

1-1-1967

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### Recommended Citation

John R. Gordon, *Remedies for Breach of Implied Covenants in Oil and Gas Leases in Montana*, 28 Mont. L. Rev. (1966).  
Available at: <https://scholarship.law.umt.edu/mlr/vol28/iss2/2>

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## **REMEDIES FOR BREACH OF IMPLIED COVENANTS IN OIL AND GAS LEASES IN MONTANA**

### *INTRODUCTION*

The typical oil and gas lease is a "compromise" whereby the lessee obtains the right to drill as well, assumes all risk and cost, and agrees to give the lessor a percentage of the oil produced from the land.<sup>1</sup> Generally, because of conflict between the interests of lessor and lessee not all the conditions and stipulations that were in the minds of the parties at execution are included in the written lease.<sup>2</sup> Except for bonus payments made upon execution of the lease, the primary consideration received by the lessor is the production royalties. Consequently, it has been recognized that the parties intend petroleum production to be the purpose of the lease.<sup>3</sup> Generally, the oil and gas lease is drafted by the lessee and development of the leasehold depends upon the unilateral decision of the lessee. He can decide to develop the leasehold or release the lease thereby terminating all his obligations. The lessor, however, does not have this power of unilateral termination and cannot coerce action even though the possibilities of production are great. In an attempt to protect the lessor from overreaching by the lessee, courts have applied the "Doctrine of Implied Covenants," which is designed to compel the lessee's compliance with the intent of the parties and the purpose of the lease.<sup>4</sup>

The purpose of the doctrine is to protect the lessor's rights from negligent and dilatory conduct by the lessee and its function should be regulation of the lessee. If the doctrine is viewed from this "protective-regulation" perspective, it becomes clear that the essence of the doctrine is the remedies available to the lessor when the covenants are violated.

Montana's law of oil and gas, especially in the area of implied covenants, is still relatively unfettered by case law or statute. While this condition has the disadvantage of making the law uncertain, it has the far greater advantage of providing an opportunity for systematic development without clouding the purpose and function of the doctrine. It is the purpose of this comment to briefly recount and analyze the implied covenants recognized in Montana and suggest a framework for their development.

There are four generally recognized categories of implied covenants: (1) The implied covenant to explore; (2) The implied covenant to

<sup>1</sup>2 AMERICAN LAW OF PROPERTY § 10.11 (Casner ed. 1952).

<sup>2</sup>MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES § 1, at 16-17 (2nd ed. 1940).

<sup>3</sup>Berthelote v. Loy Oil Co., 95 Mont. 434, 28 P.2d 187, 190 (1934).

<sup>4</sup>2 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 1, at § 10.66.

develop; (3) The implied covenant to diligently operate and market; and (4) The implied covenant to protect from drainage.<sup>5</sup> The prevailing view is that the covenants will not be implied where they conflict with an express covenant; but to the extent they are not inconsistent, both may be enforced.<sup>6</sup> A clause in a lease providing that there are no covenants other than those expressly stated will only prevent implying covenants if the meaning of the clause is unequivocally clear and there is no evidence of fraud on the part of the lessee.<sup>7</sup>

### THE IMPLIED COVENANT TO EXPLORE

In the absence of an express stipulation of time within which a test well must be commenced, there is an implied covenant that the lessee will begin an exploratory well within a reasonable time and complete it with reasonable diligence.<sup>8</sup> Recent litigation concerning this covenant is rare because most modern leases expressly provide for an exploratory term or for payment of "delay rentals."<sup>9</sup> These clauses preclude implication of the covenant because the lessor receives consideration in lieu of royalties, and because they expressly limit the lessee's duty to commence a well.<sup>10</sup> By accepting payments for delay in starting a well, the lessor has either waived his right to require lessee's diligent attention, or is estopped from asserting it.<sup>11</sup>

However, the implied covenant might not be precluded if the lessor refuses to accept delay rental payments before they are due and demands commencement of a well.<sup>12</sup> This view is based on the theory that the implied covenant is not superseded by the delay rental clause, but is only waived by acceptance of rentals. The agreement for the rentals is only an option and when the future rentals are refused, the implied covenant remains effective.

<sup>5</sup>MERRILL, *op. cit. supra* note 2, at § 4. There is some variation among the writers as to the proper classification. But generally, they seem to agree with the broad categories set forth by Merrill. See Walker, *The Nature of Property Interests Created by an Oil and Gas Lease in Texas*, 11 TEXAS L. REV. 399, 401 (1933); 2 SUMMERS, OIL AND GAS § 395, at 535 & 536 (Perms. ed. 1959); Brown, *Covenants Implied in an Oil and Gas Lease*, 1960 PROCEEDINGS, A. B. A. SECTION OF MINERAL AND NATURAL RESOURCES LAW 162 (1960).

There is some controversy, mainly academic, about whether implied covenants are implied in fact or law. The former view is that the parties actually intend the obligations to exist even though not expressly stated in the lease. The other view is that the covenants are implied from the relation of the parties and the object of the lease. Apparently the trend is toward Professor Merrill's interpretation that they are implied in law. See MERRILL, *op. cit. supra* note 2, §§ 7, 220; 2 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 1, § 10.66; *contra* Walker, *supra* note 5, at 402.

<sup>6</sup>Mills v. Hartz, 77 Kan. 218, 94 Pac. 142 (1908); MERRILL, *op. cit. supra* note 2, § 6.

<sup>7</sup>Linn v. Wehrle, 35 Ohio App. 107, 172 N.E. 288 (1928).

<sup>8</sup>2 SUMMER, *op. cit. supra* note 5, § 396; 2 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 1, § 10.67.

<sup>9</sup>Brown, *supra* note 5, at 167.

<sup>10</sup>MERRILL, *op. cit. supra* note 2, § 3.

<sup>11</sup>*Ibid.*

<sup>12</sup>MERRILL, *op. cit. supra* note 2, § 29; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N.E. 363 (1904); Monarch Oil, Gas & Coal Co. v. Richardson, 124 Ky. 602, 99 S.W. 668 (1907).

