# **14 Rocky Mt. Min. L. Inst. 12-1 1968**

***The Foundation for Natural Resources and Energy Law Annual and Special Institutes (formerly Rocky Mountain Mineral Law Foundation Annual and Special Institutes)*  > *Annual Institutes* > *(1968) Volume 14* > *Chapter 12 (REMEDIES FOR FAILURE TO PAY ROYALTIES)***

**REMEDIES FOR FAILURE TO PAY ROYALTIES**

Vernon M. Turner

General Attorney Tenneco ***Oil*** Company

Houston, Texas

In discussing the assigned subject, I must warn you not to expect a detailed or exhaustive treatise. If my comments were limited strictly to the assigned subject, perhaps a more detailed review within the time limitations would be possible. However, in conducting the research, it became more and more apparent that the subject could not be reviewed adequately without first briefly considering certain general legal principles applicable to ***oil*** and gas royalties. For example, a discussion of remedies for failure to pay royalties necessarily relates to the lessor-lessee relationship, applicable express and implied covenants, as well as a consideration of various types of royalty clauses.

**NATURE OF RELATIONSHIP BETWEEN LESSOR AND LESSEE IN PAYMENT OF ROYALTIES**

The relationship between the lessor and lessee with regard to the payment of royalties may be very significant since it may affect the remedies available to the lessor in the event the lessee fails to pay royalties. Such relationship may also be significant in determining the lessee's disclosure obligations and in determining questions concerning the effect of statutes of limitation.

The nature of the lessor-lessee relationship under an ***oil*** and gas lease as to royalty payments generally may be classified the same as any other contractual relationship between parties dealing at arm's length. There are cases holding that there is no special trust or confidence between the lessor and lessee in an ***oil*** and gas lease; they deal at arm's length, each for his own interest.[[1]](#footnote-2)1 Also, it has been held that there is no fiduciary relationship of "trust" or "joint adventure" created between the lessor and lessee under an ordinary ***oil*** and gas lease-[[2]](#footnote-3)2

On the other hand, there are cases indicating that for some purposes, a fiduciary relationship can exist between a lessor and lessee. For example, in the case of *Phillips Petroleum Co. v. Johnson*,[[3]](#footnote-4)3 the court implied that if the royalty had been payable in kind and the lessee had disposed of the lessor's royalty ***oil*** or gas, the proceeds would be a trust in the hands of the trustee and a fiduciary relationship would exist between the lessor and lessee- Also in *Expando Production Co. v. Marshall*,[[4]](#footnote-5)4 it was held that there was a fiduciary relationship on the part of the lessee to use utmost good faith in exercising the power granted under a pooling provision which gave the lessee the right to pool the lessor's royalty estate with other like estates in the same area. This case does not cite any precedents for the fiduciary obligation and it may be that the word "fiduciary" was used to identify the degree of good faith required rather than to establish a fiduciary relationship between the parties. Nevertheless, I feel that this case may be cited as authority that a fiduciary relationship may exist for some purposes between a lessor and lessee under an ***oil*** and gas lease.

It has also been held that the lessee may be the lessor's agent where the lessor's royalty is payable in kind and the lessee is given, expressly or by implication, the right to market the lessor's share if the lessor does not elect to take in kind. In such a situation, it has been held that the lessee is the lessor's agent.[[5]](#footnote-6)5 These cases hold that where the royalty provision in the lease provides that the lessor will receive a fraction of the ***oil*** produced as royalty, but does not expressly authorize the lessee to dispose of the lessor's ***oil***, if the lessor does not arrange to take his ***oil*** in kind, the lessee not only has the right to market the lessor's royalty ***oil*** but has a duty to do so as his agent- Therefore, the same fiduciary relationship which normally exists in a principal-agent relationship would be applicable.[[6]](#footnote-7)6

In the case of *Young v. West Edmond Hunton Lime Unit*,[[7]](#footnote-8)7 a unit operator was held to be a trustee for all of the royalties and royalty owners in the unit- However, this holding pertained to the unit operator under a unit created pursuant to an Oklahoma statute[[8]](#footnote-9)8 and was not a voluntary unit created under the pooling provisions of an ordinary lease. It probably, therefore, should not be cited as authority for the existence of a fiduciary relationship between a lessor and lessee.

***OIL* ROYALTY CLAUSE**

Royalty clauses have become so varied in recent years that no longer can one refer to royalty under an "ordinary ***oil*** and gas lease" or "Standard Producer's-88 Lease." Generally, as to ***oil*** royalty, one might say that almost all leases provide for the lessor's right to take a fractional percentage (for example, one-eighth of the ***oil*** in kind or to be credited with such percentage of the value thereof when run into a pipeline connected to the well or into storage tanks). Since the addition of the words "or into storage tanks," there has been little change in the royalty clause on ***oil***, particularly in the printed forms for fee leases, since the early development of the clause. However, in reviewing a number of state leases, I found interesting differences in the ***oil*** royalty provisions; in particular, with regard to the option to take or deliver in kind or pay value or market price. Therefore, I suggest that in each instance the lease form be examined for determination of the amount and manner of payment of ***oil*** royalty.

**GAS ROYALTY CLAUSE**

Gas royalty clauses generally fall into three categories:

(1)   clauses which provide for a percentage of the proceeds from the sale of gas, and some clauses may specify "gross" or "net" proceeds;

(2)   clauses which provide for the payment of a percentage of the market price of gas at the mouth of the well; and

(3)   clauses which provide for the payment of a percentage of the market value of gas at the well.[[9]](#footnote-10)9

**Proceeds Clause**

A typical proceeds-type gas royalty clause will provide:

The lessee shall pay lessor, as royalty, one-eighth (1/8) of the proceeds from the sale of the gas, as such, for gas from wells where gas only is found-

Under proceeds-type clauses, the question arises whether the lessee may deduct charges against the royalty for treating, processing, and preparing the gas for market. The issue appears to be settled in Kansas. The lessee may not deduct such charges.[[10]](#footnote-11)10 An excellent review of the meaning of the term "gross proceeds" is contained in an article by Mr- Earl Brown, who, after reviewing the authorities, questions whether under the gross proceeds gas royalty clause deductions are allowable in any jurisdiction for transporting, processing, and marketing.[[11]](#footnote-12)11

**Market Price Clause**

A typical market price gas royalty clause is found in the North Dakota State Land Department ***Oil*** and Gas Lease Form which provides that lessee agrees

to pay lessor for the 1/8th part of the gas of whatsoever nature or kind produced and sold, or used off the premises, or used in the manufacture of any products therefrom, at the market price at the well, said payments to be made monthly.

Recent litigation regarding market-price-type clauses has reflected the difficulty in properly construing these so-called standard royalty clauses. One vexing question is when or at what point in time is the market price to be determined.

