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clause in the building contract. Often the protection under the guarantee clause is considerably less than that under the code warranty. Parties inserting a guarantee clause into their building contracts should be aware of their rights under the clause and its effect on the code warranty; they should take pains to insure that the clause accurately reflects both their intentions.

Stanford O. Bardwell, Jr.

SHUT-IN GAS WELL PAYMENT — ROYALTY OR RENTAL

Under Louisiana mineral lease forms payment of delay rentals permits lessees to defer drilling operations through the primary term of the lease.¹ During and after the primary term, the lease may be maintained by production in paying quantities under the habendum clause,² upon which royalties are due to the lessor. In *Smith v. Sun Oil Co.*³ a well capable of producing gas in paying quantities but shut in due to lack of a market was held not to maintain the lease in effect beyond the primary term under the habendum clause.⁴ A special shut-in gas well payments clause then was devised to protect lessees from the automatic termination resulting from lapse of the primary term without production or current operations.⁵

1. See *Tate v. Ludeau*, 195 La. 954, 963, 197 So. 612, 615 (1940); MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES § 23, at 68 (2d ed. 1940); Comment, 27 TUL. L. REV. 353, 356 (1953).

2. Production must be in paying quantities to both lessee and lessor. *Vance v. Hurley*, 215 La. 805, 41 So. 2d 724 (1949); *Brown v. Sugar Creek Syndicate*, 195 La. 865, 197 So. 583 (1940); *Logan v. Tholl Oil Co.*, 189 La. 645, 180 So. 473 (1938).

3. 172 La. 655, 135 So. 15 (1931).

4. *Moses, Problems in Connection with Shut-In Gas Royalty Provisions in Oil and Gas Leases*, 23 TUL. L. REV. 374 (1949). Most states are in accord with the Louisiana holding; but there is a strong minority view that "discovery" alone will be sufficient to meet the requirements of production under the habendum clause. See 2 SUMMERS, THE LAW OF OIL AND GAS §§ 299, 300 (1959); *Masterson, The Shut-In Royalty Clause in an Oil and Gas Lease*, 12 Sw. L.J. 459, 463 (1958).

5. Due to its nature, gas, unlike oil, can only be stored in the stratum in which it is found. Therefore, unless the lessee has a ready market available and a pipeline to carry it, there will be no production from a completed gas well for some time. This is further complicated by governmental regulatory procedures with which gas producers must cope. By the time the lessee markets the gas the primary term of the lease may, in the absence of a shut-in gas well payment clause, have expired. 2 SUMMERS, THE LAW OF OIL AND GAS § 299 (1959); *Moses, Shut-In Gas Well Problems*, 33 MISS. L.J. 267 (1962). For the clause to operate, the gas well involved must be capable of producing gas in paying quantities. *Taylor v. Kimbell*, 219 La. 731, 54 So. 2d 1 (1951).

CHARACTERIZATION

Resolution of such issues as who is entitled to share in shut-in payments, when termination of the lease for nonpayment is available, and whether the implied obligation to develop diligently is operative may turn on whether shut-in payments are judicially or conventionally characterized as rentals or as royalties, or are treated separately under specially designed rules. Analogy to either delay rentals or production royalties enables the courts to resolve problems arising under shut-in clauses by application of the rules previously determined to govern similar controversies in the area of rentals or royalties.

AS ROYALTY

The recent case of *Davis v. Laster*⁶ shed the first real light on the characterization of shut-in payments, at least in connection with the particular lease form in issue. This lease, a standard North Louisiana form,⁷ provided in the royalty clause that "where gas from a well producing gas only is not sold or used because of no market or demand therefor, lessee may pay as royalty \$50.00 per well, per year, payable quarterly, and upon such payment it will be considered that gas is being produced within the meaning of [the habendum clause]."⁸ Use of the permissive language "lessee may pay" gave rise to the contention that the lessee at his option could still maintain the lease through the primary term with delay rentals rather than shut-in payments, even after a well capable of production had been completed and shut in.⁹ In characterizing these shut-in payments as royal-

6. 242 La. 735, 138 So.2d 558 (1962).