A majority of courts have rejected this concept because it interferes with the express contract mutually agreed to by the parties.<sup>13</sup> Ordinarily, at the time of execution of the lease the lessor does not understand the effect of a delay rental clause on the lessee's duty to commence a well, and it should not be assumed there was mutual agreement to its adoption. Instead, the court should look behind the instrument to the surrounding circumstances before denying applicability of the implied covenant.<sup>14</sup> Factors that should be utilized in such an inquiry are the length of time lessee can defer initiation of development under the delay rental clause, (*i.e.* the length of the primary term); how much delay has occurred without development since the execution of the lease; the size of the rental payments; whether the lessee has invested money and equipment in the lease prior to the refusal to accept rentals; whether the leased land is in a wild-cat field; and what the market condition and availability of equipment have been since the lease was executed. A consideration of all these factors in reference to the purpose of the lease would more closely approximate the reasonable expectations of the parties.

Upon completion of a well that is producing in paying quantities,<sup>15</sup> and unless it is expressly provided otherwise, there is an implied covenant to drill such additional wells as a reasonably prudent operator would drill, having in mind the interests of both the lessor and lessee.<sup>16</sup> Simply acting in good faith is not sufficient compliance with this covenant.<sup>17</sup>

The lessee is under a duty to drill to the strata usually penetrated in the neighborhood.<sup>18</sup> If the lease is for both oil and gas, the lessee need not drill for oil if gas has been discovered first, and vice versa.<sup>19</sup> There may be a further duty to drill below the usual sands if production is feasible and desirable at the time the lessee would have drilled.<sup>20</sup>

The duty to drill additional wells may also arise immediately upon completion of a dry-hole, at least in a lease without a delay rental

<sup>13</sup>MERRILL, *op. cit. supra* note 2, § 27.

<sup>14</sup>In *Daley v. Torrey*, 69 Mont. 599, 223 Pac. 498 (1924) the court held that a delay rental clause was subordinate to the written portions of the lease; which was the intent of the parties. In *Berthelote v. Loy Oil Co.*, *supra* note 3, at 193, the court disregarded the delay rental clause and found the implied covenant to drill an exploratory well where the lessee had not alleged he paid the rentals when due. Thus, Montana might allow implication of the covenants even where the lease has a delay rental clause. Of course, if the lessor has accepted rental payments and then attempts to claim the benefit of the implied covenants he should be prevented by either waiver or estoppel.

<sup>15</sup>*Berthelote v. Loy Oil Co.*, *supra* note 3, at 192; "Paying quantities" is defined in *Berthelote* as production that would pay a small profit over the cost of operation of the well, including the cost of drilling operations. *Severson v. Barstow*, 103 Mont. 526, 63 P.2d 1022, 1025 (1936).

<sup>16</sup>2 SUMMERS, *op. cit. supra* note 5, § 398; *Brewster v. Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905); *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272 (1934).

<sup>17</sup>*Brewster v. Lanyon Zinc Co.*, *supra* note 16; MERRILL, *op. cit. supra* note 2, § 51.

<sup>18</sup>*Berthelote v. Loy Oil Co.*, *supra* note 3, at 193-94; *Braun v. Mon-O-Co Oil Corp.*, 133 Mont. 101, 320 P.2d 366, 371 (1958).

<sup>19</sup>*Braun v. Mon-O-Co Oil Corp.*, *supra*.

<sup>20</sup>*Ibid.*; MERRILL, *op. cit. supra* note 2, § 69.

clause.<sup>21</sup> An "unless" lease is one which provides that the lease will terminate if wells are not completed by the end of a stated period unless the lessee makes periodic rental payments. Whether the covenant to drill additional wells will be implied in an "unless" lease depends upon the continued validity of the delay rental clause after the first well is drilled.<sup>22</sup> In *Berthelote v. Loy Oil Co.*,<sup>23</sup> concerning an "unless" lease, the Montana Supreme Court sustained an instruction applying the covenant to drill additional wells where two dry wells and one producing well had been drilled. The court considered it immaterial that the duty arose during the primary term of the lease. In Montana, therefore, drilling a well might terminate the delay rental clause and bring into effect the implied covenant to further develop.

But this might not be true where the first well is unproductive. In *Braun v. Mon-O-Co. Oil Corporation*<sup>24</sup> the Montana Court found that the lessee had fulfilled the drilling requirement of an "unless" lease by completing the first well within a year from the execution date of the lease. The court did not mention that the lessee had not drilled additional wells on the premises in the two years since the first well had been abandoned.<sup>25</sup> Instead the court assumed the lessee had an absolute right to the premises for the five year term after drilling the first well.

In *Braun* the court also said that the implied covenant to develop had not been breached because the lessor failed to demand commencement of development.<sup>26</sup> But, because the opinion was primarily concerned with the diligence required in completing a well, it is not clear whether the word "development" was used to describe the duty to drill additional wells or the duty to diligently complete a well.

### THE IMPLIED COVENANT OF DILIGENT OPERATION AND MARKETING

Once production in paying quantities is achieved, the lessee has two general duties to the lessor.<sup>27</sup> The lessee must use ordinary care, skill and reasonable diligence in both the operation of the well and the marketing of the product.<sup>28</sup> The principal reason for this covenant is

<sup>21</sup>MERRILL, *op. cit. supra* note 2, § 51.

<sup>22</sup>*Id.* at § 52.

<sup>23</sup>*Supra* note 3, at 192.

<sup>24</sup>*Supra* note 18.

<sup>25</sup>Compare MERRILL, *op. cit. supra* note 2, § 52 n.19.

<sup>26</sup>*Braun v. Mon-O-Co Oil Corp.*, *supra* note 18, at 371. Note that the *Braun* case was concerned primarily with the question of whether the lessee acted diligently in drilling only to the known sand. The case of *Fey v. A. A. Oil Corp.*, 129 Mont. 300, 285 P.2d 578 (1955), which the *Braun* case quoted and cited, dealt with the question of breach of the covenant to drill additional wells. See on this notes 108-20 *infra*, and accompanying text.

<sup>27</sup>*Berthelote v. Loy Oil Co.*, *supra* note 3, at 192; See note 15 *supra*.