One recent case which construed a market-price royalty clause was *Foster v. Atlantic Refining Co*.[[12]](#footnote-13)12 The lease was executed in 1955 and the lessors reserved as royalty on ***oil*** and gas one-eighth of that produced and saved from said lands, the same to be delivered to their credit into the pipeline and to be sold at the market price therefor prevailing in the field where produced when run- Atlantic entered into a long-term gas sales contract with an interested pipeline company in 1950 at a contract price of 7 cents per MCF (thousand cubic feet). The uncontroverted evidence submitted in the case was that the prevailing price for gas in the field in 1957 was 13 cents per MCF and from 1958 through 1962 the prevailing price was 14 cents per MCF. The royalty owners sued Atlantic alleging that Atlantic was required to account to them for the gas produced and sold at the market price when delivered and that the sales contract price of 7 cents per MCF was not controlling. The Fifth Circuit agreed with the royalty owners and concluded that Atlantic must settle with the royalty owners on the basis of the market price for gas as the same was produced. The court said:

The inability of Atlantic to make a gas sales contract with escalation provisions is beside the point. The obligation of Atlantic to pay royalties [based upon the market price of the gas on the date "when run," i.e., the date delivered from the well to the pipeline] is fixed and unambiguous. It [Atlantic] made the gas sales contract with full knowledge of this obligation [to pay royalty upon the market price of the gas on the date delivered from the well to the pipeline] and did nothing to protect itself against increases in price. The fact that its purchaser would not agree to pay the market price prevailing at the time of delivery does not destroy the lease obligation.[[13]](#footnote-14)13

Many attorneys engaged in ***oil*** and gas practice rationalized the holding in the *Foster* case to the effect that the court was construing an unusual provision and that the words "when run" which normally are not included in gas royalty clauses were most significant to the final holding- Apparently, the omission of such words did not make much difference, however, in a very recent Texas Supreme Court case, *Texas* ***Oil*** *& Gas Corp. v. Vela*.[[14]](#footnote-15)14

This case is of extreme importance to the ***oil*** and gas industry and has been termed a "landmark case." The court was called upon to construe a gas royalty clause in an ***oil*** and gas lease executed in 1933, which read as follows:

to pay to Lessor, as royalty for gas from each well where gas only is found, while the same is being sold or used off of the premises, one-eighth of the market price at the wells of the amount so sold or used...

There was no market for the gas when developed, but a pipeline was proposed and the lessees entered into life-of-the-lease gas sale contracts in 1935 and 1937, committing all of the gas to be produced from the lease to be sold under the contracts at 2.3 cents per MCF. Since 1935, all of the gas so produced from the lease has been marketed under these contracts. In 1950, deeper production was discovered in the area and additional pipeline purchasers ventured into the area. Since 1960, gas from other leases in the area has been sold at contract prices ranging between 13 cents and 17.24 cents per MCF. The royalty owners sued the lessees for additional royalties alleging that the "market price" during four years preceding the filing of the suit was 13.047 cents per MCF. It was their contention that the higher price should be used for computation of royalty rather than the price being realized under the contract. The trial court found that the higher price constituted the market price in the field during the period in question and rendered judgment for plaintiffs for the difference in the royalties. The Court of Civil Appeals affirmed this portion of the judgment. The Texas Supreme Court, in a 5-to-4 decision, affirmed the judgments of the lower courts as to this question, holding that market price as used in the gas royalty clause clearly meant the prevailing market price at the time of the sale or use, and the gas which was marketed under the long-term contracts was not "being sold" at the time the contracts were made but at the time of the delivery to the purchaser.

The serious impact of the court's decision in this case on the ***oil*** and gas industry cannot be overemphasized. The impact may be best demonstrated by the fact that the royalty basis approved by the court represents approximately 70 percent of the entire gross revenue received by the lessees under the gas sale contracts. The lease clause interpreted by the court is the same clause appearing in numerous printed forms which were used by the industry for many years. The opinion is the first direct ruling by any state Supreme Court on the points here involved and will be cited as authority for future interpretation of this clause and similar clauses.

The question as to when market price is determined for the purpose of calculating royalty payments under certain royalty clauses has now, at least, been decided in Texas. We may not determine it to be at the time the gas is committed to the market under an arm's length, good faith, long-term contract with a stipulated price, but rather it must be determined on each day throughout the life of the contract on delivery dates as market conditions may change and exist on such dates. The court cited, as authority for its holding, the *Foster* case.[[15]](#footnote-16)15 It is my opinion that the *Foster* case may be easily distinguished because of the variance in the royalty provisions being construed in the two cases- The royalty clause in the *Foster* case referring to market price in the field *when run* appears to me significantly different from a royalty clause which simply provides "market price." The Texas Supreme Court has for all practical purposes rewritten the royalty clause in the *Vela* case as if the words "when run" had been inserted therein by the parties to the lease. It is interesting to me that the royalty owners in the *Vela* case accepted gas royalty for thirty years, calculated on the value of the gas at the date it was sold under the contract and never suggested during that time that payment of royalty on the value should be determined at the date of delivery. It was only after the decision in the *Foster* case that the royalty owners under the Vela lease questioned the amount of the royalties which they had been receiving.

Where does the decision in the *Vela* case leave a producer-lessee? He is required by the implied covenants of the lease as well as other considerations to market the gas if a market is reasonably available. He generally is required to enter into long-term gas contracts in order to sell the gas. Any substantial volume of gas can only be sold under a long-term contract at a fixed price to be paid during the contract term. No substantial purchaser will buy the gas on a day-to-day basis but, on the contrary, will require the price to be fixed in advance. These facts are so well known that the courts have taken judicial notice of them.[[16]](#footnote-17)16 The royalty owners in turn enjoy the proceeds from the sale of the gas at the price stipulated in the gas contract until the price of gas in a particular area increases- The result is that the lessee is compelled to settle with the royalty owners at an ever-increasing price as determined by the "date of delivery" even though the lessee's realization of proceeds under the gas contract remains fixed. I feel that this decision might require lessees to litigate with their royalty owners at least every four years to permit a judge or jury in each situation to make a fact determination with regard to a day-to-day market value or market price of gas produced and sold from any particular gas producing property during such period.

Justice Hamilton, in his dissenting opinion in *Vela*, cited many legal commentaries in support of the dissent.[[17]](#footnote-18)17 A motion for rehearing and several *amici curiae* briefs in support of the motion were filed in the *Vela* case- At the time of this writing the Texas Supreme Court had granted the motion for rehearing, but on grounds other than the issue discussed herein. It is my hope that the court will, on rehearing, also reconsider this issue.

**Market Value Clause**

Many of the market-value-type royalty clauses are similar to the clause in the State of Wyoming Lease Form which provides that royalties to be paid by the lessee are:

on gas, including casinghead gas or other hydrocarbons substance, produced from said land, saved and sold or used off the premises or in the manufacture of gasoline or other products therefrom, the market value at the well of 1/8th of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale.

Market value as used in gas royalty provisions generally means the current market price paid for gas at the well or in the field where it is produced. In a case arising in Texas, however, the Court stated that there was a distinction between market value and market price.[[18]](#footnote-19)18 The court stated:

market price is the price that is actually paid by buyers for the same commodities in the same market- It is not necessarily the same as "market value" or "fair market value" or "reasonable worth." Price can only be proved by actual transactions. Value or worth, which is often resorted to when there is no market price proveable, may be a matter of opinion. There may be a wide difference between them.