7. For a typical North Louisiana lease form, see Bath-O-Gram 14 BR1-2A, ¶3(c); for a typical South Louisiana lease form, see Bath-O-Gram, Form 42 CPM—New South Louisiana Revised Four (4)-Pooling.

8. 242 La. at 744, 138 So.2d at 561.

9. The delay rentals were paid for eight years after the well had been shut in. Less than one month prior to the end of the primary term of the lease, lessee tendered a check to lessor for his proportionate share of the shut-in payment for the year commencing with the expiration of the primary term. Lessor refused to accept the check. Nine months later lessor made written demand for lease cancellation, contending shut-in payments were not optional and failure to pay was a breach warranting cancellation. Lessee refused to cancel and upon suit by lessor he relied on permissive language in the shut-in clause contending continuance of delay rentals after shutting in a gas well maintained the lease.

Although there had been indications that shut-in payments were permissive or optional in nature, in no case prior to *Davis v. Laster*, 242 La. 735, 138 So.2d 558 (1962), was the issue squarely presented to any court. The Louisiana Supreme Court in *Sohio Petroleum Co. v. V.S. & P.R.R.*, 222 La. 383, 396, 62 So.2d 615, 620 (1952) stated: "The payment of this royalty [the shut-in payment] is not made a condition precedent for the continuation of the lease. Instead, the provision makes it optional with the lessee to make such payment if he wants

ty,¹⁰ the court emphasized that they were designated as such in the lease, that they were provided for in the same paragraph as production royalties,¹¹ and that they were not due on the annual rental-paying date but were payable quarterly.¹² The court then concluded that since the lease treats shut-in royalties as constructive production, the permissive language referred only to the lessee's choice either to pay shut-in royalties or resume drilling operations.¹³ Once drilling results in actual or constructive

it 'to be considered that gas is being produced within the meaning of Article 2' of the contract.' The Second Circuit Court of Appeal approved this same language in *LeLong v. Richardson*, 126 So. 2d 819, 825 (La. App. 2d Cir. 1961). However, this language in both decisions was dictum. Although writers have indicated the existence of an option may depend on whether the shut-in clause uses mandatory or permissive language, they do not favor an option even when permissive language is used, since shut-in payments substitute for production. Malone, *The Evolution of Shut-In Royalty Law*, 11 BAYLOR L. REV. 19, 57 (1959); Moses, *Problems in Connection with Shut-In Gas Royalty Provisions in Oil and Gas Leases*, 23 TUL. L. REV. 374, 377 (1949), 27 TUL. L. REV. 478, 481 (1953); Scurlock, *Practical and Legal Problems in Delay Rental and Shut-In Royalty Payments*, in *FOURTH OIL AND GAS INSTITUTE* 17, 46 (Sw. Legal Foundation 1953); Walker, *Clauses in Oil and Gas Leases Providing for the Payment of an Annual Sum as Royalty on a Nonproducing Gas Well*, 24 TEXAS L. REV. 478, 481 (1946).

10. The shut-in payment was first definitively classified as royalty rather than delay rental by the Texas Court of Civil Appeals in *Morriss v. First Nat'l Bank*, 249 S.W.2d 269 (Tex. Civ. App. 1952); all persons entitled to share in production royalties were held entitled to share in shut-in payments. *Carlisle v. United States Prod. Co.*, 278 F.2d 893 (10th Cir. 1960), which followed the *Morriss* case, was the only other case found dealing with this question in other jurisdictions. The Louisiana Supreme Court in *Risinger v. Arkansas-Louisiana Gas Co.*, 198 La. 101, 3 So. 2d 289 (1941) evidently treated shut-in payments as royalty, for the court refused to cancel a lease for erroneous method of payment. At this time the court was requiring explicit compliance with the lease provisions as to payment of delay rentals. Although the classification was not at issue in *Sohio Petroleum Co. v. V.S. & P. R.R.*, 222 La. 383, 62 So. 2d 615 (1952), the court in passing called shut-in payment a royalty. These cases, as well as most of the numerous writings on the subject, seem to favor the royalty classification. 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), 27 TUL. L. REV. 478 (1953), 10 LOYOLA L. REV. 1 (1960); Noel, *Shut-In Gas Well Payments*, in *TWELFTH OIL AND GAS INSTITUTE* 171 (Sw. Legal Foundation 1961). But see Masterson, *The Shut-In Royalty Clause in an Oil and Gas Lease*, 12 Sw. L.J. 459 (1958); Scurlock, *Practical and Legal Problems in Delay Rental and Shut-In Royalty Payments*, in *FOURTH OIL AND GAS INSTITUTE* 17, 37 (Sw. Legal Foundation 1953).

