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Mineral Rights

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MINERAL RIGHTS

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Introduction

The oil and gas industry in Louisiana, as elsewhere, remains in a depressed state. The number of active drilling rigs dropped from a high of 484 in December, 1981, to a low of around 90 in the summer of 1986. The rig count has increased very modestly to a level of 103 as of August 18, 1986.[1] Reflective of the current conditions is the large number of Oil Well Lien Act cases and other cases relating to bankruptcies and failed businesses being filed in the Louisiana courts. This symposium report will discuss recent legislation concerning the Oil Well Lien Act, as well as other recent developments concerning the exercise of mineral rights in Louisiana.

Legislative Developments

Act 191—Lien Prescription for Filing

A controversy over the proper interpretation of the Louisiana Oil Well Lien Act,[2] discussed below, has been resolved legislatively by Act 191 of 1986. Briefly stated, the Oil Well Lien Act provides for a privilege for services and materials supplied to a leasehold. The Act specifies a 180-day time period for filing notice of the lien in the records of the parish where the property is located. The courts of appeal for the third and fourth circuits split on whether this was a prescriptive period or merely a period that determined the ranking of the privilege. Act 191 of 1986, amending Louisiana Revised Statutes [La. R.S.] 9:4862 and 9:4865, now makes it clear that the privilege is extinguished if the claimant or holder does not preserve it by filing the required notice within 180 days, or if the claimant does not institute an action on the privilege within a year of recordation of the notice. Subsequent to the enactment of Act 191, the Louisiana Supreme Court, as discussed below, ruled that the 180-day period was not a prescriptive period prior to this amendment.

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1. Oil & Gas Journal, Newsletter, p. 3 (August 18, 1986).
2. La. R.S. 9:4861-4867 (1983 & Supp. 1986).

Act 304—Imprescriptibility of Mineral Rights Reserved when Land Transferred to Nonprofit Conservation Organization

Article 149 of the Mineral Code[3] exempts from the operation of the rules of liberative prescription certain mineral rights arising in connection with acquisitions of land by governmental agencies and entities with the power to expropriate land. Its reach has been broadened by article 149.1 to include transfers of land with a reservation of mineral rights to a national nonprofit membership land conservation organization. In amending this article this year, the legislature provided that prescription on the mineral rights will not begin to run if the conservation organization subsequently transfers the land to the federal government.[4] The statute had already provided that prescription will not run if the land is transferred to the state government or to another national nonprofit membership land conservation organization.

Act 673—Severance Tax Exemption

Act 673 of 1986 exempts the first ten thousand barrels of oil produced annually from a well drilled between July 15, 1986 and July 15, 1987 from the severance tax otherwise applicable to oil under La. R.S. 47:648.1. The exemption extends to July 15, 1990. The exemption is lost for any month in which the value of the oil exceeds $21.00 per barrel.

Act 763—Louisiana Economic Acceleration Program (LEAP)

In addition to the one year drilling incentive severance tax exemption of Act 673, the legislature has established the LEAP program under Act 763.[5] It too provides an exemption from severance taxes for certain wildcat and development wells. This Act applies to gas as well as oil wells and provides for the suspension of severance taxes (and state royalties on natural gas) from certified wells until January 1, 1990, or until the posted price of West Texas Intermediate crude oil equals $29.50 per barrel, whichever is first. It further provides for a consumer natural gas incentive tax warrant to qualified Louisiana industries and utilities of $.05 per Mcf of certified LEAP gas consumed in Louisiana in excess of 1985 natural gas consumption levels. Such warrants are to be funded by the state's oil royalties from certified LEAP oil and natural gas wells. Certified LEAP oil and natural gas well severance and royalty revenues collected upon resumption of collection are to be dedicated to economic diversification through credits made to the Louisiana Economic Diversification Fund established by the Act.

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3. La. R.S. 31:149.
4. 1986 La. Acts No. 304.
5. To be codified as La. R.S. 47:648-652, 30:148.1-148.7 (effective July 1, 1986).

Act 1031—Prescription of Actions to Recover for Underpayment or Overpayment of Mineral Royalties

A sub-paragraph (5) has been added to article 3494 of the Louisiana Civil Code to specify that a liberative prescription of three years applies to "[a]n action to recover underpayments or overpayments of royalties from the production of minerals, provided that nothing herein applies to any payments, rent, or royalties derived from state-owned properties."[6]

Act 1047—Consent of Co-owners for Oil and Gas Development

Act 1047, which revises articles 164, 166 and 175, preserves the principle of the Mineral Code that one co-owner may not conduct operations without the consent of the other co-owner(s), but limits this principle so that a small minority cannot frustrate the desires of the majority of owners of rights in land and minerals. Partition remains an alternative in some situations, even though the jurisprudence has reflected that it is often an inadequate remedy, denied in certain circumstances that often arise. The servitude owner or lessee who acquires his rights from a co-owner, for example, cannot compel partition.

It is the intent of these amendments to be read broadly in favor of allowing the majority of owners to develop where they so desire. Thus the 90% approval which is required for there to be the requisite consent is to be calculated such that it includes the interest of the owner seeking to gain the consent of the others. It is intended that "co-owner" mean any owner without the consent of whom development could not be undertaken. A co-owner of land or a mineral servitude who does not consent to development has no liability for the costs of development and operations except out of his share of production.

JURISPRUDENCE

I. CONVEYANCE PROBLEMS; INTERPRETATION OF AGREEMENTS

Gas Purchase Contracts

There is considerable litigation going on around the country over gas purchase contracts. Many of the contracts for the purchase of gas executed in the past several decades have contained "take or pay" clauses. Such clauses require the purchaser to take a specified volume of gas (or percentage of deliverability of the well or percentage of reservoir reserves) over a specified period of time or pay for that volume. Gas purchase

6. 1986 La. Acts No. 1031.

contracts have also in some instances mandated the taking of a specified volume of gas without the option of paying money in lieu of taking the gas; this type of provision may be found in the same contract with a "take or pay" clause and is intended to protect against reservoir damage or drainage by adjacent wells.

