the facts, allowing prejudgment interest, costs, and fees to the prevailing lessor would give the lessee an incentive to deal with delay causing factors on a timely basis. The oil, gas, and mineral lessor has the same economic motivations as any other landlord, he should have the same protections.

X. RECOMMENDATIONS

While the Florida cases form a basis for case by case applications of the principles developed in Louisiana, the dire consequences of nonpayment and the economic risks to the lessor should be eliminated by the legislature. To date no cases involving non-

103. *Id.* at 927.

104. *Lightcap v. Mobil Oil Corp.*, 562 P.2d 1, 13-16 (Kan.), *cert. denied*, 434 U.S. 876 (1977).

105. 562 P.2d at 16.

payment of production royalties have been reported. The increased drilling activity¹⁰⁶ and production will, in time, produce such cases. The Florida legislature should act now and adopt a comprehensive scheme, patterned on the Louisiana model, that will be fair to all the participants in the leasing, production, and sale of oil and gas.

106. 43 *SOUTHEASTERN OIL REVIEW* (1980-81) contains reports of increased drilling in wildcat and proven areas in Collier, Hendry, Santa Rosa and Taylor counties.