11. Paragraph 3(c) of the lease dealt with shut-in payments. Delay rentals were provided for in paragraphs 4 and 5 of the lease. The court concluded from the context that the parties literally sought to designate the payment as royalty. 242 La. at 747, 138 So. 2d at 562.

12. The failure of lessee to make these payments quarterly as provided in this lease was not dealt with by the court. Inasmuch as the parties by their actions had modified the contract (see note 13 *infra*), lessee was permitted to maintain the lease by the payment of delay rentals annually during the primary term. For a good discussion of the timeliness aspect of the shut-in payments, see Malone, *The Evolution of Shut-In Royalty Law*, 11 BAYLOR L. REV. 19, 61 (1959); Noel, *Shut-In Gas Well Payments*, in *TWELFTH OIL AND GAS INSTITUTE* 171, 197 (Sw. Legal Foundation 1961).

13. After stating that lessee was supporting his argument by the decision of *Sohio Petroleum Co. v. V.S. & P. R.R.*, 222 La. 383, 62 So. 2d 615 (1952) (see

production the lessee may maintain the lease with production royalties or shut-in royalties, as the case may be, or by conducting drilling operations, but he may no longer resort to rental payments.¹⁴

The *Davis* characterization of shut-in payments as royalty appears to be a sound interpretation of the particular lease form involved. If this interpretation is consistently adhered to in solving other controversies concerning shut-in payments, the royalty characterization will have at least three important concomitant effects. First, nonparticipating royalty owners, who receive no portion of delay rentals, would be entitled to share the payments with the lessor.¹⁵ Second, the jurisprudential principles governing cancellation for nonpayment of production royalties would govern cancellation for failure to pay shut-in royalties. Although not entirely certain in the light of recent cases, resolution for failure to pay production royalties ordinarily cannot be obtained unless the lessee has been placed in default;¹⁶

note 9 *supra*), no further mention of the case is found in the opinion; no effort was made to distinguish it, overrule it, or brand its statement therein dictum. Although agreeing with lessor that lessee did not have an option to make the payments, the Supreme Court denied cancellation finding a modification of the contract by mutual consent. For a discussion of this aspect of the case and another shut-in problem dealt with by the court (What is a "gas only" well?), see *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Mineral Rights*, 23 LA. L. REV. 323, 340 (1963).

14. The court is very emphatic in its language, stating: "He [lessee] cannot pay delay rentals when royalties are required." *Davis v. Laster*, 242 La. 735, 750, 138 So.2d 558, 563 (1962).

15. *Id.* at 749, 138 So.2d at 563: "The importance of the choice available to lessees after production has been obtained and the well is shut in is readily apparent when consideration is accorded to the fact that the shut-in payments which lessee may make, having been designated by the parties as royalty, allow others besides the mineral owner-lessor to become entitled to these payments. In many instances the mineral-owner lessor has sold royalties, and the royalty owners thereby created do not enjoy the right to participate in bonus and rentals under the lease due the mineral-owner lessor, but these nonparticipating royalty owners do become entitled to their acquired portion of royalties. To permit the lessees to elect to pay rentals where royalties are due would be to invest them with the power to foreclose nonparticipating royalty owners from receipts to which they are entitled under the lease." For a statement of the general rule that royalty owners do not share in delay rentals, see *Continental Oil Co. v. Landry*, 215 La. 518, 526, 41 So.2d 73, 75 (1949): "The owner of the mineral right has the right of ingress to, and egress from, the land, the right to produce the minerals, the right to participate in the bonuses and delay rentals paid under the terms of any lease. On the other hand, the owner of a royalty right has none of these rights, nor is his consent even necessary for the execution of a lease by the mineral owner, his right being to share in production if and when it is had." Under some of the more modern lease forms the amount of shut-in payment is equal to the delay rental payment, thus amounting in some instances to a sizable sum. See *Moses, Recent Problems in Connection with Shut-In Gas Well Royalty Provisions in Oil and Gas Leases*, 10 LOYOLA L. REV. 1, 9 (1960).