Since mid-1982 a number of purchasers have been unable or have refused to fulfill their obligations under these gas purchase contracts. Numerous cases have resulted which have spawned a variety of issues, both substantive and procedural, concerning liability of the purchasers under the contracts. Several such cases have been reported in Louisiana. More decisions and more litigation can be expected in the future. Not only will pending cases reach the decision and appeal stages, but new orders from the Federal Energy Regulatory Commission (FERC) rendered in recent months will bring changes in the natural gas market that will spawn further litigation between producers and purchasers.

The case of *Superior Oil Co. v. Transco Energy Co.* has resulted in several decisions[7] from the United States District Court for the Western District of Louisiana. In the first of these decisions, a preliminary injunction requiring specific performance of gas purchase contracts was denied where the plaintiff was unable to show irreparable injury before trial on the merits. In the second decision, the producer was granted partial summary judgment with respect to the defendant's liability to take gas from two of the fields under contract. The court refused to refer certain claims to the FERC under the doctrine of primary jurisdiction, and stayed certain claims under three of the contracts pending arbitration of the pertinent issues.

The plaintiff oil company, Superior, brought a claim for breach of gas purchase contracts (for gas produced from federal lands on the Outer Continental Shelf) against the defendant pipeline company and sought a preliminary injunction for specific performance of the contracts. Applying Lousiana law to the contracts, the court denied the preliminary injunction because the plaintiff "failed to meet its burden of establishing the likelihood of its suffering irreparable harm in the absence of a preliminary injunction."[8] While defendant's conduct in refusing to perform its obligations under the contracts constituted bad faith in the court's view,[9] this finding did not support the issuance of a preliminary injunction, but was only relevant to the amount of damages available at the trial on the merits.

7. Superior Oil Co. v. Transco Energy Co., 616 F. Supp. 94 (W.D. La. 1986); Superior Oil Co. v. Transco Energy Co., 616 F. Supp. 98 (W.D. La. 1986).

8. 616 F. Supp. at 97-98.

9. Id. at 97.

The second decision[10] grew out of the same lawsuit. The gas producer brought suit against the purchaser for the purchaser's failure to take gas or pay for it under the terms of six gas purchase contracts for gas produced from federal leases on the Outer Continental Shelf and from onshore fields in Louisiana and Texas. The plaintiff also alleged violations of the antitrust laws. The defendant pipeline sought to have issues regarding possible violations of the Natural Gas Policy Act referred to the FERC under the primary jurisdiction doctrine and stayed in this proceeding pending the FERC determination. The defendant also sought to stay litigation concerning three of the contracts pending arbitration of certain issues under arbitration clauses in those contracts.

The court denied the motion to stay claims under the primary jurisdiction doctrine and refer them to the FERC. The court stayed all but the antitrust claims under the two onshore contracts, as well as the "price" provision of one of the offshore contracts, and granted the plaintiff's motion for partial summary judgment on the defendant's liability to take. The primary jurisdiction doctrine was not invoked because "[t]he FERC has taken the position that questions of this nature should not be referred to it."[11] The court found that three of the contracts contained arbitration clauses which applied, and that the facts did not give rise to a waiver of arbitration. In addition, said the court, there is a strong national policy in favor of arbitration, which would supersede any Texas law to the contrary as applied to the Brazos Field contract. Under the Outer Continental Shelf Lands Act,[12] the court noted, Louisiana law would apply to the contracts on the federal leases offshore Louisiana, the Vermilion and West Cameron contracts. Under Louisiana Civil Code articles 1808 through 1812, the take or pay provisions of these two contracts are alternative obligations; thus, regardless of the legality or enforceability of the payment provisions, taking the gas was still available. The court rejected the defendant's reliance on a force majeure clause because it had not properly invoked the clause by giving notice after the occurrence relied on, and denied the defense of commercial impracticability as not having been recognized in Louisiana law. In addition, the court ruled that the defendant had failed to establish an issue of fact as to whether there was error regarding the principal cause of the contract (a certain price for a certain quantity of natural gas).

In another suit on gas purchase contracts, *Exxon Corp. v. Columbia Gas Transmission Corp.*,[13] the western district again declined to apply the primary jurisdiction doctrine to allow the FERC the opportunity to resolve

10. 616 F. Supp. 98 (W.D. La. 1986).
11. Id. at 102 (citation omitted).
12. 43 U.S.C. § 1333 (1982).
13. 624 F. Supp. 610 (W.D. La. 1985).

the issues. In this case, the producer brought suit against a pipeline company for breach of gas purchase contracts. The pipeline company moved to stay the proceeding under the primary jurisdiction doctrine to allow the FERC to resolve the issues. The producer moved for summary judgment on the issue of the defendant's liability under the contracts. The defendant asserted a defense of force majeure and argued that the producer's pricing claims were not in the public interest. The court denied the motion to stay brought under the primary jurisdiction doctrine for the same reasons given in *Superior Oil Co. v. Transco Energy Co.*,[14] namely, that the FERC had chosen not to resolve those issues in such cases. On the issue of force majeure, the court held that a full evidentiary hearing was necessary to resolve the claims. As to pricing issues, the contract was clear that the producer was given complete discretion in the mix of gas categories it could deliver, and there was no basis for declaring the pricing provisions void or rescinding them, so the court granted summary judgment for the producer.