Recent cases have also held that market value is not necessarily the price received by a lessee under a sales contract with an interstate pipeline company, whether the same be contract price or based upon approved rate schedules on file with the Federal Power Commission. *Weymouth v. Colorado Interstate Gas Co*.[[19]](#footnote-20)19 and *J- M. Huber Corp. v. Denman*[[20]](#footnote-21)20 are being watched with much interest, not only for the royalty price question but also for the question related to Federal Power Commission jurisdiction over royalty owners. The court, in both of these cases, decided the contractual question presented in those cases relating to the proper interpretation of the royalty pricing provisions in the lease agreements, and ruled in each case that the lessorroyalty owners were entitled under their respective lease agreements to royalty payments based on market value and that market value might in fact be a rate other than the gas sales contract price or FPC approved price. The court, however, remanded the cases to the United States District Court and ordered that the District Court defer action on fixing the actual market prices pending a determination by the Federal Power Commission as to whether or not it has jurisdiction. This determination is currently before the FPC in Docket No. RI67-113.

Although perhaps outside the scope of this paper, I nevertheless feel that some comments should be made regarding the jurisdiction of the Federal Power Commission over the payment of gas royalties when the gas is being sold in interstate commerce. Until recently the leading case on the jurisdiction (or lack of jurisdiction) of the Federal Power Commission over the payment of gas royalties was *Le Cuno* ***Oil*** *Co. v. Smith*.[[21]](#footnote-22)21 In *Le Cuno*, the royalty owners brought an action in the Texas District Court against the lessee (who was both producer and pipeline operator) for an accounting based on the full one-eighth royalty of the gas price received by the lessee at the well for sales in interstate commerce to transmission companies- The lessee, Le Cuno, contended that the FPC had exclusive jurisdiction over the subject matter of the controversy and that the royalty owners had not exhausted their administrative remedies. The Court held for the royalty owners and ordered Le Cuno to account to them on the basis of the price received from transmission companies, as adjusted. With regard to FPC jurisdiction, the Court said that FPC regulatory authority was not involved in the suit; nor could it be said that the FPC had exclusive jurisdiction of the controversy, or even that there was a controversy between the litigants that the FPC in the exercise of its lawful authority might determine.

In the *Weymouth* and *J. M. Huber* cases, the question of FPC jurisdiction over royalty matters was again ripe for judicial review. Here the royalty owners had filed actions in the lower courts claiming royalties based on gas prices higher than the producers received under their respective approved rate schedules on file with the Federal Power Commission. The royalty owners' contentions were based upon their lease agreements which provided that gas royalties be paid on the basis of market value. In each case, the lessee-producers pleaded that since the gas was delivered and sold into interstate commerce, the FPC had primary jurisdiction over the controversy. As previously mentioned, the cases were remanded to the District Court to defer action pending a determination by the Federal Power Commission as to whether it had jurisdiction.

The question of Federal Power Commission jurisdiction over gas royalty has been highlighted again as the result of recent actions brought in the state district courts of Kansas.[[22]](#footnote-23)22 In each of these cases, the royalty owners are contending that royalties should be paid at rates greater than the producer-defendants are receiving under their respective rate schedules as approved by the Federal Power Commission- Further action here, as in *Weymouth* and *Huber*, is currently suspended pending the outcome of the hearings in Docket No. RI67-113, before the Federal Power Commission in respect to the Commission's jurisdiction over the royalty question. However, unlike *Weymouth* and *Huber*, the contractual question of each producer's liability to each royalty owner is also presently held in abeyance by the Kansas district courts. But, in *Rowan v. Allied Chemical Corp*. (pending before the U.S. District Court, Northern District of Texas), the plaintiffs, on September 19, 1967, in Docket No. RI68-136, petitioned the Federal Power Commission for a Declaratory Order requesting the Commission to determine that it does not have primary jurisdiction over the contract issues. By order issued January 17, 1968, the Federal Power Commission cited the *Huber* and *Weymouth* cases and pointed out that the Fifth Circuit Court of Appeals had ruled on the contractual issues in each case. Here the Commission stated that *Huber* and *Weymouth* thus "support the view that the Commission does not have primary jurisdiction over contract questions related to a jurisdictional sale and that a court may properly decide such questions." In view of this order, it is possible that the U.S. District Court for the State of Kansas could rescind its earlier order suspending judgment in the state district courts of Kansas.

While *Huber* and *Weymouth* may have established some ground rules for determining market value, the courts apparently will await the outcome of the FPC proceedings in Docket No. RI67-113, before clarifying the matter on gas sales in interstate commerce. An FPC determination is not expected prior to the latter part of this year.

If the Texas Supreme Court does not grant the motion for rehearing in the *Vela* case, the decision may very well influence the Federal Power Commission in the hearings related to jurisdiction over royalty owners. The FPC may be compelled to assume jurisdiction over royalty owners to prevent them from claiming royalty based upon a value in excess of the regulated price of the gas because of the Commission's concern over the possible economic impact nonregulated royalty payment would have on the cost of the gas to the interstate customer.[[23]](#footnote-24)23

**"TAKE-OR-PAY" PROCEEDS DERIVED FROM GAS SALES CONTRACT**

Another question related to payment or nonpayment of ***oil*** and gas royalties is the status of take-or-pay proceeds derived by a lessee under a gas sales contract-

A take-or-pay clause in a gas sales contract has been defined as "requiring the purchaser to take, or failing to take, to pay for the minimum annual contract volume of gas which the producer-seller has available for delivery. Under such clause the purchaser usually has the right to take the gas paid for (but undelivered) in succeeding years. Such gas is called makeup gas."[[24]](#footnote-25)24

The phrase take-or-pay has not to my knowledge had any reported judicial definition- Take-or-pay provisions are included in many gas purchase and sales agreements for various reasons, some of which are: (1) it assures the seller of a minimum annual income from his property; (2) it could prevent possible drainage to offset properties by requiring further diligence upon the part of the purchaser to purchase at a reasonably constant level; and (3) it provides the buyer with flexibility of gas takes at a time when the buyer is requiring more gas for future expansion than he may presently absorb.

As noted in the definition, the clause requires the buyer to pay for a certain volume of gas, whether taken or not, with the right, in most instances, to recoup the gas at no cost to it during some future period of time. The clause normally results in no economic windfall to the producer since a diligent buyer will arrange his purchase pattern so as to recover the value of the gas within the makeup period. For example, I am advised that one of Tenneco's associated companies, Tennessee Gas Pipeline Company, which is a major purchaser of gas for interstate transmission, has never paid for gas under a take-or-pay provision which it has not ultimately recouped through future deliveries. To further maintain a certain stability in the purchase pattern, a provision may be added requiring the buyer to pay any price differential for the gas should the gas be taken during a different pricing period than when the payment for the take-or-pay gas was made.

Notwithstanding specific provisions in gas contracts regarding a take-or-pay provision, the Federal Power Commission in two instances (one regarding a Transwestern Pipe Line Company contract and the other a Western Natural Gas Company contract) has taken the position that such clauses should be eliminated because the clause "militates against and is incompatible with building up of long-term reserves."