16. Until recently a putting in default was required since the failure was considered a passive breach of contract. *Brown v. Sugar Creek Syndicate*, 195

termination upon failure to pay delay rentals is automatic.¹⁷ Third, although the implied obligation of diligent development apparently becomes operative upon discovery of a well capable of producing in paying quantities¹⁸ and thus is independent of the lease characterization of shut-in payments, treatment of these payments as constructive production would seem to foreclose any argument that the parties had contractually abrogated the implied covenant. Under a rental characterization, it could be argued that the parties intended to treat a shut-in well as no well, thus avoiding the development covenant.¹⁹

AS RENTAL

The *Davis* royalty characterization apparently was hinged entirely on construction of the particular lease form involved; hence, a contractual attempt to characterize shut-in payments as "rentals" is not foreclosed unless there are unrevealed policy considerations which limit the parties' freedom of contract in this area. The more recent South Louisiana forms have attempted this rental treatment by providing that after shutting in of a well, the lessee may maintain his rights "by commencing or resuming rental payments" in the same manner as after termination of unsuccessful drilling operations.²⁰ Since the payment is

La. 865, 197 So. 583 (1940). More recently, however, no default has been required on the theory failure to pay was an active breach due to the economic coercion involved. *Bollinger v. Texas Co.*, 232 La. 637, 95 So.2d 132 (1957); *Melancon v. Texas Co.*, 230 La. 593, 89 So.2d 135 (1956). Most recently mere failure to pay for an appreciable time without justification is held to constitute an active breach permitting cancellation without requiring default. *Pierce v. Atlantic Ref. Co.*, 140 So.2d 19 (La. App. 3d Cir. 1962); *Bailey v. Meadows*, 130 So.2d 501 (La. App. 2d Cir. 1961). However, failure to pay shut-in royalties as stipulated in the lease forms at issue in the instant case could be distinguished from the above cases dealing with failure to pay production royalties, for in those cases there was no set due date for payment of the production royalties, whereas shut-in payments are stated to be paid quarterly. Thus, it could be argued that if the shut-in payments are not paid on or before the due date, the lease ceases to be in force.

17. This is universally an express provision of the lease. See *e.g.*, Bath-O-Gram, Form 42 CPM—New South Louisiana Revised Five (5)—Pooling: "This lease shall terminate on, 19....., unless on or before said date the Lessee either (1) commences operations for the drilling of a well . . . ; or (2) pays to the Lessor a rental of Dollars . . ." For application of this type of provision, see *e.g.*, *Atlantic Ref. Co., v. Shell Oil Co.*, 217 La. 576, 46 So.2d 907 (1950).

18. *Stubbs v. Imperial Oil & Gas Prod. Co.*, 164 La. 689, 114 So. 595 (1927); *Hutchinson v. Atlas Oil Co.*, 148 La. 540, 87 So. 265 (1921); MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES § 57, at 148 (2d ed. 1940); 2 SUMMERS, THE LAW OF OIL AND GAS § 398, at 559 (1959).

19. See text accompanying note 23 *supra*.

20. Bath-O-Gram, Form 42 CPM—New South Louisiana Revised Six (6)—Pooling: "In the event that any well on the land or on property pooled therewith (or with any part thereof), is capable of producing gas or gaseous substances in

keyed to delay rentals, the question whether shut-in payments are optional is not presented. If controversies concerning the legal effects of this type of clause are resolved by analogy, the rules normally governing delay rentals would be applicable to shut-in payments under these new South Louisiana forms. Thus nonpayment under such clause would result in automatic termination of the lease.²¹ However, the effect of rental characterization on the diligent development covenant and on the rights of nonparticipating royalty holders is not so readily determinable.