Royalty Valuation

In *Louisiana Land & Exploration Co. v. Texaco*,[15] the lessor brought suit for the failure of the lessee to pay royalties based on the value of the gas produced. The gas was sold under "warranty" contracts rather than "dedication" contracts; that is, the source of the gas sold to defendant's buyers was unspecified. The lessee asserted that it had paid on the basis of the market value of the gas, and that in any event section 105 of the Natural Gas Policy Act[16] (NGPA), applicable to sales of gas in intrastate commerce at the time of the passage of the NGPA, limited the price at which the gas could be sold, thus determining its value as a matter of law under prior Louisiana cases. The lessor claimed that the higher price limit of section 109 of the NGPA applied to the gas, not section 105, because for section 105 to apply the gas had to be "subject to" the contract at the time of the NGPA's effectiveness, not simply "sold under" the contract. The trial court granted partial summary judgment for the plaintiff lessor, declaring that the royalty payments had been improperly made. The Louisiana Fourth Circuit Court of Appeal affirmed and remanded for the determination of damages on the basis that the gas was not "subject to" any contract and was governed by section 109 rather than section 105.[17] The Louisiana Supreme Court reversed and remanded for trial on the merits, finding that the plaintiff lessor's gas

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14. 616 F. Supp. 98 (W.D. La. 1985).
15. 491 So. 2d 363 (La. 1986).
16. 15 U.S.C. § 3315 (1982).
17. Louisiana Land & Exploration Co. v. Texaco, 478 So. 2d 926 (La. App. 4th Cir. 1985).

was being "sold under" existing contracts and was governed by the maximum lawful price in section 105 of the NGPA. Noting that the calculation of the plaintiff's royalties under the contract prices negotiated by the defendant did not result from any unreasonable action by the defendant, the court held that the defendant was entitled to partial summary judgment decreeing that its royalty payments to the plaintiff lessor were controlled by section 105 of the NGPA on gas flowing and sold under the contract as of November 8, 1978.[18] Three justices dissented.

A decision by the United States District Court for the Western District of Louisiana made the same ruling regarding section 105, but held that the value of the gas under the royalty clause could be higher than the section 105 price. In *Amoco Production Co. v. Hodel*,[19] plaintiff Amoco brought an action for declaratory judgment that it had properly paid royalties to its lessor, the Department of the Interior. The gas was being sold to Florida Power and Light under a warranty contract (no particular reserves of gas were dedicated to it) entered into in 1965. The lease was entered into in 1974. The plaintiff contended that the gas was limited in price under section 105 of the NGPA, and that it could not be required under the lease to pay a royalty at a higher value than was allowed as a maximum lawful price for the gas. The court granted summary judgment for defendants, reasoning that, although plaintiff was correct in asserting that section 105 acted to limit the price of gas "sold under" a contract even though it was not "subject to" the contract in the sense of the reserves being dedicated, the value of the gas for purposes of the royalty clause and a valuation determination by the government could still be higher than the maximum lawful price. The lessee here could have sold the gas at a higher price had it elected to do so on the effective date of the NGPA controls.

Description Problems

In *Molero v. Bass*,[20] the executrix of Molero's estate filed suit for overriding royalties claimed under a 1945 contract between Molero and S. W. Richardson. The contract provided for an assignment of royalty in the amount of the difference between the lease royalty and a 3/16ths royalty, and was to apply to all leases obtained by Richardson in Pla-

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18. For two prior Louisiana Supreme Court cases regarding the "market value" issues, see Henry v. Ballard & Cordell, 418 So. 2d 1334 (La. 1982), and Shell Oil Co. v. Williams, Inc. 428 So. 2d 798 (La. 1983). For commentary on the subject under Louisiana law, see Note, What Price Market Value? Henry v. Ballard & Cordell Corp., 28 Loyola L. Rev. 1233 (1982), and Note, Henry v. Ballard & Cordell Corp.: Louisiana Chooses a Point in Time in the Market Value Gas Royalty Controversy, 43 La. L. Rev. 1257 (1983).

19. 627 F. Supp. 1375 (W.D. La. 1986).

20. 486 So. 2d 780 (La. App. 4th Cir. 1986).

quemines and St. Bernard Parishes so long as a certain other lease was in effect. Molero received assignments from 1945 to 1949. In 1950 Molero made demand for overriding royalties on leases acquired by Richardson through assignment from the Humble Oil Company. This suit was filed in 1964 to recover the claimed royalties.

The defendants, successors in interest to Richardson, asserted that the contract applied only to leases obtained from a landowner. As to leases in the Cox Bay area from the State of Louisiana, the royalty was three-sixteenths, but the plaintiff claimed that they could have been obtained for a lower royalty and thus a fraud was worked on Molero. The defendants raised the defense of laches and denied the allegations of fraud, and argued that they did not assume the debts or obligations of Richardson. The trial court interpreted the agreement in favor of the defendants, finding that it did not apply to leases not obtained from landowners, that there was no fraud, and that laches did not apply.

The plaintiff appealed. The court of appeal initially affirmed in part, reversed in part and remanded.[21] The court held that the contract applied to all leases, however obtained, and that ambiguity in the agreement should be interpreted against the draftsman, Richardson. The right acquired by Molero was an incorporeal immovable, and the claim was thus subject only to a thirty year prescription. The court affirmed the finding of no fraud in the Cox Bay leases.

Following that decision, the Louisiana Supreme Court granted the defendants' application for a writ of certiorari.[22] The court ordered the fourth circuit to reconstitute itself as a five-judge panel to reconsider the ownership of the overriding royalties at issue. The reconstituted panel affirmed the trial court's determination that the plaintiff was not entitled to overriding royalties on the Pointe a la Hache-Humble oil leases, but reinstated the original opinion reported in the court's first hearing of the case in all other respects. The court now held that the trial court had correctly determined that the contract for conveyance of overriding royalties did not apply to leases not obtained from landowners. That contract had applied to leases "from the State of Louisiana or other owners." Applying the rule or doctrine of ejusdem generis, the court interpreted the phrase "other owners" to mean other owners like the State of Louisiana which was only a landowner or lessor.[23]

At issue in *Northcott Exploration Co. v. Delcambre*[24] was ownership of a 1/256th royalty interest in a 160 acre tract. This was a concursus