<sup>28</sup>MERRILL, *op. cit. supra* note 2, § 72 at 184, n.6; *Berthelote v. Loy Oil Co.*, *supra* note 3, at 191; *Severson v. Barstow*, *supra* note 15, at 1024.

that the lessor is not compensated merely because the well is drilled; he is entitled to royalties only for actual production.<sup>29</sup>

The lessee's covenant to diligently operate is basically a fiduciary duty to refrain from intentionally or negligently harming the interests of the lessor. The lessee is required to act with reasonable care in completing, refitting, pumping and the general operation of the lease.<sup>30</sup>

The duty to diligently operate is interrelated with the duty to market. The lessee's duty to market does not arise until there is production and he is not obligated to produce unless there is an available market.<sup>31</sup> The lessee is not required to act with absolute diligence. Instead, he must act with the "diligence which would be exercised by the ordinarily prudent persons under similar circumstances."<sup>32</sup> The "practice of the fields" will be a good indication of whether the lessee has drilled enough wells to enable him to obtain a market.<sup>33</sup> The fact that the lease is in a wild-cat field, that there are war-caused shortages of drilling and marketing materials, and that there is a labor shortage, are factors that have been considered in determining whether the lessee has acted with reasonable diligence under the circumstances.<sup>34</sup> The lessee, however, cannot excuse his failure on the ground that the lessor refused to allow him to use lessor's personal property to find a market or operate a well.<sup>35</sup> Thus, where the lessor removed his gas pipe-line which lessee attempted to use, the court held this was not interference sufficient to excuse lessee's failure to diligently operate or market.<sup>36</sup>

The covenant to market does not require the lessee to create a market,<sup>37</sup> nor to take it upon himself to build a pipe-line to an existing market.<sup>38</sup> If the lease contains an express clause allowing the well to be "shut-in" or capped for lack of a market, the lease will not be terminated for failure to market or produce.<sup>39</sup> Even if the lease does not contain a "shut-in" clause, if the lessee acts with reasonable diligence in searching for a market, then, in legal contemplation, production will be considered as continuing in paying quantities and the covenant will not be

<sup>29</sup>Walker, *supra* note 5, at 437-45; *Berthelote v. Loy Oil Co.*, *supra* note 3, at 191; Annot., 86 A.L.R. 725 (1933); 71 A.L.R.2d 1219 (1960).

<sup>30</sup>Walker, *supra* note 5, at 437-45; MERRILL, *op. cit. supra* note 2, §§ 76,80.

<sup>31</sup>*Severson v. Barstow*, *supra* note 15, at 1024; *Fey v. A. A. Oil Corp.*, *supra* note 26, 587-88.

<sup>32</sup>*Berthelote v. Loy Oil Co.*, *supra* note 3, at 192; But see *Fey v. A. A. Oil Corp.*, *supra* note 26, at 588, which speaks of the duty of the lessee to operate the lease with "due diligence."

<sup>33</sup>*Stranahan v. Independent Natural Gas Co.*, 98 Mont. 597, 41 P.2d 29, 42 (1935).

<sup>34</sup>*Fey v. A. A. Oil Corp.*, *supra* note 26, at 588; *Steven v. Potlatch Oil & Refining Co.*, 80 Mont. 239, 260 Pac. 119, 122-23 (1927).

<sup>35</sup>*Berthelote v. Loy Oil Co.*, *supra* note 3, at 194.

<sup>36</sup>*Ibid.*

<sup>37</sup>*Stranahan v. Independent Nat. Gas Co.*, *supra* note 33.

<sup>38</sup>*Fey v. A. A. Oil Corp.*, *supra* note 26, at 587.

<sup>39</sup>*Steven v. Potlatch Oil & Refining Co.*, *supra* note 34.

breached.<sup>40</sup> Neither will the lease terminate by its own terms if production stops due to lack of a market during the "thereafter" period of the lease.<sup>41</sup>

If an action for breach of the implied covenant is brought by the lessor, the lessee has the burden of showing that he has acted with reasonable diligence in complying with its terms.<sup>42</sup> Even though the lessee has refuted the breach, if it appears the lessee has drilled wells only on a portion of the land and an unreasonable burden on the lessor would result if the lessee is allowed to retain the entire leasehold while waiting for a market, the court may order cancellation of the lease as to the undeveloped land.<sup>43</sup>

### THE IMPLIED COVENANT TO PROTECT THE PREMISES FROM DRAINAGE

This covenant, sometimes called the "covenant to drill offset wells," is the most strictly applied of all the covenants. This is because of the extreme and irreparable damage occurring when oil beneath the lessor's land is permanently drained away by wells on adjoining tracts. Therefore, express provisions for delay rental will not preclude implying the covenant when drainage is discovered after acceptance of the rental payments.<sup>44</sup> The lessor, however, may be precluded from demanding compliance with the implied covenant if he accepts rentals with knowledge that drainage is occurring.<sup>45</sup> In order to prevent enforcement of the covenant under these circumstances, the lessee will be required to show that the lessor was fully aware of the existence of the drainage at the time of acceptance.<sup>46</sup>

Some writers have broken down the implied covenant to drill an offset into two separate covenants.<sup>47</sup> The distinction is based on a de-

<sup>40</sup>*Severson v. Barstow*, *supra* note 15, at 1024; The court rejected the rule of the Kansas court in *Elliot v. Crystal Springs Oil Co.*, 106 Kan. 248, 187 Pac. 692, 694 (1920) which held that if the lease does not contain an express "shut-in" clause, the lease will terminate whenever production ceases because of lack of market or otherwise.

<sup>41</sup>In *Severson v. Barstow*, *supra*, the lease provided that it would remain in effect for "the term of five years and as long thereafter as oil or gas, or either of them, was produced from the land by the lessees. . . ." It is generally held that when the primary term is complete, production must continue during the "thereafter" period or the lease will terminate of its own terms. See *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582 (1926); *Stimson v. Tarrant*, 132 F.2d 363 (9th Cir. 1942).

<sup>42</sup>*Berthelote v. Loy Oil Co.*, *supra* note 3, at 192; *Severson v. Barstow*, *supra* note 15, at 1024.

<sup>43</sup>*Severson v. Barstow*, *supra* note 15, at 1025.

<sup>44</sup>*Blair v. Clear Creek Oil & Gas Co.*, 148 Ark. 301, 230 S.W. 286, 19 A.L.R. 430 (1921); *Texas Co. v. Ramsower*, 255 S.W. 466, *aff'd*, 7 S.W.2d 872, 10 S.W.2d 537 (Tex. Comm'n. App. 1928); *Carper v. United Fuel Gas Co.*, 78 W.Va. 433, 89 S.E. 12, L.R.A. 1917A 171 (1916); MERRILL, *op cit. supra* note 2, §§ 102, 103, 104; Walker, *supra* note 5, at 432.

<sup>45</sup>SUMMERS, *op. cit. supra* note 5, § 399, nn. 79, 81, 82; MERRILL, *op. cit. supra* note 2, § 105.

<sup>46</sup>Walker, *supra* note 5, at 433, n. 105.