In 1959, after the Federal Power Commission in its Opinion No. 328[[25]](#footnote-26)25 indicated that "makeup" clauses in contracts should be eliminated, the Commission on May 22, 1961, issued a Notice of Proposed Rule Making regarding "non acceptability of contracts between independent producers and interstate natural gas companies containing certain provisions in daily contract quantity and 'take-or-pay' clauses-" On January 18, 1967, in Order No. 334, the Commission revised Part 154, Subchapter E, Regulations Under the Natural Gas Act, Chapter I, of Title 18 of the Code of Federal Regulations by adding a new Paragraph 154.103, which set limitations on provisions in rate schedules relating to makeup period for taking prepaid gas and provided that no contract would be accepted for filing which was executed after February 1, 1967, which precluded the buyer from receiving gas paid for, but not taken, at any time during a period of at least five years immediately following payment for such gas not taken. Prior to this Order, the Commission issued certificates subject to the final rule to be promulgated regarding this matter.

It would appear that as between producer and purchaser, a take-or-pay clause can be fashioned in any manner that the imagination will permit, using the fundamentals of sound contracting law and sound producing practices. However, the problem of the royalty owner's rights under a take-or-pay clause is a matter which is somewhat more difficult to determine. The prime question is whether or not a royalty owner has a right to an advance payment made under a take-or-pay clause prior to the gas being severed from the land. If a lease provides that the lessor will participate in any and all payments made to the producer attributable to the leased premises regardless of severance, there is little doubt that the royalty owner would be entitled to his royalty portion of advance payments made under the take-or-pay provisions and would be subject to the same makeup provisions as the producer. In instances where the matter of advance payments made to producer under a take-or-pay clause is not provided in the lease by express agreement, his right would seem to be only those rights so specifically reserved. In my opinion, there are no implied covenants requiring such payments to be distributed to the royalty owner prior to production.

A survey of producers who have in the past received advance payments under take-or-pay clauses in gas sales contracts indicates that in all instances, royalty has not been paid until the gas was actually produced from the land. The position taken by the producer is that the royalty owner has no right without a specific provision in the lease, to an advance royalty on take-or-pay payments and that none should be paid to him until actual production. A similar situation occurs under a two-price system brought about by the Federal Power Commission's permitting producers to collect a firm rate and collect under bond any increase in rates not finally approved. Here the producer's position generally is that no royalty is paid on any amounts subject to refund unless the royalty owner is willing to post a bond guaranteeing refund on the royalty portion should such refund be ordered. Otherwise, royalties paid out on prices which are not firm could get beyond the reach of the producer, therefore, making this a producer liability.

It, therefore, may be stated that in the absence of case law, we must look to the specific provisions of the lease to determine the royalty owner's rights to payments for gas. It is possible that some proceeds-type royalty clauses might be written in such manner as to include take-or-pay moneys when received by lessee.

Mr. Ben R. Howell, in an article written in 1953, raised the identical question. He queried: "When Buyer has become obligated to pay Seller for undelivered gas under the 'take or pay' provisions, what results follow as to royalty payments...? Is Seller required to pay royalty owners for gas remaining in the ground which will be produced at a future date?"[[26]](#footnote-27)26 As I have indicated, this question fifteen years later has not been judicially determined-

**REMEDIES FOR NONPAYMENT OF ROYALTY**

The obligation to pay royalties is created by an express covenant in an ***oil*** and gas lease. Although lessee's obligation to pay royalties may be closely associated with his implied covenant to market the production, there is no implied covenant as such in a lease obligating the lessee to pay royalties. In most instances, the remedy for failure to pay royalties may be an action based upon (1) recovery of the amount owing by reason of the breach of the express covenant, (2) conversion of the lessor's royalty portion of the ***oil*** or gas produced, or (3) cancellation of the lease.

**Breach of Express Covenant**

A cause of action at law for the amount owing based upon the breach of the lease covenant to pay royalties is available in all jurisdictions and is the customary theory of recovery in a suit where the lessee has failed to properly pay royalties. The normal remedy is an action for damages, as in most jurisdictions nonpayment of royalty will not terminate a lease in the absence of a specific clause to that effect.[[27]](#footnote-28)27 It has been the usual practice of lessors, in the absence of an express forfeiture provision in the lease, to bring an action for breach of certain implied covenants in the lease which, under certain conditions, would result in termination; the lessors in such case obviously preferring the cancellation remedy rather than money damages- Even so there has been a degree of uncertainty in the courts between cancellation and noncancellation for breach of implied covenants.

A lessee normally continues liable for the payment of royalty even though he may subsequently transfer the lease to another, unless the lease contains an express provision relieving him of further liability.[[28]](#footnote-29)28 Many lease forms presently in use contain such a clause so that in the event of a good faith assignment by lessee, he is relieved of liability for breaches of express covenants occurring subsequent to the assignment-[[29]](#footnote-30)29 Where royalty is payable in money rather than in kind, there may be a question in those states which distinguish between assignments and subleases as to whether a sublessee is in such privity of estate with a lessor as to be liable to lessor for the royalty. It is quite customary, however, that there may be an express assumption of the royalty obligation by a sublessee in the sublease.[[30]](#footnote-31)30

**Conversion**

In situations where lease provisions permit a lessor to take his royalty in kind, a suit may be brought on the theory of conversion-[[31]](#footnote-32)31 However, in these situations, the provisions of the lease must be carefully examined since the lease form may be worded in such a manner that the lessor is required to give notice or make some special arrangement before he is entitled to take his royalty or gas in kind and, under these conditions, his failure to give the necessary notice or make the required arrangements would preclude any action based upon conversion. Even in situations where lessor has reserved royalty in kind, there may be express or implied authority or duty on the part of the lessee to market lessor's royalty share and if such authority exists, recovery on the theory of conversion would be precluded, at least against the purchaser of the production. The only theory upon which the purchaser of the ***oil*** might be found liable, in absence of conspiracy or fraud, would be the theory of conversion, which would only be applicable in situations where the lessee was not authorized to dispose of the lessor's royalty ***oil*** and gas.[[32]](#footnote-33)32 It is normal practice for a purchaser of a production to protect himself from an action of conversion by a lessor by the circulation of a division order- If lessor executes the division order, he cannot maintain an action against the purchaser because the division order is a contract to sell the production to the purchaser.[[33]](#footnote-34)33 The measure of damages for conversion depends upon whether innocent or willful conversion is proved. If the conversion is innocent, the measure of damages is a reasonable market value of the ***oil*** at the time it should have been delivered to lessor or to lessor's credit in the pipeline.[[34]](#footnote-35)34 In the event of willful conversion, a lessee has been held liable for the highest intermediate value of ***oil*** between the date of conversion and the date lessor files suit-[[35]](#footnote-36)35 Several cases regarding the question of innocent or willful conversion have been decided by the courts.[[36]](#footnote-37)36

**Cancellation of Lease**

In certain instances, cancellation of the lease may also be a remedy of a lessor for nonpayment of royalties- It has become quite customary for a lease from a governmental agency to expressly provide for a cancellation of the lease for breach of covenants. A typical lease provision in this regard is contained in the State of Wyoming lease form which provides:

In the event that the lessee shall default in the performance or observation of any of the terms, covenants and stipulations hereof, or of the general regulations promulgated by the Board of Land Commissioners and in force on the date hereof, the lessor shall serve notice of such failure or default either by personal service or by certified or registered mail upon the lessee, and if such failure or default continues for a period of thirty (30) days after the service of such notice, then and in that event the lessor may, at its option, declare a forfeiture and cancel this lease....