21. Molero v. Bass, 478 So. 2d 929 (La. App. 4th Cir. 1985).

22. Molero v. Bass, 479 So. 2d 915 (La. 1985).

23. Molero v. Bass, 486 So. 2d 780 (La. App. 4th Cir.), cert. denied, 488 So. 2d 1020 (La. 1986).

24. 489 So. 2d 471 (La. App. 3d Cir. 1986).

proceeding brought by an oil company to decide between conflicting claimants to a share of the production from a well the company operated. Howard Delcambre had acquired an undivided 1/16th mineral interest in the tract in 1957 from his parents. In 1958 he inherited from his father a 1/16th interest in the surface and a 1/32nd interest in the minerals. In 1963 Delcambre made a conveyance to his brothers and sisters which is the source of the controversy. The deed described the property as a 1/16th mineral interest in certain described marshlands. Another clause in the deed said that it conveyed all of the vendor's right, title and interest in the property described. The following year Delcambre conveyed a royalty to a third party named Billings that was the basis for the 1/256th royalty asserted by the Billings group. The Delcambre group asserted that Howard Delcambre had conveyed all of his interest in the minerals, including the 1958 1/32nd mineral interest, to his brothers and sisters in 1963 and thus had no interest left to convey in 1964. The trial court held for the Billings group. The Delcambre group appealed, and the court of appeal affirmed, finding that the 1963 deed specifically describing a 1/16th interest conveyed only that 1/16th. The general rule, held the court, is that where a particular and a general description in a deed conflict, the particular will prevail unless the intent of the parties is otherwise manifested on the face of the instrument.

Accounting under a Farmout Agreement

The United States District Court for the Eastern District of Louisiana had to resolve an accounting dispute under a farmout agreement in the case of *Aminoil USA, Inc. v. OKC Corp.*[25] Plaintiff Aminoil entered into a farmout agreement with defendant OKC under which Aminoil farmed out its interest in a federal offshore lease. Aminoil was to receive an overriding royalty until payout and then a net profits interest. A dispute arose as to what production was covered by the agreement and as to whether it was proper accounting to charge to the net profits account actual and imputed interest of OKC and legal costs out of this dispute. The court held for the plaintiff, finding that the agreement did not specifically include interest in the calculation of net profits, and that it is not in accordance with generally accepted principles of accounting in the industry to charge such interest. While the farmout agreement made reference to legal costs, the court found that, under the general usage in the industry, this did not include legal costs of disputes between the parties to the agreement.

25. 629 F. Supp. 647 (E.D. La. 1986).

II. Other Contract and Procedural Problems

Vesting of a Mineral Royalty Bequest

The bequest of a mineral royalty vests in the legatees upon the testator's death, and thus the legatees are entitled to the royalty payments from the date of death, not just from the date of demand for delivery. This was the holding of the court in *Succession of Woods.*[26]

The decedent Woods owned a royalty interest under a mineral lease. In her will she bequeathed a one-half interest in the royalty to each of two legatees. She died on November 1, 1983. On October 17, 1984 the two legatees made formal demand on the executor for delivery of the interests bequeathed to them. They were placed in possession of the interest, effective on that date. They then made claim to royalty payments of over $14,000 paid to the executor in the period from the date of death to the placing in possession. The trial court ruled for the legatees. On the executor's appeal, the fourth circuit affirmed, holding that the bequeathed interest was the royalty and not the proceeds from the royalty. Under Civil Code article 1626, the court noted, the particular legatees were entitled to the thing from the day of the testator's death, and thus they had the right to the royalty payments from the date of death.

Acquisitive Prescription: Successions

The first circuit held in *Humble Oil & Refining Co. v. Streetman*[27] that acquisitive prescription does run against beneficiary heirs to a succession when asserted by unrelated third parties. In that case, the plaintiff, Humble, initiated a concursus proceeding to determine ownership of mineral rights and royalty payments for certain tracts of land. The Group A claimants asserted title by ten-year and thirty-year acquisitive prescription. Group B asserted title through a succession, which was opened and in which they were recognized as heirs, but which was never closed. Against the claims of Group A, they asserted that under the Louisiana Civil Code acquisitive prescription could not run against the beneficiary heirs to the succession. The trial court ruled for the Group A claimants and Group B appealed. In affirming the trial court, the court of appeal held that, although under Civil Code article 3470[28] prescription does not

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26. 480 So. 2d 444 (La. App. 4th Cir. 1985).

27. 484 So. 2d 963 (La. App. 1st Cir.), cert. denied, 489 So. 2d 247 (La. 1986).

28. La. Civ. Code art. 3470:

> Prescription runs during the delay the law grants to a successor for making an inventory and for deliberating. Nevertheless, it does not run against a beneficiary successor with respect to his rights against the succession.
>
> Prescription runs against a vacant succession even if an administrator has not yet been appointed.

run against a beneficiary heir with respect to the rights against the succession, this provision does not apply to third parties; the article only affects the rights one heir must assert against another heir and is not an escape clause from acquisitive prescription.

Limitation of Actions: Personal Actions

In *Plaquemines Parish Commission Council v. Delta Development Co.*,[29] the fourth circuit held that an action to recover overriding mineral rights and for an accounting because of fraud and violation of a fiduciary duty is a personal action which prescribes in ten years. The Plaquemines Parish Commission Council (the Council) brought an action to recover overriding mineral interests affecting its lands. These interests were acquired by the defendant Delta Development Company (Delta) and the heirs and successors of Leander H. Perez, Sr. (Perez) and his wife Agnes O. Perez. The Council alleged that Perez acquired overriding interests in leases granted in 1936 and 1938 by predecessors of the Council to Delta, which was a corporation owned and controlled by Perez. Since Perez was a member of the Council and also an attorney and public official of the parish (district attorney and ex-officio legal counsel for the Council's predecessors), the Council asserted that Perez's actions and concealment of his relationship with Delta constituted fraud, conflict of interest and violation of a fiduciary duty. The defendants filed a peremptory exception of prescription.