<sup>47</sup>Seed, *The Implied Covenant in Oil and Gas Leases to Refrain from Depletory Acts*, 3 U.C.L.A.L. REV. 508 (1955).

termination of who is responsible for the drainage; the lessee or a third person holding wells on an adjoining lease. For instance, where a lessee operates wells on tracts adjoining those of a particular lessor, and the wells are draining the lessor's land, the fact of the drainage is within the knowledge of the lessee because he is responsible for the drainage. Notice or demand for protection under those circumstances should be unnecessary.<sup>48</sup> This is distinguishable from the situation where drainage is caused by a third person unconnected with the lessor's land; in that case notice to the lessee should be required.

Drainage of the lessor's land is a prerequisite to the duty of the lessee to drill offset wells. However, where the drainage is caused by a third person, it must be substantial.<sup>49</sup> In addition, other circumstances must be present so that an ordinarily prudent operator would drill an offset with the expectation of making a profit.<sup>50</sup> Furthermore, in Montana there must be an available market before the lessee is obligated to drill offset wells.<sup>51</sup>

Where drainage is caused by the lessee's own wells, he has an absolute duty to drill, regardless of the substantiality of the drainage,<sup>52</sup> and irrespective of whether a reasonably prudent operator would drill.

### THE REMEDIES

Lessors have been awarded damages, cancellation, partial cancellation, alternative decrees, which require the lessee to drill or forfeit the lease, and combinations of these for breach of the implied covenants. The type of remedy afforded in a particular instance depends upon the covenant breached, and the jurisdiction in which the action is brought. While other remedial actions having longer traditions in the common law and equity have attained uniformity in the various jurisdictions of the United States, suits for breach of implied covenants in oil and gas leases are only consistent in the diversity of remedies awarded.

Some courts have found damages to be the exclusive remedy for breach of the covenants.<sup>53</sup> Others have held forfeiture to be the sole result of breach where there is a general forfeiture clause,<sup>54</sup> even in the absence of express forfeiture provisions.<sup>55</sup> In *Carper v. United Fuel Gas Co.*,<sup>56</sup> the West Virginia Supreme Court found that the purpose of the implied covenants was to protect the interest of the lessor and that the lessee's interest was dependent upon compliance with the covenants.

<sup>48</sup>*Berthelote v. Loy Oil Co.*, *supra* note 3, at 192.

<sup>49</sup>MERRILL, *op. cit. supra* note 2, § 110; 2 SUMMERS, *op. cit. supra* note 5, § 399.

<sup>50</sup>See cases cited *supra* note 44; 2 SUMMERS, *op. cit. supra* note 5, § 399, n.75.

<sup>51</sup>*Severson v. Barstow*, *supra* note 15, at 1025.

<sup>52</sup>Seed, *supra* note 47, at 511, n.13.

<sup>53</sup>*Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502 (1897); *Gibson v. Sheldon*, 90 S.W.2d 841 (Tex. Civ. App. 1936).

<sup>54</sup>*Brewster v. Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905).

<sup>55</sup>*Carper v. United Fuel Gas Co.*, *supra* note 44.

<sup>56</sup>*Ibid.*



Thus, failure of the lessee to comply with the duty resulted in forfeiture of the lease.<sup>57</sup> The Texas Supreme Court, however, has held that the lessee acquires a determinable fee in the oil and gas underlying the lessor's land.<sup>58</sup> As long as the lessee pursues the purpose of the lease, his estate will not revert to the lessor.<sup>59</sup> Simply breaching an implied covenant does not terminate the lessee's fee interest if he otherwise conforms to the purpose of the lease.<sup>60</sup>

### IN MONTANA: FORFEITURE

The Montana Court recognized at an early date that the aversion of courts of equity to forfeiture of leases was inapplicable to the field of oil and gas law. Not only were oil and gas leases to be strictly construed in favor of the lessor instead of the lessee, but forfeiture was to be favored unless it would result in hardship and inequity between the parties.<sup>61</sup> This concept was applied even though the lease did not contain an express forfeiture clause.<sup>62</sup> Consequently, the lessee carries the burden of showing that there has not been a violation of the terms and covenants of the lease.

In Montana various methods have been used to disencumber property of an oil and gas lease—suits to cancel,<sup>63</sup> quiet title actions,<sup>64</sup> and actions under the compulsory release statutes.<sup>65</sup> In *Berthelote v. Loy Oil Co.*,<sup>66</sup> Montana held that implied covenants are to be treated in the same manner as express covenants because:

<sup>57</sup>*Id.* at 89 S.E. 16.

<sup>58</sup>*Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 280 (Tex. Sup. Ct. 1923).

<sup>59</sup>*Texas Co. v. Davis*, 254 S.W. 304 (Tex. Sup. Ct. 1923).

<sup>60</sup>*W. T. Waggoner Est. v. Sigler Oil*, 118 Tex. 509, 19 S.W.2d 27 (1929); Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEXAS L. REV. 539, 595-96 (1928-29).

<sup>61</sup>*Daley v. Torrey*, 69 Mont. 599, 223 Pac. 498 (1924); *Solberg v. Sunburst Oil & Gas Co.*, 76 Mont. 254, 246 Pac. 168 (1926); *McNamer Realty Co. v. Sunburst Oil & Gas Co.*, 76 Mont. 332, 247 Pac. 166 (1926); *Schumacher v. Cole*, 131 Mont. 166, 309 P.2d 311 (1957).

<sup>62</sup>*Solberg v. Sunburst Oil & Gas Co.*, *supra*; *Stanolind Oil & Gas Co. v. Guertzen*, 100 F.2d 299 (9th Cir. 1938).

<sup>63</sup>*McNamer Realty Co. v. Sunburst Oil & Gas Co.*, *supra* note 61; *Stimson v. Tarrant*, *supra* note 41.

<sup>64</sup>*Bingham v. Stevenson*, 23 St. Rptr. 651, 420 P.2d 839 (Mont. 1966); *Schumacher v. Cole*, *supra* note 61; *Fey v. A. A. Oil Corp.*, 129 Mont. 300, 285 P.2d 578 (1955); *Consolidated Gas Co. v. Rieckhoff*, 116 Mont. 1, 151 P.2d 588 (1944); *Cedar Creek Oil & Gas Co. v. Archer*, 112 Mont. 477, 117 P.2d 265 (1941); *Nadeau v. Texas Co.*, 104 Mont. 558, 69 P.2d 586 (1937); *Hochsprung v. Stevenson*, 82 Mont. 222, 266 Pac. 406 (1928); *Bowes v. Republic Oil Co.*, 78 Mont. 134, 252 Pac. 800 (1927); *Thomas v. Standard Development Co.*, 70 Mont. 156, 224 Pac. 870 (1924).