Diligent Development.— Since the implied obligation to develop diligently apparently arises upon discovery of oil or gas in paying quantities,²² this condition to its existence is fulfilled even though a well is subsequently shut in and despite the parties' characterization of shut-in payments as rentals. Furthermore, the lessor certainly has an interest in further development: oil deposits might be discovered; discovery of additional gas might facilitate marketing; and when marketing facilities and a market are secured, more gas would be readily available for sale.

It may be argued, however, that the characterization of shut-in payments as rentals, particularly with the contractual equation to termination of unsuccessful drilling operations, is intended to negate the implied development covenant until the discovery well is no longer shut in for lack of a market.²³ Although

paying quantities but such minerals are not being produced then Lessee's rights may be maintained, in the absence of production or drilling operations, by commencing or resuming rental payments as hereinabove provided for in connection with the abandonment of wells drilled. Should such conditions occur or exist at the end or after the primary term, or within ninety (90) days prior to the expiration thereof, Lessee's rights may be extended beyond and after the primary term by the commencement, resumption or continuance of such payments at the rate and in the manner herein provided for rental payments during the primary term, and for the purpose of computing and making such payments the expiration date of the primary term and each anniversary date thereof shall be considered as a fixed rental paying date; provided, however, that in no event shall Lessee's rights be so extended by rental payments and without drilling operations or production of oil, gas or some other mineral for more than five consecutive years." See Bath-O-Gram, Form 42 CPM—New South Louisiana Revised Five (5)—Pooling which is similar to the Revised Six but which spells out the causes of non-production: ". . . but which the Lessee is unable to produce (or which although previously produced, Lessee is unable to continue to produce) because of lack of a reasonable market or of marketing facilities or because of governmental restrictions"

21. See note 17 *supra*.

22. See note 18 *supra*.

23. Lessee may desire this deferment because of difficulties in securing a market or marketing facilities and the complexities of planning a long-range drilling program.

express covenants displace conflicting implied covenants,²⁴ there is some possibility that an express covenant in derogation of the development covenant might be held in conflict with Louisiana's established public policy favoring mineral development.²⁵ It is submitted, however, that parties should be free to contract for deferment of this obligation if both lessor and lessee clearly express that intent.

If parties have this freedom, the issue becomes whether rental characterization is an express displacement of the implied covenant. An express disavowal of an implied covenant certainly cannot be gleaned from language characterizing shut-in payments as delay rentals. Nor does any of the language in the shut-in clause of the new South Louisiana form impose any express covenant upon the lessee with regard to development that might be said expressly to displace the implied development covenant.

The only possible argument favoring displacement is the lease treatment of shut-in wells as analogous to unsuccessful wells. In view of the rule of construction resolving ambiguous oil and gas lease forms against the lessee,²⁶ it is submitted that the shut-in clause of the new South Louisiana form does not affect the implied covenant of development, and that express language of disavowal, or an express development covenant would be necessary to achieve this effect.

Impact on Nonparticipating Royalty Owners.— If shut-in payments are characterized as rentals, it would seem to follow that nonparticipating royalty owners would not be entitled to share in them.²⁷ Furthermore, there appears to be no compelling consideration which deters the lessor from contractually preventing royalty owners from sharing, as they would under a royalty characterization,²⁸ in shut-in payments. These royalty owners possess only the passive right to share in production; they have no right to grant or join in mineral leases.²⁹ Thus a

24. See *Sabatier v. Canal Oil Co.*, 202 La. 639, 12 So. 2d 665 (1942); *Nabors v. Producers Oil Co.*, 140 La. 985, 74 So. 527 (1917); *Cochran v. Gulf Ref. Co.*, 139 La. 1010, 72 So. 718 (1916); *McClendon v. Busch-Everett Co.*, 138 La. 722, 70 So. 781 (1916); BROWN, OIL AND GAS LEASES § 16.02, at 288 (1958).