The trial court ruled for all of the defendants, holding that the suit was a personal action subject to ten years prescription. On the plaintiff's appeal, the fourth circuit affirmed, agreeing that the suit was barred by liberative prescription. Although noting that a levee district is the "state" for the purpose of determining whether acquisitive prescription of mineral rights can run,[30] the court held that the levee district is not the "state" for the purpose of the constitutional immunity from liberative prescription for personal actions, and thus prescription began to run in 1941 when the Council's predecessors investigated the circumstances surrounding the leases. The court also held that there is no constructive trust established under Louisiana law for the Council arising from a breach of fiduciary obligations.

Prescription of Securities Claims Arising from Investment in Drilling Program; Unjust Enrichment Not Available

In *Wilkins v. Hogan Drilling Co.*[31] the second circuit ruled that the trial court properly sustained exceptions of lack of subject matter juris-

29. 486 So. 2d 129 (La. App. 4th Cir.), cert. granted, 489 So. 2d 909 (La. 1986).
30. See Dynamic Exploration, Inc. v. LeBlanc, 362 So. 2d 734 (La. 1978).
31. 471 So. 2d 863 (La. App. 2d Cir. 1985).

diction, prescription and no cause of action in claims arising from investment in a drilling program, because the state court lacked jurisdiction over claims of Securities Exchange Act of 1934 violations, because any federal and state securities law claims had prescribed, and because a claim of unjust enrichment cannot be maintained where there is a contract between the parties.

In *Wilkins*, the plaintiff brought suit in August of 1982 claiming that the defendant had sold to him unregistered securities in September of 1979 consisting of fractional interests in oil, gas and minerals from wells to be drilled. He sought recovery under federal and state securities acts and under a theory of unjust enrichment. At trial the plaintiff conceded a lack of subject matter jurisdiction with respect to any alleged violations of the Securities Exchange Act of 1934. The trial court sustained exceptions of lack of subject matter jurisdiction, prescription and no cause of action. Plaintiff appealed and the second circuit affirmed, holding that this claim, brought nearly three years after the alleged violations, did not fall within the prescriptive periods of one year and two years of the relevant statutes. The court also held that a claim of unjust enrichment or quantum meruit cannot be maintained where there is a contract between the parties; because the plaintiff's position throughout the proceedings had been that there was a contract, the court denied relief under this theory as well.

III. Lease Maintenance

What Constitutes Additional Drilling or Reworking Operations

The Supreme Court of Louisiana ruled in the case of *Jardell v. Hillin Oil Co.*[32] that where a well ceased production, but the lease operator took timely essential preparatory steps for resolving the difficulties with the well and began part of the reworking operations (tubing tests) within ninety days of the cessation, the lease was maintained under the ninety day "reworking" clause even though production was not restored within the ninety days.

The lessors (and their new lessee) in *Jardell* brought suit for cancellation of the lease for cessation of production, and sought an accounting for production that occurred after the time the lease had allegedly terminated. The defendant working interest owners in the lease and the lease operator claimed the lease had been maintained by commencement of reworking operations within ninety days after cessation of production. The trial court ruled that the defendants' activities within ninety days after cessation of production—the repairing of salt water disposal lines and a jack pump, cleaning up of the lease site, and pressure testing of

32. 485 So. 2d 919 (La. 1986).

the well tubing—did not constitute "reworking" of the well within the meaning of the ninety-day clause of the lease and thus the lease had terminated. The defendants appealed, and the court of appeal affirmed,[33] ruling that the defendants were not reasonable or diligent in conducting their activities, and that these activities did not constitute a "reworking" of the well to restore production, as required by the lease.

The defendants appealed to the Louisiana Supreme Court which reversed the court of appeal, holding that reworking operations encompass essential preparatory steps. Since these steps were taken within ninety days, as was the testing of the well tubing, and since these actions were consistent with those of an ordinarily competent operator in similar circumstances, the court found that the lease had been maintained under the ninety-day "reworking" clause. As the court noted, "an exact definition of reworking operations is difficult to formulate,"[34] and as such, each case must turn on its own facts. Pointing out that the good faith and diligence of the operator in the circumstances will be significant, the court found noteworthy the fact that the well was marginal and that it was necessary to get an AFE for the substantial expenditures from the other working interest owners.

Quitclaim by Sublessor

A case most likely to cause significant problems for the future of oil and gas law if it is accepted as a correct statement of the law is *Brown v. Mayfield.*[35] In this case the third circuit ruled that a lessor's acquisition of a quitclaim from the sublessor who had originally taken the lease had the effect of terminating the lease and the sublessee's interest. The plaintiffs, landowners of two tracts of land, brought suit against the defendant Mayfield to cancel a mineral lease on the land. Mayfield was a sublessee from Gulf who had originally leased the property from a previous landowner, Evangeline Land & Mineral Co., Inc., with Gulf retaining a 50% net profits interest. Mayfield filed an exception of nonjoinder of Gulf and two other working interest owners as indispensable parties. The plaintiffs secured quitclaims or releases from Gulf and the two other working interest owners moved for summary judgment on the basis that the quitclaim by the sublessor terminated the lease. The trial court granted summary judgment for the plaintiffs. The defendant appealed and the court of appeal affirmed, finding that Gulf's intent in the quitclaim was to release not only its retained rights, but also all rights it had in the lease, including the rights held by its sublessee.

33. 476 So. 2d 1118 (La. App. 3d Cir. 1985).
34. 485 So. 2d at 924.
35. 488 So. 2d 322 (La. App. 3d Cir. 1986).

The case is clearly incorrect as a proposition of law. The court cited no oil and gas authority whatsoever for its startling conclusion that a sublessor can cause the termination of a lease without the consent of the sublessee. The court relied on the statement in the quitclaim that neither Gulf nor its successors or assigns claim any right or title to the property. This may be true for successors after the quitclaim but not for those who acquired rights before the quitclaim. The court in effect said that a sublessee holds a derivative right which can be extinguished by the one from whom the right arose.[36] If the court is correct, then every sublease held by a company who acquired from a person who retained an override, net profits interest or other share of production is in jeopardy. Indeed, it was not even clear in *Brown* that the plaintiffs, who were the owners of the land, were successors in interest to the original lessors. In fact, the owner of the sublease was the one who held the principal rights under the lease and was the holder of a real right which could not be extinguished by the unilateral act of one who had some share of the right.