<sup>65</sup>REVISED CODES OF MONTANA, 1947, §§ 73-114, 73-115, 73-116; See *Beavers v. Rankin*, 142 Mont. 570, 385 P.2d 640 (1963); *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961); *Braun v. Mon-O-Co. Oil Corp.*, 133 Mont. 101, 320 P.2d 366 (1958); *Severson v. Barstow*, 103 Mont. 526, 63 P.2d 1022 (1936); *Stranahan v. Independent Natural Gas Co.*, *supra* note 33; *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 P.2d 187 (1934); *Abell v. Bishop*, 86 Mont. 478, 284 Pac. 525 (1930); *Steven v. Potlatch Oil & Refining Co.*, *supra* note 34; *Solberg v. Sunburst Oil & Gas Co.*, 76 Mont. 254, 246 Pac. 168 (1926); *Solberg v. Sunburst Oil & Gas Co.*, 73 Mont. 94, 235 Pac. 761 (1925); *Daley v. Torrey*, 71 Mont. 513, 230 Pac. 782 (1924); *Solberg v. Sunburst Oil & Gas Co.*, 70 Mont. 177, 225 Pac. 612 (1924); *Daley v. Torrey*, *supra* note 61. (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.).

<sup>66</sup>*Supra* note 65.

Whatever is implied in a contract is as effectual as what is expressed. Implication is but another name for intention, and if it arises from the language of the contract when considered in its entirety, and is not gathered from the mere expectations of one or both of the parties, it is controlling.<sup>67</sup>

Thus, remedies developed in cases dealing with breach of express covenants are equally applicable in those cases concerned with implied covenants.

Montana has enacted statutes that substantially affect the remedies available for breach of an oil and gas lease: the "compulsory release statutes."<sup>68</sup> Under these statutes an oil and gas lessee has a statutory duty to discharge a lease from record within sixty days after its forfeiture.<sup>69</sup> The lessor can enforce the duty by suing the lessee for neglect or refusal to release. He can obtain the release of record and recover one hundred dollars in statutory damages or penalty, and costs and attorney fees and such additional damages as are warranted by the evidence.<sup>70</sup> The only prerequisite of the action is that the lessor must make written demand for release at least twenty days before the suit is commenced.<sup>71</sup> By amendment in 1947,<sup>72</sup> it was provided that if three years have passed since a lease terminated by its terms, the lessor can send written notice to the lessee demanding release within sixty days. Unless the lessee discharges the lease or files an affidavit affirming the validity of the lease within that period, the lease automatically terminates and is removed of record upon the filing of an affidavit of notice by the lessor.

Analysis of these statutes raises several questions: First, what is meant by "forfeiture," when is it determined, when does it occur? Second, what is the scope of the action created by the statute? Third, does the provision for "additional damages" include damages caused by the breach of the lease, or are they limited to damages occurring from refusal to release? The remainder of this article will attempt to answer these questions.

Several writers have grouped Montana's compulsory release statutes with other "duty-to-release" laws and in so doing have blurred their distinctiveness.<sup>73</sup> While Montana's statutes are similar to statutes of other states in a few respects, they are distinctly different in that they have molded the remedies for breach into a system that is unparalleled elsewhere. The result is that the Montana law cannot be classified simply as establishing liability for failure to remove a cloud from title. For example, in some states the lessee's duty to release the lease of record

<sup>67</sup>*Id.* at 190. Quoting *Brewster v. Lanyon Zinc Co.*, *supra* note 54.

<sup>68</sup>R.C.M. 1947, §§ 73-114 to 73-116.

<sup>69</sup>R.C.M. 1947, § 73-114.

<sup>70</sup>R.C.M. 1947, § 73-115.

<sup>71</sup>R.C.M. 1947, § 73-116.

<sup>72</sup>Laws of Montana 1947, ch. 146, § 1, at 192-93.

<sup>73</sup> SUMMERS, OIL AND GAS § 472, at 390 (Perm. ed. 1958; 2 AMERICAN LAW OF PROPERTY § 10.45 (Casner ed. 1952)); Kuntz, *Liability for Clouding Title to Oil and Gas Interests*, 10 OKLA. L. REV. 125, 137-39 (1957).

is dependent on the lessor's demand for release.<sup>74</sup> The duty of the lessee in Montana arises immediately upon forfeiture.<sup>75</sup> Only two states other than Montana provide a suit to compel release that is available immediately upon expiration of a grace period.<sup>76</sup> Most statutes require the lessor to file a written demand and notice and thereafter allow the lessee time to either comply with the demand or assert the validity of the lease.<sup>77</sup> Under the laws, the suit to compel release and obtain a statutory penalty is exclusively a final remedy.<sup>78</sup> In at least two states there is no statutory remedy for the lessor. Instead, the failure of the lessee to release is made a misdemeanor.<sup>79</sup>

Only the Montana statute makes a procedural distinction between forfeiture occurring by the lessee's failure to act and termination of the lease by its own terms.<sup>80</sup> The statutes of all the other states provide the same remedies regardless of the manner of termination.<sup>81</sup> The 1947 amendment demonstrates that the Montana legislature not only recognized the distinction, but decided to perpetuate it by providing different remedies.<sup>83</sup> If termination results from breach of a covenant, express or implied, a question of fact arises and court adjudication is necessary. But where the lease terminates by its own terms evidenced on the face of the instrument, court determination is unnecessary, costly and time consuming. Use of the notice-affidavit to obtain compulsory release is obviously more practical under these circumstances.

While a lessor's action brought under the "compulsory release statute"<sup>84</sup> seeks a remedy similar to cancellation in equity, it is an action at law and the parties are entitled to a jury trial.<sup>85</sup> Nevertheless, the principles to be applied by the court in administering the statutory remedies are equitable.<sup>86</sup> This dual legal-equitable nature of the statute caused some difficulty at first. In *McNamer Realty Co. v. Sunburst Oil & Gas Co.*,<sup>87</sup> the lessor brought an action to have an oil and gas lease declared void, but did not seek the statutory penalty, attorney's fees, or damages.

<sup>74</sup>CAL. CIV. CODE § 794; LA. REV. STAT. ANN. § 30:102 (1951); WYO. STAT. ANN. § 34-62 (1957).

<sup>75</sup>R.C.M. 1947, § 73-114.

<sup>76</sup>N.M. STAT. ANN. § 65-2-4 (1953); COLO. REV. STAT. ANN. § 118-13-5 (1963).