Most printed forms of ***oil*** and gas leases covering fee lands do not contain forfeiture provisions. However, such provisions are appearing more and more frequently in typewritten forms of leases. In the absence of an express forfeiture provision, cancellation of a lease for nonpayment of a royalty by lessee is permitted only in the states of Louisiana and North Dakota.[[37]](#footnote-38)37 In Louisiana, where codal provisions respecting ordinary leases have been extended to ***oil*** and gas leases, cancellation of ***oil*** and gas leases for nonpayment of royalty has been sustained in the courts-[[38]](#footnote-39)38 It should be noted, however, that even in Louisiana, the remedy of cancellation is circumscribed with certain limitations. For example, it has been stated that a lessor is not entitled to cancellation when an adequate reason for the delay is shown by the mineral lessee.[[39]](#footnote-40)39 In *Broadhead v- Pan American Petroleum Corp*. [[40]](#footnote-41)40 the court denied the remedy of cancellation where the facts showed that the land was a wildcat area, there were marketing difficulties, and that the lessor failed to cooperate in clearing title to the property. One issue frequently litigated in Louisiana has been the question of whether or not the lessor, as a prerequisite to filing suit for cancellation, must put the lessee in default by making a formal demand for the payment of royalty. An excellent discussion of this question is contained in a recent article in the *Tulane Law Review*.[[41]](#footnote-42)41 It is also provided by statute in North Dakota that cancellation is an available remedy-[[42]](#footnote-43)42

Some writers have advocated that the equitable remedy of cancellation should be allowed in other jurisdictions when it can be shown that the lessee is insolvent and the remedy at law is, therefore, inadequate.[[43]](#footnote-44)43 No court decisions have been found to support this position, but I agree that in certain situations such position has merit-

**Other Remedies**

Another possible remedy is the enforcement of a lien provision. However, the lease must expressly provide for a lien upon the lessee's property to secure the payment of production royalties before such remedy is available.

A further remedy of mandamus applicable in certain situations has been provided by statute in Louisiana.[[44]](#footnote-45)44 The Act was passed in 1934 and authorizes the issuance of a writ of mandamus in certain instances where the withholding of rentals, royalties, or other sums due under a mineral lease are declared to be unlawful- I am not aware of any other jurisdictions where this method of enforcement of royalty obligations is available.

An additional remedy which a member of the Texas Bar, Mr. Linton E. Barbee, has suggested as possibly being available for nonpayment of royalties is the remedy provided for breach of sales agreements under the Uniform Commercial Code.[[45]](#footnote-46)45 This article contains a most interesting analysis of the application of the Uniform Commercial Code to ***oil*** and gas transactions, and raises some very interesting questions with regard to such applicability- It is my opinion that the sales article in the Code is not applicable to ***oil*** and gas leases.

The importance of this question is demonstrated by the fact that as of April 1, 1968, all ***oil***-producing states, except the State of Louisiana, had adopted the Uniform Commercial Code, and if Mr. Barbee's views are correct, the remedy of cancellation of an ***oil*** and gas lease for nonpayment of royalty would then be available in all jurisdictions. Mr. Barbee concludes his article:

If the ***oil*** and gas lease is a contract for the sale of goods to which article 2 of the UCC is applicable and if the lessee's failure to pay royalty amounts to a repudiation of the contract, the lessor will be entitled to cancel if the lessee defaults on any royalty payments. Cancellation puts an end to the contract, and since the "contract" is the total legal obligation resulting from the agreement of the parties, cancellation of the contract would terminate the lease, and the lessee's interest would revert to the lessor.[[46]](#footnote-47)46

Time does not permit me to present a detailed answer to Mr- Barbee's comments. In view of their possible significance, however, particularly in the absence of judicial expression on the subject, I feel that some arguments should nevertheless be presented in support of my opinion that the U.C.C. is not applicable to ***oil*** and gas leases. Mr. Barbee points out that Article 2 of the U.C.C. is applicable to transactions in goods. As he indicates, the term "transactions" is not defined in the U.C.C. There is no argument that an ***oil*** and gas lease is a transaction. He concludes, however, "Therefore, Article 2 is applicable to an ***oil*** and gas lease if ***oil*** and gas in place can be classified as 'goods'." I do not concur with this conclusion. As indicated by its title, Article 2 applies to sales. A complete analysis of the scope of Article 2 reveals that it applies exclusively to contracts relating to the present or future sales of goods and of the rights, powers and privileges, duties, obligations, liabilities, and remedies of the parties to such contract. According to Summers, an ***oil*** and gas lease has been held to be "a deed, a lease, a sale, a license, and an optional contract, and the legal interest created...has been held to be a *profit a prendre*, a corporeal hereditament, an incorporeal hereditament, an estate in land, not an estate in land, an estate in ***oil*** and gas, not an estate in ***oil*** and gas, a servitude, a chattel real, real estate, interest in land, not an interest in land, personal property, a freehold, a tenancy at will, property interest, and the relation of landlord and tenant."[[47]](#footnote-48)47 He further states "this gives some idea of the difficulties faced by the courts in attempting to make the interest created by an ***oil*** and gas lease fit into various classifications of common-law interests in property as applied by statutes and judicial decisions."[[48]](#footnote-49)48 I find no authorities holding an ***oil*** and gas lease to be a contract for the sale of ***oil*** and gas as to be within the purview of Article 2 of the Uniform Commercial Code-

However, even if an ***oil*** and gas lease were considered as a contract for sale, ***oil*** and gas in place, in my opinion, does not fall within the term "goods" as delineated in Article 2 of the U.C.C. The term "goods" is defined in Section 2-105(1) of the Code as follows:

"Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

The words "things which are movable" appear to me to be most significant in the above definition of goods. Such words have been used synonymously with "personal property." ***Oil*** and gas in place not being deemed personal property would, therefore, in my opinion not be included within the definition of goods.[[49]](#footnote-50)49 Reference also may be made to the term "moveables" and other authorities which would further support the proposition that ***oil*** and gas in place should not be considered moveable within the scope of Article 2 of the Code-[[50]](#footnote-51)50 "Goods" is also defined in Section 2-105(1) of the Code as "other identified things attached to realty...." In discussing this portion of the definition of goods, Mr. Barbee concludes that "since ***oil*** and gas in place is part of the realty, then it should follow that it is attached thereto." *Webster* defines the term "attach" to mean "connect, bind, fasten or tie." If ***oil*** and gas in place is considered a part of the realty, I cannot conceive how under any definition it can be considered as attached to the realty. In view of the above, as well as other reasons not detailed in this article, it is my opinion that the Uniform Commerical Code is not applicable to ***oil*** and gas leases and I submit that the remedies provided in the Code have no application to ***oil*** and gas leases.