Several articles of the Mineral Code may be examined that support this writer's position. Article 128 provides: "To the extent of the interest acquired, an assignee or sublessee acquires the rights and powers of the lessee and becomes responsible directly to the original lessor for performance of the lessee's obligations."[37] Article 131 provides: "A mineral lessor must accept performance by an assignee or sublessee whether or not the assignment or sublease is filed for registry."[38] Thus, it should not matter whether the sublessor is willing to perform or not, or whether the sublessor wishes the lease to be maintained or not. Only if the sublessee and the sublessor have agreed that the sublessor will control the maintenance of the lease should the sublessor have the power to oust the sublessee. The court in *Brown* did not examine the sublease to establish this, though the court did note that the sublessor retained certain rights in the sublease. It does not appear that this power to terminate the sublease unilaterally was one of those rights.[39]

36. The court cited the case of Ogden v. John Jay Esthetic Salons, Inc., 470 So. 2d 521 (La. App. 1st Cir. 1985), for the proposition that "the rights under a sublease are secondary to the primary lease, and a sublease ceases to exist at the moment the primary lease is dissolved." 488 So. 2d at 324. The court apparently forgot that an oil and gas lease is an incorporeal immovable, a real right and not a personal right, La. R.S. 31:16, :18, :114 (1975), and that legislation has long distinguished the oil and gas lease from other leases.

37. La. R.S. 31:128 (1975).

38. La. R.S. 31:131 (1975).

39. The case of Cameron Meadows Land Co. v. Bullard, 348 So. 2d 193 (La. App. 3d Cir. 1977), does not address the issue in *Brown*. There the court found that the sublessee had been granted implicitly and by the conduct of the parties the power to control all aspects of the lease performance and maintenance. The sublessee had the power to release the lease without consent of the sublessor. Here, as there, the sublessee maintained the active role in the fulfillment of the lease.

The Implied Covenant of Reasonable Development

In *Allen v. Horne*,[40] a lessee was found not in breach of his obligation to develop as a reasonable prudent operator where he had seven producing wells on a 22-acre lease and testimony established that each well would drain five acres. Here, the lessors of the 22 acres of land brought a claim against their lessee seeking lease cancellation for failure of the lessee to develop as a reasonable, prudent operator. They asserted that 14 more wells could be drilled profitably on the acreage, even though there were already seven producing wells. The trial court held that the evidence established that the lessee had not breached his obligations under the lease. The second circuit affirmed the judgment for the defendant. The court pointed out that the question of reasonable development of a lease must be decided under the facts of each case, considering geological data, number and location of wells on the property in question and on adjoining property, productive capacity of producing wells, costs compared with profits, time between last drilling and the demand for additional operations, and the acreage involved in the dispute. Using these criteria, the court found that the defendant's witnesses had established that there had been reasonable development.

Continuous Drilling Clause; Depth Limitation Clause

The United States District Court for the Western District of Louisiana, in *Massie v. Inexco Oil Co.*,[41] held that a continuous drilling clause will not maintain an oil and gas lease at the end of the primary term, when the lease also contains a depth limitation clause which is intended as an absolute cut-off below that depth when there is production at the end of the primary term. In *Massie*, the lessor brought suit for cancellation of a lease as to his interest. The defendant claimed that the lease was held as to all depths by the continuous drilling clause of the lease. The lessor asserted that the continuous drilling clause was limited by a depth limitation clause which operated as an absolute cut-off at the end of the primary term so as to require the lessee to release all depths 100 feet below the deepest productive depth when the lease is being maintained only by production. The court granted judgment for the plaintiff lessor, reading the clause as an absolute cut-off at the end of the primary term without any additional rights under the continuous drilling clause to explore deeper depths when the lease was being held by production at the end of the primary term. Had there been no production by the end of the primary term, the lessee could have relied on the continuous drilling clause to maintain the lease as to all depths. But since production was

40. 478 So. 2d 671 (La. App. 2d Cir. 1985).
41. 614 F. Supp. 880 (W.D. La. 1985).

achieved within the primary term, the lessor intended to cut off the lessee's rights to minerals located below the deepest horizon upon which production had been established.

Negligent Failure to Pay Royalty; Indemnification

In *Bailey v. Franks Petroleum*,[42] the defendant Franks entered into an oil and gas lease with the plaintiffs' predecessors in title. Franks thereafter entered into a contract with defendant Scurlock to purchase condensate from the lease and to pay a royalty to the plaintiffs. Through error, some years passed with no payment of royalty as to plaintiffs' interests. On January 5, 1981, an inquiry on behalf of the plaintiffs was made to Franks concerning the royalty payments. On January 28, 1981, Franks responded that Scurlock was responsible for the payments. On February 4, 1981, an attorney for the plaintiffs sent a formal demand under the Louisiana Mineral Code[43] to Franks for payment. On February 5, Franks responded that the royalty would be paid and the following day a check was sent for the royalty. The plaintiffs filed suit, seeking additional royalties, interest, attorney's fees and cancellation of the lease. Franks made a third party claim against Scurlock for indemnification for any losses suffered from Scurlock's failure to pay the royalties.