<sup>77</sup>KAN. STAT. ANN. §§ 55-201, 55-202 (1964); N.D. CENT. CODE §§ 47-16-36, 47-16-37 (1960); MICH. STAT. ANN. §§ 26.1161, 26.1162 (Rev. 1953); S.D. CODE § 42.0812 (1960 Supp.) (provides for suit by lessee); IOWA CODE ANN. §§ 84.6, 84.7 (1946); NEB. REV. STAT. §§ 57-201 to 57-205 (Reissue 1960).

<sup>78</sup>These statutes have provisions similar to the 1947 amendment to R.C.M. 1947, § 73-115.

<sup>79</sup>ILL. REV. STAT. ch. 80, § 39 (Smith-Hurd 1966); OKL. STAT. ANN. tit. 41, § 40 (1954).

<sup>80</sup>R.C.M. 1947, § 73-115.

<sup>81</sup>See statutes cited notes 74, 76, 77 and 79 *supra*.

<sup>82</sup>Laws of Montana, 1947, ch. 146, § 1, at 192-93.

<sup>83</sup>Termination by the terms of the lease usually occurs when the lessee fails to drill or pay rentals under an "unless" lease because by the very wording of the lease it is to terminate if drilling is not commenced *unless* rentals are paid. See *McDaniel v. Hager-Stevenson Oil Co.*, *supra* note 41.

<sup>84</sup>R.C.M. 1947, §§ 73-114, 115, 116.

<sup>85</sup>*Solberg v. Sunburst Oil & Gas Co.*, *supra* note 65, 225 Pac. at 612.

<sup>86</sup>*Ibid.*; *Berthelote v. Loy Oil Co.*, *supra* note 65; *Severson v. Barstow*, *supra* note 65.

<sup>87</sup>*Supra* note 61.

The Supreme Court held that the action came under the equitable cancellation statute<sup>88</sup> and not the compulsory release statute because the lessor had not sought the additional remedies of the latter.<sup>89</sup> *Berthelote v. Loy Oil Co.* seems to have overturned this case, holding that *McNamer* did not stand for the rule that cancellation could only be obtained in equity, but that the compulsory release statute applies whenever there is a forfeiture.<sup>90</sup> One need not, therefore, seek all the statutory relief of the compulsory relief statute in order to come within part of its provisions.

The primary object of the legislature in passing the compulsory release statute was to penalize the lessee for failure to clear record title after forfeiture of the lease.<sup>91</sup> However, this was not its sole purpose. As the court stated in the first *Solberg v. Sunburst Oil & Gas Co.* case:

In enacting the statutes forming the basis of this action, it seems to us clear that the Legislature intended to accord to the lessor of lands leased for oil, gas, or other mineral development a similar remedy to that which then existed in favor of mortgagors. But it was determined, in order to avoid multiplicity of suits, to accord the lessor the privilege of obtaining desired relief in one action, and therefore the right of obtaining a clearance of the record and of recovery of the penalty and damages for failure of the lessee so to do was accorded as a remedy to the lessor in a single action.<sup>92</sup>

Thus, the statute provides for the inclusion of three independent causes of action in one suit: First, the suit to cancel the lease and clear it of record; Second, to provide for a penalty against the recalcitrant lessee; Third, an action for damages.<sup>93</sup> A prima facie case under this "three-in-one" action is established upon showing that there was a forfeiture, a demand for release and failure of the lessee to release.<sup>94</sup> The action has been called *in rem*<sup>95</sup> and although classified as a tort action, the specific attachment provision of the statute is applicable even though the claim does not come within the general attachment statute.<sup>96</sup>

If a lessor seeks the equitable remedy of forfeiture, it is not necessary to prove the inadequacy of damages.<sup>97</sup> Furthermore, the court may decree only partial cancellation of the lease if the circumstances require.<sup>98</sup> The lessor's demand for release need be given only twenty days

<sup>88</sup>MONT. REV. CODES, 1921, § 8733; now codified as R.C.M. 1947, § 17-1001.

<sup>89</sup>*McNamer Realty Co. v. Sunburst Oil & Gas Co.*, *supra* note 61, at 170.

<sup>90</sup>*Berthelote v. Loy Oil Co.*, *supra* note 65, at 190.

<sup>91</sup>*Solberg v. Sunburst Oil & Gas Co.*, *supra* note 65, 225 Pac. at 614.

<sup>92</sup>*Ibid.*, *Daley v. Torrey*, *supra* note 65, 230 Pac. at 783; *Abell v. Bishop*, *supra* note 65, at 529.

<sup>93</sup>*Daley v. Torrey*, *supra* note 65, at 783; *Beavers v. Rankin*, *supra* note 65.

<sup>94</sup>*Solberg v. Sunburst Oil & Gas Co.*, *supra* note 65, 225 Pac. at 613-14; *Berthelote v. Loy Oil Co.*, *supra* note 65, at 190; See also *Stranahan v. Independent Natural Gas Co.*, *supra* note 33.

<sup>95</sup>*Beavers v. Rankin*, *supra* note 65.

<sup>96</sup>*Daley v. Torrey*, *supra* note 65, 230 Pac. at 784.

<sup>97</sup>*Berthelote v. Loy Oil Co.*, *supra* note 65, at 190-91.

<sup>98</sup>*Severson v. Barstow*, *supra* note 65, at 1025. The court found in this case that neither of the parties was at fault, and that it would be inequitable to allow the lessees to hold the land for many years without action or profit. But see *Fey v.*

prior to the commencement of the action. The fact that the demand is given before the end of the sixty day grace period will not affect lessor's ability to commence the suit, so long as it is done sixty days after forfeiture.<sup>99</sup>

As Montana oil and gas law developed, particularly with reference to the compulsory release statute, the doctrine of "ipso facto forfeiture" was adopted. This doctrine states that regardless of whether the lease contains an express forfeiture clause, upon breach of one of the covenants the lessee loses his rights under the lease.<sup>100</sup> The doctrine arose from the nature of the "unless" lease and has been limited in application to that type of lease. But, because the "unless" lease is the most common lease in use today, the effect of the doctrine on lease-created rights is potentially great.