**DEFENSES OF LESSEE**

A consideration of remedies for failure to pay royalties is not complete without some mention of the defenses available to lessee in any such actions. In actions against an ***oil*** and gas lessee for failure to pay royalties, the usual defenses available to the lessee are: account stated, accord and satisfaction, estoppel, laches, waiver, and the statutes of limitation. All of these constitute affirmative defenses of a lessee.

Where royalty payments are tendered and received over a period of time and the royalty owner realizes that such payments are made with the understanding that they constitute full payment, such acceptance of payment has been held to constitute a stated and settled account.[[51]](#footnote-52)51

Acceptance of royalty checks, when the amount of royalty to be paid is in dispute, may constitute a complete accord and satisfaction, if the sum is tendered in satisfaction of the claim-[[52]](#footnote-53)52 It has also been held that retention of royalty checks and accounting statements without objection over a long period of years gives rise to the defenses of equitable estoppel and laches where the parties had knowledge of the facts or where there was sufficient opportunity for them to know the facts.[[53]](#footnote-54)53

Where a suit is brought for breach of the contractual covenant, the statute of limitations pertaining to written contracts is applicable to royalty payments accruing to the lessor from the lessee-[[54]](#footnote-55)54 Assuming that there is no concealment of information, the statute begins to run at the time the royalty becomes due. Obviously, the theory upon which the recovery is sought determines which limitation statute is applicable. If an action is brought in tort for conversion, the limitation statute applicable to tort actions in the particular jurisdiction would be controlling.

An analysis of the statutes of limitations is beyond the scope of the subject under review; however, in absence of fraudulent concealment, the applicable statute commences to run at the time the contract is breached, or at the time the conversion takes place if the action is brought in tort. Here the relationship of the parties becomes significant, since if no fiduciary relationship exists, the lessee is under no duty to make a full disclosure and the mere failure to disclose a fact does not necessarily constitute fraudulent concealment which would have the effect of tolling the statute of limitations.[[55]](#footnote-56)55 If a fiduciary relationship exists between the lessor and lessee with regard to the payment of royalties, the lessee is not only obligated to refrain from active concealment of the facts giving rise to the action, but is actually required to make a full disclosure of all such facts, and failure to do so will stop the running of the limitation period until such facts become known to the lessor- Therefore, in an action for the recovery of royalties, it would be to the lessor's benefit if he could show such a fiduciary relationship and allege that the proceeds from the sale of his royalty ***oil*** or gas constituted a trust in the hands of the lessee.

In a situation where the lease provisions authorize forfeiture for failure to pay royalties, acceptance of royalties subsequent to accrual of grounds for forfeiture has been held to estop the lessor from asserting forfeiture, even though he may still have an action for damage for breach of the covenant.[[56]](#footnote-57)56

A situation in which a lessor is attempting to cancel or forfeit a lease for failure to pay royalties is distinguishable from a situation in which a lease is terminated automatically by it own terms as a result of a clause of limitation, such as a lease in which the habendum clause provides that the lease term extends so long as ***oil*** and gas are produced in paying quantities and royalties are being paid thereon- Under this type clause, failure to pay royalties will work an automatic termination of the lease, and the defenses available to the lessee to prevent forfeiture are not ordinarily available to revive a dead lease.[[57]](#footnote-58)57 Generally, the courts are more lenient in permitting a lessee to avoid forfeiture after a lessor has accepted royalties subsequent to accrual of the breach on the theory that the election to forfeit was waived; however, upon termination of the lease as a result of a limitation clause therein, acceptance of royalties, in absence of harsh extenuating circumstances, will not operate to revive the dead lease.[[58]](#footnote-59)58 Acceptance of royalties after a lease has terminated may be significant in determining whether or not a lessee is a trespasser, and if so, whether the lessee is a trespasser in good faith, thereby affecting the measure of damages-[[59]](#footnote-60)59

**CONCLUSION**

In situations where royalties have not been paid under an ***oil*** and gas lease and the legal remedies for such nonpayment are being reviewed, the lessor and lessee should consider the following questions:

(1)   What relationship between the parties was created by the lease?

(2)   What is provided expressly in the lease with regard to payment of royalties?

(3)   What other covenants, express or implied, are applicable?

(4)   What remedies are available in the particular jurisdiction?

(5)   Are facts such as to require consideration of laches, waiver, estoppel, or statute of limitations?

(6)   What defenses for nonpayment of the royalties may be available to the lessee?

These are but only a few of the questions which must be considered in analyzing the respective rights of the parties to any controversy arising from nonpayment of royalties under an ***oil*** and gas lease.

Copyright 2024 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, All Rights Reserved