25. For the latest in a line of enthusiastic applications of the covenant, see *Sohio Pet. Co. v. Miller*, 237 La. 1015, 112 So. 2d 695 (1959). See also Comment, 37 TUL. L. REV. 90 (1962).

26. *Hunt Trust v. Crowell Land & Mineral Corp.*, 210 La. 945, 28 So. 2d 669 (1947); *Rives v. Gulf Ref. Co.*, 133 La. 178, 62 So. 623 (1913).

27. See note 15 *supra*.

28. *Ibid.*

29. See, *e.g.*, *Continental Oil Co. v. Landry*, 215 La. 518, 41 So. 2d 73 (1949).

royalty owner has no vested right in shut-in payments or their characterization under a lease unless they form part of his right to a portion of the production. Although some lease forms treat shut-in payments as constructive production or in lieu of production, it is manifest that such payments do not represent any actual production. Therefore any right of the royalty owner to share in shut-in payments is solely dependent on the language of the lease³⁰ — not vested under his independent right to share in production. Hence whether shut-in payments are treated as rental or royalty, and therefore whether the royalty owner shares in them, should be purely within the lessor's prerogative.

The position that there is nothing immutable in the treatment of shut-in payments as constructive production raises the issue whether prescription of a royalty right is interrupted by a well capable of commercial production but shut in for lack of a market or otherwise when the lease under which the well was drilled is thereafter maintained by shut in payments characterized as rentals. Production, whether actual or constructive (as in the case of shut-in payments characterized as royalty) is clearly an exercise of the royalty right which interrupts prescription.³¹ Further, there is unequivocal language in both *Union Oil Co. v. Touchet*³² and *LeBlanc v. Haynesville Mercantile Co.*³³ indicating that the Louisiana Supreme Court has adopted the realistic approach that prescription on a royalty right is interrupted by completion of a well capable of commercial production

30. In civilian terminology, treatment of shut-in payments as royalty would constitute a stipulation pour autrui between the lessee and lessor in favor of the royalty owner.

31. *LeBlanc v. Haynesville Mercantile Co.*, 230 La. 299, 88 So.2d 377 (1956).

32. 229 La. 316, 325, 86 So.2d 50, 53 (1956): "It is well settled that the right of the owner of a royalty interest is restricted to a share in production if and when it is obtained. . . . The completion of a well capable of producing oil and gas in paying quantities constitutes production, and, if such a well is completed within 10 years of the royalty sale, the royalty owner is entitled to share in the production from it. Consequently, if the Louise Thibodeaux Well No. 1 had been located on the Touchet tract, Nemours and Small, the owners of the 1/32 royalty interest, would have been entitled to share in production because the well was completed capable of producing gas and gas condensate in paying quantities within 10 years from the date of the royalty sale, and their right to share in such production would not have been lost by the fact that the well was shut in for want of market and no gas was sold or marketed from it until after the expiration of 10 years from the date of the royalty sale." (Emphasis added.)

33. 230 La. 299, 309, 88 So.2d 377, 380 (1956): "The well designated A. D. LeBlanc No. 1 was capable of producing gas and gas condensate in paying quantities, and was on land included within the unit which was formed within ten years from the date of the royalty sale; consequently, the fact that the well was shut in for want of a market and that no gas was sold from it until after the expiration of ten years from the date of the royalty sale cannot defeat the rights of the defendant to share in the production, once begun."

regardless of whether there is an actual disposition of the minerals within the prescriptive period. Under this principle rental characterization of shut-in payments would not interfere with interruption of prescription on the nonparticipating royalty interests.

Although the court in both cases spoke in terms of "shut-in royalties," the interruption of prescription was based on completion of the well—not payment of royalty.³⁴ The court's position may be additionally supported by the realization that a slight amount of production is necessary to test the capabilities of a well before it is shut in.³⁵ If there is an inconsistency between the position which treats capability to produce as equivalent to production for prescriptive purposes, and the position that shut-in payments need not be treated as constructive production because in actuality there is no production, it should be reconciled on the theory that *Touchet* and *LeBlanc* represent a basic policy decision that the mineral royalty owner's right should be preserved by a well shut in but capable of producing because the lack of production from this known commercially productive source is entirely beyond his control and a circumstance easily brought about by collusion between the lessor and lessee. Thus determination of the production necessary to interrupt prescription on royalty interests should be independent of the terms of the lease.