The "unless" lease at an early date was characterized in Montana law as an option contract.<sup>101</sup> Because under this lease the lessee had the choice of either drilling a well or paying delay rental, or doing nothing, it was distinguished from the drill or pay lease.<sup>102</sup> Under the latter type lease, the lessee was obligated to pay rental if he did not drill and upon breach the lessor could sue for the unpaid rentals or cancel the lease.<sup>103</sup> Under the "unless" lease, the lessee had an interest in the premises only when he performed one of the options.<sup>104</sup> *Berthelote v. Loy Oil Co.* recognized that the implied covenants were also optional conditions,<sup>105</sup> and upon a "plain and substantial breach" the lease ipso facto terminated.<sup>106</sup> Notice of forfeiture was unnecessary, at least where it could be assumed the lessee had knowledge of the breach.<sup>107</sup>

A line of cases commencing in 1955 have brought the validity of the ipso facto doctrine into question. The case of *Fey v. A.A. Oil Corp.*,<sup>108</sup> decided in that year, involved the implied covenant to market. The lessee drilled a well and capped it because of the lack of a market. Another well was not attempted for five years, and when it was the lessor physically prevented lessee from coming on the land. Subsequently, the lessor brought an action to quiet title and obtained judgment cancelling the

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*A. A. Oil Corp.*, *supra* note 64, at 589, where the court reversed partial cancellation in favor of the lessee on the ground that the evidence would not support such a decree although lessee had not attempted to drill a well for four years.

<sup>99</sup>*Steven v. Potlatch Oil & Refining Co.*, 80 Mont. 239, 260 Pac. 119, 121 (1927).

<sup>100</sup>*McDaniel v. Hager-Stevenson*, 75 Mont. 356, 243 Pac. 582, 586 (1926); *Bowes v. Republic Oil Co.*, 78 Mont. 134, 252 Pac. 800, 802 (1927); *Steven v. Potlatch Oil & Refining Co.*, *supra* note 99, at 121; *Berthelote v. Loy Oil Co.*, *supra* note 65, at 190.

<sup>101</sup>*McDaniel v. Hager-Stevenson*, *supra*.

<sup>102</sup>*Ibid.*; and cases cited note 100 *supra*. See also *Irwin v. Marvel Petroleum Corporation*, 139 Mont. 413, 365 P.2d 221 (1961) involving an "or" lease.

<sup>103</sup>*Irwin v. Marvel Petroleum Corporation*, *supra* at 223-4; *McDaniel v. Hager-Stevenson*, *supra* note 100, at 585.

<sup>104</sup>See cases cited note 100 *supra*.

<sup>105</sup>*Berthelote v. Loy Oil Co.*, *supra* note 65, at 190.

<sup>106</sup>*Ibid.*

<sup>107</sup>*Ibid.*

<sup>108</sup>129 Mont. 300, 285 P.2d 578 (1955).

lease, from which lessee appealed. The Supreme Court reversed, holding that the lessee acted with "reasonable diligence" and had not breached the implied covenant to market. Furthermore, when the lessor declared the forfeiture and prevented lessee from operating the lease, lessee was excused from his obligations under the lease. The court said the lessor's conduct was inequitable and precluded him from getting cancellation, and that the lessee was entitled to an extension of the period of the lease equal to the delay.<sup>109</sup>

The factual similarities between *Berthelote* and *Fey* point up the inconsistencies in their results. Both cases involved breaches of the implied covenants to market and develop. Both leases had a primary term of five years plus "so long thereafter as oil and gas is [sic] produced in paying quantities," and both contained "unless" clauses. In each instance, the lessee drilled one or more wells that were either dry holes, or had been capped because of the absence of a market. Both of the lessors declared a forfeiture of the lease after the end of the five year term, and in both cases the lessee had attempted to drill another well after that period. In neither case did the lessor give notice of forfeiture or demand further development. The only possible distinction between the cases might be that *Berthelote* was an action in law brought under the compulsory release statute and *Fey* an equitable suit to quiet title. This, however, would be an illogical refinement since it has been held repeatedly that an action under the release statute, although at law, confers equitable relief.<sup>110</sup>

One explanation for the inconsistency between these cases is that the court in *Fey* either ignored or was completely unaware of the doctrine of ipso facto forfeiture in *Berthelote*. Had *Fey* applied the doctrine it would have been immaterial that the lessor did not demand development because the lease terminated upon breach of the covenant. Also, the lessor's declaration of forfeiture and his preventing the lessee from entering would have been immaterial facts because the rights of the lessee had already terminated.

Another explanation for the inconsistency may be that *Fey* was based on authority from outside Montana which was alien to existing doctrines of oil and gas lease interpretation. *Fey* held that the lessor could not assert breach of the covenants because he failed to demand commencement of development. This is in direct conflict with the holding in *Berthelote* that notice is only necessary where the cause of breach is not within the lessee's knowledge. *Fey* cited for authority the Kansas case of *Storm v. Barbara Oil Co.*<sup>111</sup> The essential facts of this case are identical to those of *Berthelote* and *Fey*. In *Storm* the lessor contended that the lessee had forfeited the lease through his failure to develop the premises by not drilling an additional well for twenty years. The Kansas Supreme

<sup>109</sup>*Id.* at 590.

<sup>110</sup>*Supra* note 86.

<sup>111</sup>177 Kan. 589, 282 P.2d 417 (1955).



still be used in limited instances. If this is true, the problem is to determine when it is applicable. The doctrine was used in *Berthelote* but ignored in *Fey*, both of which concerned implied covenants. It was utilized in *Schumacher* but disregarded in *Braun*, both dealing with express covenants.

Much of the case authority surrounding the compulsory release statute is based on the ipso facto doctrine. The *Fey* decision and its progeny may have substantial impact on the remedies available to a lessor under the statute. If breach of a covenant does not forfeit the lease automatically, a lessor's statutory cause of action under the compulsory release statute may not arise until after he has obtained judicial determination of forfeiture. Therefore, because *Fey* is based on authority inconsistent with the approval of forfeiture by the Montana Court and because it is incompatible with Montana's compulsory release statute, *Fey* should be overruled.

An indirect result of *Fey* has been the adoption of the rule that if a lessor asserts forfeiture and later the lease is found not forfeited, the lessee is entitled to an extension of time under the lease equal to the resultant delay.<sup>119</sup> This idea was first only incidentally asserted in *Fey*, but became a principal ground of the decision in *Braun v. Mon-O-Co. Oil Corporation*. Unfortunately, it also became a focal point for the recent decision in *Bingham v. Stevenson*.<sup>120</sup> Admittedly a lessee should obtain restitution for malicious or fraudulent interference with his right to work a lease,<sup>121</sup> but extension of the period of the lease is not justified solely because the lessor challenged that right. Instead, the reason for the interference by the lessor and the extent of harm to the lessee should be considered. For example, in *Bingham* the lessee apparently never intended to drill a well. Yet that lease will burden the land for almost twenty-eight years solely because the lessor contested the lessee's compliance with the purpose of the lease. The most obvious result of this "interference rule" will be intimidation of lessors even though a flagrant breach of the lease may exist. This will always be true unless the lessor has an invulnerable case so he need not risk extending the period of the lease by protracted litigation.