**End of Document**

1. 1Colgan v. Forest ***Oil*** Co., 194 Pa. 234, 45 A. 119 (1899). See other authorities that lessee's duty is contractual and not fiduciary, Carter ***Oil*** Co. v. Crude ***Oil*** Co., 201 F.2d 547, 549 (10th Cir. [Okla.] 1953); Bunger v. Rogers, 188 Okla. 620, 112 P.2d 361, 363 (1941). [↑](#footnote-ref-2)
2. 2Cooper v. Ohio ***Oil*** Co., 25 F. Supp. 304 (1938), *aff'd*, 108 F.2d 535 (10th Cir. 1939). [↑](#footnote-ref-3)
3. 3155 F.2d 185 (5th Cir.), *cert. denied*, 329 U.S. 730 (1946). [↑](#footnote-ref-4)
4. 4407 S.W.2d 254 (Tex. Civ. App. 1966). [↑](#footnote-ref-5)
5. 5Wolfe v. Prairie ***Oil*** & Gas Co., 83 F.2d 434 (10th Cir. 1936); Wolfe v. Shell Petroleum Corp., 83 F.2d 438 (10th Cir.), *cert. denied*, 299 U.S. 553 (1936). [↑](#footnote-ref-6)
6. 6See Brown, "Royalty Clauses in ***Oil*** and Gas Leases," *16th Ann.* ***Oil*** *& Gas Inst*. 139, 177 (Matthew Bender & Co. 1965). [↑](#footnote-ref-7)
7. 7275 P.2d 304, 3 O. & G.R. 68 (Okla. 1954) and second appeal, 325 P.2d 1047, 9 O. & G.R. 534 (1958). [↑](#footnote-ref-8)
8. 8Okla. Laws 162-170, Ch. 52, §§ 1-17, (1945) (repealed 1951). [↑](#footnote-ref-9)
9. 9Corman, "Recent Cases Dealing With Provisions and Obligations Under ***Oil*** and Gas Leases," *17th Ann.* ***Oil*** *& Gas Inst*. 89, 98 (Matthew Bender & Co. 1966). [↑](#footnote-ref-10)
10. 10Gilmore v. Superior ***Oil*** Co., 192 Kan. 388, 388 P.2d 602, 20 O. & G.R. 457 (1964); Schupbach v. Continental ***Oil*** Co., 193 Kan. 401, 394 P.2d 1, 21 O. & G.R. 304 (1964). In both cases, the gas royalty clause read "1/8th of the proceeds of the sale thereof at the mouth of the well." In the *Gilmore* case, the court held that a 3 cents per 1,000 cubic feet charge for processing through a compressor to make the gas marketable was not justified and lessee was required to pay "one-eighth of the *gross* proceeds." In the *Schupbach* case, which presented the same issue, the court followed *Gilmore*. However, Oklahoma does not follow Kansas rule. See *In re* Martin, 321 P.2d 659, 5 O. & G.R. 1324 (Okla. 1956). [↑](#footnote-ref-11)
11. 11See N. 6 *supra*. [↑](#footnote-ref-12)
12. 12329 F.2d 485 (5th Cir. 1964). [↑](#footnote-ref-13)
13. 13*Id*. at 489. [↑](#footnote-ref-14)
14. 14Tex. Sup. Ct. A-1166, 11 Texas Sup. Ct. J. 340 (1968). [↑](#footnote-ref-15)
15. 15See N. 12 *supra*. [↑](#footnote-ref-16)
16. 16Gex v. Texas Co., 337 S.W.2d 820, 828 (Tex. Civ. App. 1960). The court stated: "Additionally, we believe the practice is so common that we may take judicial knowledge of the fact that gas, unlike ***oil***, is usually purchased under long-term or 'life of the lease' contracts." [↑](#footnote-ref-17)
17. 17Siefkin, "Rights of Lessor and Lessee With Respect to Sale of Gas and as to Gas Royalty Provisions," *4th Ann.* ***Oil*** *& Gas Inst*. 181 (Matthew Bender & Co. 1953); Bounds, "Division Orders," *5th Ann.* ***Oil*** *& Gas Inst*. 91, 116-117 (1954); Brown, *The Law of* ***Oil*** *and Gas Leases* § 6.09; Gregg, "Analysis of the Usual ***Oil*** and Gas Lease Provisions," 5 S. Tex. L.J. 1, 14 (1960). [↑](#footnote-ref-18)
18. 18Shamrock ***Oil*** & Gas Corp. v. Coffee, 140 F.2d 409 (5th Cir. 1944); see also Siefkin, N. 17 *supra* at 212, n. 37, where the writer states that even though the *Shamrock* case has been critized, to him the court did not insist on a difference between market "price" and market "value" but rather pointed out the difference between "market" value and price on the one hand and "fair" value on the other. [↑](#footnote-ref-19)
19. 19367 F.2d 84 (5th Cir. 1966). [↑](#footnote-ref-20)
20. 20367 F.2d 104 (5th Cir. 1966). [↑](#footnote-ref-21)
21. 21306 S.W.2d 190 (Tex. Civ. App. 1957), *cert. denied*, 356 U.S. 974 (1958). [↑](#footnote-ref-22)
22. 22Matzen v. Columbian Fuel Corp., Case No. 2395 (Dist. Ct. of Grant Co., Kan.); Stanley v. Columbian Fuel Corp., Case No. 2602 (Dist. Ct. of Grant Co., Kan.); Hennigh v. Western Natural Gas Co., Case No. 2525 (Dist. Ct. of Grant County, Kan.); Hennigh v. Sinclair ***Oil*** & Gas Co., Case No. 2498 (Dist. Ct. of Grant Co., Kan.); and Waechter v. Pan Am. Petroleum Corp., Case No. 4656 (Dist. Ct. of Stephens Co., Kan.). [↑](#footnote-ref-23)
23. 23The concern for the economic impact on consumer costs was expressed by the Staff of the Federal Power Commission in its brief as amicus curiae in J. M. Huber Corp. v. Denman, N. 19 *supra*. [↑](#footnote-ref-24)
24. 24Williams & Meyers, ***Oil*** *and Gas Terms* 398 (2d ed. 1964). [↑](#footnote-ref-25)
25. 2522 F.P.C. 391 (1959). [↑](#footnote-ref-26)
26. 26Howell, "Gas Purchase Contracts," *4th Ann.* ***Oil*** *& Gas Inst*. 151, 180 (Matthew Bender & Co. 1953). [↑](#footnote-ref-27)
27. 27Williams & Meyers, ***Oil*** *and Gas Law* § 656.5; Brown, N. 6 *supra* at 178; Hafeman v. Gem ***Oil*** Co., 163 Neb. 438, 80 N.W.2d 139 (1956); Indian Territory Illuminating ***Oil*** Co. v. Killingsworth, 175 Okla. 78, 51 P.2d 505 (1935); Ladd v. Upham, 58 S.W.2d 1037 (Tex. Civ. App. 1933), *aff'd*, 128 Tex. 14, 95 S.W.2d 365 (1936). [↑](#footnote-ref-28)
28. 28Williams, N. 27 *supra*. [↑](#footnote-ref-29)
29. 29See Broussard v. Hassie Hunt Trust, 231 La. 474, 91 So. 2d 762, 764 (1956), where lease contained following provision: "In case Lessee assigns this lease, in whole or in part, Lessee shall be relieved of all obligations with respect to the assigned portion or portions arising subsequent to the date of assignment, except as to payment of the minimum rental above provided.” Another suggested form of such provision is set out in Huie, Walker & Woodward, *Cases on* ***Oil*** *and Gas Law* 1810 (1966): "In the event of assignment...in whole or in part, liability for breach of any obligation hereunder shall rest exclusively upon the owner of this lease or of a portion thereof who commits such breach...." [↑](#footnote-ref-30)
30. 30See Shearer v. United Carbon Co., 143 W. Va. 482, 103 S.E.2d 883, 9 O. & G.R. 399 (1958). In this case, the transfer instrument was a sublease rather than an assignment and the court indicated that normally the sublessee would not be liable to the original lessor on the covenants of the lease because of lack of privity. It was held, however, that lessor was entitled to recover as a creditor beneficiary on the ground that the sublease contained an express agreement by the defendant to pay the royalty. [↑](#footnote-ref-31)