The trial court held that the placement of the condensate into non-segregated tanks did not constitute payment, and that prolonged non-payment amounted to gross negligence which in turn amounted to willful nonpayment, which justified doubling the royalties due as damages and awarding attorney's fees. The court further held for Franks on its claim for indemnification for these damages against Scurlock. Franks and Scurlock appealed and the plaintiffs answered the appeal. The first circuit agreed with the trial court that the placing of condensate into nonsegregated tanks did not constitute payment of royalty under the lease, but declined to hold that this conduct constituted willful nonpayment. Thus, the damages were reduced to the amount of royalties due with interest from the date due and attorney's fees. Scurlock was properly held liable under Franks' third party claim for negligently failing to pay the royalties. The court further ruled that the trial court was correct in ruling that the inquiry of January 5, 1981, was not notice of nonpayment as required by the Mineral Code, and that payment was made within 30 days of the proper notice made by the attorney for the plaintiffs.

Obligation of Assignee for Bonus Where Lessee has Signed Note for Bonus but has not Paid the Note

The United States Fifth Circuit Court of Appeals held in *Singer Co. v. Continental Illinois Energy Development Corp.*[44] that the delivery of

42. 479 So. 2d 563 (La. App. 1st Cir. 1985).
43. La. R.S. 31:137 (1975).
44. 786 F.2d 647 (5th Cir. 1986).

a promissory note by a lessee to his lessor satisfied the obligation of the lessee to pay a lease bonus rental so that the lessor could not demand payment of the bonus rental by the lessee's assignee after the lessee defaulted on the note. In this case, the plaintiff Singer granted five mineral leases to Tomlinson for a lease bonus of $40 per acre. By amendment to the agreement, the money was to be paid in installments with one-half of each installment to be paid in cash and the other half by delivery of a promissory note. The money installments were paid, but Tomlinson, after assigning the leases to defendant Continental Illinois Energy Development Corporation, defaulted on the notes and filed bankruptcy. The plaintiff sought recovery of the bonus money from the assignee, relying on article 128 of the Louisiana Mineral Code[45] which makes the assignee liable for the lease obligations of the lessee. The defendant asserted that the obligation had been extinguished by the delivery of the promissory note and that it, as assignee, was not liable. The district court held for the defendant and the plaintiff appealed. In affirming the district court, the fifth circuit ruled that the agreement was a conjunctive obligation with obligations to make installment payments and to deliver a promissory note. Finding that the obligation was fully performed and thus was extinguished, the court held that the assignee could assert the defense of extinguishment in response to the assignee's obligation under the Mineral Code to perform the lessee's obligations.

IV. The Oil Well Lien Act

A split among the circuit courts of appeal on an important provision of the Louisiana Oil Well Lien Act (the Act) has just been resolved by the Louisiana Supreme Court as of the writing of this article. The split concerned whether the failure to file of record notice of the lien within the 180-day period specified in the Act[46] resulted in the loss of the privilege or merely the loss of ranking of the privilege. That is, has the 180-day period been a prescriptive period? The supreme court has ruled that it has not been a prescriptive period, so that a lien could be asserted by parties who gave notice up to a year after the furnishing of services or supplies.[47] Nonetheless, the 180 days is now a prescriptive period by virtue of Act 191 of 1986 of the legislature. The nature of the controversy can be seen by summary of the circuit court decisions.

In *I. E. Miller of Eunice, Inc. v. Source Petroleum, Inc.*,[48] plaintiff Miller brought suit against defendant Source Petroleum to seek recognition of an oil well lien the plaintiff asserted for services provided a certain well. The notice of lien was filed eight months after the services that

45. La. R.S. 31:128 (1975).
46. La. R.S. 9:4862 (Supp. 1986).
47. Louisiana Materials Co. v. Atlantic Richfield Co., 493 So. 2d 1141 (La. 1986).
48. 484 So. 2d 239 (La. App. 3d Cir. 1986).

gave rise to the lien were rendered. The defendant filed an exception based on an assertion that the lien had not been filed within the time prescribed by statute, 90 days at the time the lien arose.[49] The trial court overruled the exception, deciding that the time period in question was to establish the priority of the lien and not its existence, and recognized the lien. The defendant appealed and also filed a peremptory exception of prescription, claiming that liberative prescription had run because of the failure to file within the statutory time period. The third circuit affirmed, holding that the recordation requirement of La. R.S. 9:4861 only affects the ranking of the privilege, not its existence. Failure to record forfeits the priority of the lien only; if the privilege is filed later, it is to be given full effect from the date of recordation, losing only its superior rank, said the court.

The third circuit reiterated its position in *Genina Marine Services, Inc. v. Mark Producing Co.*[50] This case involved the filing of a lien for furnishing towing and other services in connection with drilling and production of offshore wells. The court held that the Louisiana Oil Well Lien Act is applicable to wells located on the Outer Continental Shelf off the Louisiana coast and rejected a claim that the lien was extinguished by failure to file notice of it within 90 days of performance of the services. But, ruled the court, the failure of the plaintiff to file within one year caused the lien to prescribe.

This decision conflicted with a recent decision of another Louisiana circuit. In *C-Craft Marine Services, Inc. v. Llog Exploration Co.*,[51] the fourth circuit held that the statutory period for filing of record a claim or privilege under the Louisiana Oil Well Lien Act is a prescriptive period after which the privilege is lost, not a period for filing simply to make the privilege superior to all other privileges or mortgages. That court interpreted *Western Wireline Services, Inc. v. Pecos Western Corp.*[52] as "overruling" the holdings of the federal court decisions in *Continental Casualty Co. v. Associated Pipe & Supply Co.*[53] and *Beacon Gasoline Co. v. Sun Oil Co.*[54] The Louisiana Supreme Court refused to review *C-Craft.*

The fourth circuit then reaffirmed its *C-Craft* position in *Louisiana Materials Co. v. Atlantic Richfield Co.*[55] There the plaintiff supplied clam shells to Luke Construction, the general contractor for the defendant

49. La. R.S. 9:4862 was amended by 1983 La. Acts No. 374 to change the filing period from 90 to 180 days.
50. 490 So. 2d 1158 (La. App. 3d Cir. 1986).
51. 470 So. 2d 241 (La. App. 4th Cir.), cert. denied, 472 So. 2d 921 (La. 1985).
52. 377 So. 2d 892 (La. App. 4th Cir. 1979).
53. 447 F.2d 1041 (5th Cir. 1971).
54. 455 F. Supp. 506 (W.D. La. 1978).
55. 486 So. 2d 776 (La. App. 4th Cir. 1986).