Prior decisions of the Montana Court held that the lessee has a right to work the lease if it has not been forfeited, regardless of adverse actions by the lessor, and that the production obtained by a lessor during the period of a valid lease is rightfully attributable to the lessee.<sup>122</sup> Therefore, if the lessee has a right to recover for wrongful interference by the lessor he should get damages or restitution. But, in light of a policy which favors forfeiture and encourages development of oil and gas land,

<sup>119</sup>*Fey v. A. A. Oil Corp.*, *supra* note 108, at 590.

<sup>120</sup>23 St. Rptr. 651, 420 P.2d 839 (Mont. 1966).

<sup>121</sup>See MERRILL, *op. cit. supra* note 115, §§ 47, 70; But see *Arkansas Nat. Gas Corp. v. Pierson*, 84 F.2d 468 (8th Cir. 1936) holding that mere declaration of forfeiture is not an excuse for the lessee.

<sup>122</sup>See *Rieckhoff v. Consolidated Gas Co.*, 123 Mont. 555, 217 P.2d 1076 (1950).



extension of the term of a lease should be resorted to only in the most extreme circumstances. In any event, the court should carefully examine the conduct of the lessee to insure that the purpose of the lease will be furthered by an extension.

### IN MONTANA: DAMAGES.

The specific question of whether damages are available for breach of implied covenants in Montana has never been raised. Indirectly, however, the court has indicated their availability. In *Brown v. Homestake Exploration Corporation*,<sup>123</sup> holders of prospecting permits on federal land were awarded damages for the failure of a drilling contractor to drill test wells. The court rejected the argument of the defendant that the correct measure of damages is the reasonable value of oil plaintiff would have received had the wells been drilled. The court held that because this was a drilling contract and not a lease the damages would be awarded on the basis of what it would have cost to drill the wells that should have been drilled. The court implied that the "cost of well" measure of damages applied only to drilling contracts and that the "reasonable value" test would apply to leases.

One provision of the compulsory release statute relevant to the availability of damages for breach of an oil and gas lease allows recovery of "any additional damages that the evidence in the case will warrant."<sup>124</sup> This provision may authorize both forfeiture and recovery of damages. Similar provisions in statutes of other states have been worded to specifically limit damages to the harm caused by the lessee's failure to release.<sup>125</sup> Interpretation of the Montana statute might be made to obtain this result. The Montana cases mentioning this "additional damage" clause have interpreted it to allow damages resulting to the lessor because of the lessee's refusal to release and have not yet considered whether it includes damages for oil lost because of breach of the lease.<sup>126</sup> However, these cases do not hold that damages recoverable under the statute are restricted to this measure. Because the legislative purpose in enacting the compulsory release statute was to avoid multiplicity of suits,<sup>127</sup> it is probable that the legislature also intended to include recovery of damages for breach of the lease. Had the Montana legislature intended to limit recovery to the harm caused by the lessee's refusal the statute could have been narrowly worded to that end.

<sup>123</sup>98 Mont. 305, 39 P.2d 168 (1935).

<sup>124</sup>R.C.M. 1947, § 73-115.

<sup>125</sup>See WYO. STAT. ANN. § 34-62 (1957); CAL. CIV. CODE § 794; LA. REV. STAT. ANN. § 30:102 (1951).

<sup>126</sup>*Solberg v. Sunburst Oil & Gas Co.*, 70 Mont. 177, 225 Pac. 612 (1924); *Solberg v. Sunburst Oil & Gas Co.*, 73 Mont. 94, 235 Pac. 761 (1925); *Solberg v. Sunburst Oil & Gas Co.*, 76 Mont. 254, 246 Pac. 168 (1926); In all these cases the court held that the lessee could introduce evidence establishing the amount of his damages in the form of the value of the lease at the time of forfeiture.

<sup>127</sup>See note and text at note 92 *supra*.

The measure for damages for breach of implied covenants is generally the reasonable value of the oil that would have been produced had the lessee complied with the purpose of the lease.<sup>128</sup> This is usually applied to all covenants except the covenant to explore; in that case the lease is forfeited.<sup>129</sup>

### CONCLUSION

Most leases used in the oil and gas industry today are decidedly advantageous for the lessee insofar as the determination of when and to what extent development of the lease will be made. The lessee can either develop the lease or pay delay rentals if he considers the risk worth it, or he can simply release the lease. The lessor, however, cannot under the terms of the lease unilaterally coerce development or terminate the lessee's interest in his land. To a certain extent this is justified by the fact that it is usually the lessee who assumes the financial risk. However, this should not obscure the fact that the lessor also has a substantial interest in development of the lease.

Montana's potential for oil and gas production has as yet been barely recognized, and the probable total of undiscovered oil fields continues to outnumber the developed ones. Under these circumstances, the typical lessee wants an oil and gas lease for speculation, or to prevent competitors from gaining control of an entire field, or as security until he decides the risk is sufficiently justified by the possibilities of recovery of oil. While this may be mutually beneficial for both the lessor and the lessee under some circumstances, as where the possibility of oil production is very remote, it may also cause great hardship to the lessor where neighboring lands are producing.

The lessor is usually inexperienced in leasing oil and gas rights and unaware of the extent to which he is encumbering his land. The early Montana Court recognized that because the lessee drafts the oil and gas lease, as opposed to the usual real property lease, the presumption against forfeiture should be reversed in order to protect the lessor. The doctrine of ipso facto termination was also developed within this frame of reference as were Montana's compulsory release statutes. Yet the *Fey* decision and its successors, based on authority inconsistent with the favored forfeiture rule and incompatible with the compulsory release statutes, now challenge the effectiveness of Montana's law of implied covenants. If these cases are allowed to stand they will eliminate any protection for the lessor which has been created to counterbalance the unilateral power of the lessee embodied in current oil and gas leases.

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<sup>128</sup>MERRILL, *op. cit. supra* note 115, §§ 153-56; 3 SUMMERS, *op. cit. supra* note 73, §§ 433-35; 2 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 73, § 10.74.

<sup>129</sup>MERRILL, *op. cit. supra* note 115, § 153.