34. The leases involved in *Touchet* and *LeBlanc* were similar. The court in *LeBlanc* described the lease: "[A] provision of the lease (Paragraph 3) stipulated that in the event gas was discovered for which there was lack of a market at the well, the lessor could pay to the lessee, on or before the first of January of each year after production had ceased for lack of market, \$100 'as royalty for each such well, * * * and while such royalty is so paid such well or wells shall be considered as producing in commercial quantities for all purposes hereunder.' The lease was amended . . . to provide that 'in lieu of the shut-in gas royalty clause' (Paragraph 3), 'Lessee may maintain its rights hereunder from month to month' if there were on the leased land a well capable of producing gas or gas condensate and the lease was not then being maintained by production or by operations on the land, by paying lessors 'for rentals herein elsewhere named a sum equal to 1/12 of the amount of annual rentals' based on the number of acres then covered by the lease, 'each payment to extend Lessee's rights for a period of one month from the due date thereof * * *.'" *LeBlanc v. Haynesville Mercantile Co.*, 230 La. 299, 302, 88 So.2d 377, 378 (1956). Although the court in both cases referred to payments under the above clause as "shut-in royalties," it indicated that interruption of prescription was independent of the lease provisions. See notes 32 and 33 *supra*. Had the court been presented an issue which turned on whether these payments were to be treated as rentals or royalty, it seems arguable that payments under the amended lease were more analogous to rentals than royalty.

35. Furthermore, Louisiana's policy considerations demanding mineral development would seem satisfied with respect to royalty interests when commercial production capacity is located and would not seem to require that the existence of the royalty right be subjected to the vagaries of the market.

AS A SEPARATE REGIME

Only the convenience of the parties to the lease, or of the court which must interpret it, seems to require that shut-in payments be treated as either royalties or rentals. The parties apparently are free to create separate or hybrid regimes by incorporating into the lease their own rules governing problems such as distribution of the shut-in payments, termination for non-payment, and the others which are so conveniently handled by analogy to royalties or rentals.

CONCLUSION

In *Davis v. Laster* the court chose to resolve a controversy arising under a shut-in clause by characterizing shut-in payments as royalty. Since this characterization was derived from the terms of the lease, *Davis* does not foreclose a contractual attempt to classify shut-in payments as rentals or to create a separate regime for them. Rental characterization should prevent nonparticipating royalty owners from sharing in shut-in payments, but should have no effect on the lessee's diligent development obligation or interruption of prescription on nonparticipating royalty interests.

Gordon R. Crawford and William Shelby McKenzie

RACIAL DISCRIMINATION — SYSTEMATIC EXCLUSION
IN JURY SELECTION

Due process and equal protection of the law under the fourteenth amendment to the United States Constitution guarantees no distinction shall be made in the selection of grand or petit juries on account of race, color, or previous condition of servitude.¹ This guarantee, which is also incorporated in the Louisiana Constitution² and Code of Criminal Procedure,³ is denied by

1. *Pierre v. Louisiana*, 306 U.S. 354 (1939) established this principle. Subsequent Supreme Court cases elaborating this proposition include: *Smith v. Texas*, 311 U.S. 128 (1940); *Hill v. Texas*, 316 U.S. 400 (1942); *Akins v. Texas*, 325 U.S. 398 (1945); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Cassell v. Texas*, 339 U.S. 282 (1950); *Brown v. Allen*, 344 U.S. 443 (1953); *Avery v. Georgia*, 345 U.S. 559 (1953); *Reece v. Georgia*, 350 U.S. 85 (1955); *Eubanks v. Louisiana*, 356 U.S. 584 (1958).

2. LA. CONST. art. I, § 9.

3. LA. R.S. 15:172 (1950).