31. 31Southern ***Oil*** Corp. v. Waggoner, 276 Fed. 487 (5th Cir. 1921), *cert. denied*, 258 U.S. 626 (1922); Shreveport-El Dorado Pipe Line Co. v. Bennett, 172 Ark. 804, 290 S.W. 929 (1927); Livingston ***Oil*** Corp. v. Waggoner, 273 S.W. 903 (Tex. Civ. App. 1925); Williams & Meyers, ***Oil*** *and Gas Law* § 656.6. [↑](#footnote-ref-32)
32. 32Shreveport-El Dorado Pipe Line Co. v. Bennett, N. 31 *supra*. [↑](#footnote-ref-33)
33. 33See Hafeman v. Gem ***Oil*** Co., N. 27 *supra*; Amerada Petroleum Corp. v. Melton, 139 Okla. 119, 121-122, 281 P. 591, 593 (1929); Texas Co. v. Beall, 3 S.W.2d 524, 526-527 (Tex. Civ. App. 1927). [↑](#footnote-ref-34)
34. 34Corrigan v. Shell Petroleum Corp., 62 S.W.2d 663 (Tex. Civ. App. 1933); Livingston ***Oil*** Corp. v. Waggoner, N. 31 *supra*. [↑](#footnote-ref-35)
35. 35Overton Refining Co. v. Harmon, 81 S.W.2d 207, 211 (Tex. Civ. App. 1935), *aff'd*, 130 Tex. 365, 110 S.W.2d 555 (1937); not in accord, however, on question of whether measure of damages is any different for willful conversion than for innocent conversion. McCormick, *Damages* § 48 at 186 (1935). [↑](#footnote-ref-36)
36. 36Champlin Refining Co. v. Aladdin Petroleum Corp., 205 Okla. 524, 527, 238 P.2d 827, 830 (1951); Reynolds v. McMan ***Oil*** & Gas Co., 14 S.W.2d 819, 820 (Tex. Comm'n App. 1929); Corrigan v. Shell Petroleum Corp., 62 S.W.2d 663 (Tex. Civ. App. 1933); Mooers v. Richardson Petroleum Co., 146 Tex. 174, 204 S.W.2d 606 (1947). See also dictum in Arkansas Power & Light Co. v. Decker, 179 Ark. 592, 598-599, 17 S.W.2d 293, 295 (1929). [↑](#footnote-ref-37)
37. 37Wagoner ***Oil*** & Gas Co. v. Marlow, 137 Okla. 116, 278 P. 294 (1929); Morris v. First Nat'l Bank, 249 S.W.2d 269, 1 O. & G.R. 1371 (Tex. Civ. App. 1952); 3 Summers, ***Oil*** *and Gas* § 438. (2d ed. 1938). [↑](#footnote-ref-38)
38. 38Melancon v. Texas Co., 230 La. 593, 89 So. 2d 135, 6 O. & G.R. 623 (1956); Bollinger v. Texas Co., 232 La. 637, 95 So. 2d 132, 7 O. & G.R. 805 (1957). [↑](#footnote-ref-39)
39. 39Mire v. Hawkins, 177 So. 2d 795 (La. App. 1965); Fawvor v. U.S. ***Oil*** of Louisiana, Inc., 162 So. 2d 602 (La. App. 1964); Harris v. J.C. Trahan Drilling Contractor, Inc., 168 So. 2d 881 (La. App. 1964). [↑](#footnote-ref-40)
40. 40166 So. 2d 329 (1964). [↑](#footnote-ref-41)
41. 41Comment, "Cancellation of a Mineral Lease for Nonpayment of Royalty: The Necessity for a Prior Putting in Default," 39 Tul. L. Rev. 524 (1965). [↑](#footnote-ref-42)
42. 42N.D. Laws 1961, S.B. No. 44, approved March 11, 1961. [↑](#footnote-ref-43)
43. 43Walker, "The Nature of the Property Interests Created by an ***Oil*** and Gas Lease in Texas," 10 Texas L. Rev. 291 (1932); Barbee, "The Lessor's Remedies for Nonpayment of Royalty," 45 Texas L. Rev. 132, 166 (1966). [↑](#footnote-ref-44)
44. 44La. Rev. Stat. Ann. § 30:107 (1951). [↑](#footnote-ref-45)
45. 45Barbee, N. 43 *supra*. References are to the Texas Uniform Commerical Code, Ch. 721, §§ 1.101-9.507; Tex. Laws §§ 2345-2552 (1967). [↑](#footnote-ref-46)
46. 46*Id*. at 163-164. [↑](#footnote-ref-47)
47. 47Summers, ***Oil*** *and Gas* § 152 at 370-374 (2d ed. 1938) (footnotes omitted). [↑](#footnote-ref-48)
48. 48*Id*. at 374-375. [↑](#footnote-ref-49)
49. 49In *Black's Law Dictionary* 1301 (4th ed. 1951), "personalty" is defined as "movable property." [↑](#footnote-ref-50)
50. 50"Things are either immovable or movable. Immovables include land and all that is so attached to land as to be legally regarded as a part of it. All other things are movable. Whether a thing is so attached to the land as to be regarded as a part of it is determined by the law of the place where the land is...." *Restatement, Conflict of Laws* § 46, Comment *b* at 76-77 (1934). "The word 'movables' is a convenient term to include all kinds of things, whether tangible or intangible, interests in which constitute personal property and is so used throughout the Restatement of this Subject." *Id*. § 208 at 298 (Special Note). [↑](#footnote-ref-51)
51. 51Kretni Dev. Co. v. Consolidated ***Oil*** Corp., 74 F.2d 497 (10th Cir. 1934), *cert. denied*, 295 U.S. 750 (1935). [↑](#footnote-ref-52)
52. 52Warfield Natural Gas Co. v. Allen, 261 Ky. 840, 88 S.W.2d 989 (1935). [↑](#footnote-ref-53)
53. 53LaFitte Co. v. United Fuel Gas Co., 177 F. Supp. 52, 11 O. & G.R. 977 (1959), 11 O. & G.R. 994, *aff'd*, 284 F.2d 845, 13 O. & G.R. 744 (1960). [↑](#footnote-ref-54)
54. 54Indian Territory Illuminating ***Oil*** Co. v. Killingsworth, N. 27 *supra*. [↑](#footnote-ref-55)
55. 55Phillips Petroleum Co. v. Johnson, N. 3 *supra*. [↑](#footnote-ref-56)
56. 56Masterson v. Amarillo ***Oil*** Co., 253 S.W. 908 (Tex. Civ. App. 1923); ***Kern*** Sunset ***Oil*** Co. v. Good Roads ***Oil*** Co., 215 Cal. 768, 6 P.2d 71, 80 A.L.R. 453 (1931); Axis Petroleum Co. v. Taylor, 42 Cal. App. 2d 389, 108 P.2d 978 (1941). But see William & Myers, ***Oil*** *and Gas Law* § 658.3, wherein Mr. Williams is critical of this view and states in his opinion that it is erroneous. He further states: "By the weight of authority, the mere acceptance of royalties (without more) does not have the effect of depriving the lessor of the benefit of express or implied forfeiture provisions of the lease. Of course where there has been detrimental reliance by the lessee on the conduct of the lessor in accepting royalty payments subsequent to accrual of the right to claim a forfeiture, valid grounds for estoppel may be found." [↑](#footnote-ref-57)
57. 57Hutchinson v. McCue, 101 F.2d 111 (4th Cir.), *cert. denied*, 308 U.S. 564 (1939). [↑](#footnote-ref-58)
58. 58Haby v. Stanolind ***Oil*** & Gas Co., 228 F.2d 298 (5th Cir. 1955); Woodson ***Oil*** Co. v. Pruett, 281 S.W.2d 159 (Tex. Civ. App. 1959); Woodruff v. Brady, 181 Okla. 105, 72 P.2d 709, 113 A.L.R. 391 (1937). See Williams & Meyers, ***Oil*** *and Gas Law* § 658.4 n. 7, citing cases which suggest that acceptance of royalties after termination of the lease by limitation has revived the lease. However, the authors conclude that by the clear weight of authority "revivor is not effected by such acceptance of royalties". *Id*. at n. 8. [↑](#footnote-ref-59)
59. 59Renner v. Huntington-Hawthorne ***Oil*** & Gas Co., 39 Cal. 2d 93, 244 P.2d 895, 10 O. & G.R. 1063 (1952); Woodruff v. Brady, N. 58 *supra*; United States v. Brown, 15 F.2d 565 (1926). [↑](#footnote-ref-60)