Atlantic Richfield Company (ARCO). The shells were used to provide support for a pipeline running from an onshore petroleum plant to an oil well on the Outer Continental Shelf. Luke declared bankruptcy before the plaintiff was paid, and the plaintiff filed a lien affidavit against ARCO under the Louisiana Oil Well Lien Act. The defendant filed exceptions of no cause of action based on assertions that the Act did not apply to the Outer Continental Shelf (federal lands) and that it did not apply to portions of the pipeline that lay outside the leased property. The defendant also filed an exception of prescription, alleging that the lien affidavit had not been filed timely. The trial court granted the exception of no cause of action, ruling that the Act does not apply to property located on the Outer Continental Shelf.

On the plaintiff's appeal, the fourth circuit reversed, noting that Louisiana law applies to the Outer Continental Shelf unless it is inconsistent with federal law, and finding no inconsistency here. The court also found no prohibition against filing a lien on property located outside of the leased premises. Nevertheless, reaffirming its position in *C-Craft*, the court held that a lien affidavit executed under the Act must be filed within 90 days. Since this was not done, the court held that the lien had prescribed.

On appeal to the Louisiana Supreme Court, *I. E. Miller* and *Louisiana Materials* were consolidated for argument. The supreme court adopted the reasoning of the *I. E. Miller* decision, holding:

> In order to be effective the lien need not be recorded within the one hundred eighty days specified in R.S. 9:4862 (or ninety days if prior to the 1983 amendment to R.S. 9:4862). When prescription runs on an unrecorded lien or a lien filed later than one hundred eighty days after service or supply of materials, is a matter we need not resolve in this opinion . . . .[56]

The United States District Court for the Middle District of Louisiana has recently decided a case involving the Oil Well Lien Act, *Ogden Oil Co. v. Servco, Inc.*[57] The court held that a workover rig, under contract to a lessee, placed on a lease some time after a supplier furnished materials and services to the lessee, was subject to the supplier's lien under the Act and that the lien could be enforced though it was filed more than ninety days after the last performance of labor or services.

In *Ogden Oil Co. v. Servco*, the plaintiff, Ogden, moved a workover rig onto a lease held by Workover One Alliance Group in March, 1983. The defendant, Servco, had provided materials and services to the lessee at some time before this, and on April 7, 1983, more than 90 days after

56. Louisiana Materials Co. v. Atlantic Richfield Co., 493 So. 2d 1141 (La. 1986).
57. 611 F. Supp. 572 (M.D. La. 1985).

the last performance of services by Servco, Servco filed a lien affidavit. On May 16, after Ogden had already removed the rig from the site, Servco seized the rig for nonpayment of debts owned by the lessee. Ogden brought this action for wrongful seizure of the rig by Servco, arguing that the Oil Well Lien statute, La. R.S. 9:4861.2, applied only to a rig located on the lease at the time the lienholder was furnishing materials or services. The defendant moved for summary judgment that the seizure was authorized by the statute, and the court granted it, holding that the application of the statute is not restricted to machinery and equipment located on the lease at the time materials or services were furnished. The court also held that the privilege authorized by the statute becomes effective and attaches without recordation as to movable property, thus the 90-day time period for the filing of notice concerned only the ranking and not the existence of the privilege.

The Oil Well Lien Act also survived a challenge to its consitutionality and was held to apply to property placed on a lease after the services for which the lien is asserted were performed in *Ogden Oil Co. v. Venture Oil Corp.*[58] In that case, Ogden performed workover services for Venture on a certain well in May and June of 1983. When Venture refused to pay Ogden certain sums for these services, Ogden filed, on September 26, 1983, a statement of claim and privilege in the mortgage records of the parish where the well was located. Ogden then brought suit against Venture for the amount and filed a writ of sequestration on all property located on the leased premises. Callon Energy's workover rig, which had been placed on the well site on August 1, 1983, was sequestered under the writ, and Callon intervened in the litigation. Callon contended that the Act permitted an unconstitutional taking of property as its property was being taken to satisfy the debt of Venture when Callon had no debtor/creditor relationship with Ogden, that it denied Callon equal protection because third party contractors in no other industry are subject to the risk that their property will be seized and sold to satisfy the debt owned by a fellow contractor, and that the Act was intended to attach a lien to property used in connection with operations taking place contemporaneously with the services forming the basis of the lien. The trial court ruled for the plaintiff and ordered seizure and sale of Callon's workover rig and equipment to satisfy Odgen's judgment against Venture. Callon appealed and the court of appeal affirmed, holding that the Act was not a taking, as it protects all laborers and suppliers, and that it does not deny equal protection under the "rational basis" test. The court further agreed with the trial court that the legislature did not intend to restrict the application of the privilege solely to machinery and equipment located on the lease at the time supplies and material are furnished.

58. 490 So. 2d 725 (La. App. 3d Cir.), cert. denied, 494 So. 2d 328 (La. 1986).

In another challenge to the constitutionality of the Act, in *Lor, Inc. v. Martin Exploration Co.*,[59] the court held that the Act applies to portions of leases included in conservation units with wells on other property and is not unconstitutional. In five consolidated suits, plaintiffs, who were furnishers of labor, services and supplies on a dry hole oil well, sought recognition and enforcement of privileges under the Act. Although the well was not a producer, portions of the lease on which the well was located were included in units from which there was production. The plaintiffs sought sequestration of the lease, all production from the lease, and proceeds from the sale of the lease production. The writ was granted, but then dissolved after a hearing insofar as it pertained to two conservation units which covered parts of the leased premises, and the plaintiffs appealed. The first circuit reversed,[60] holding that the Act applies to the entire lease for which the services or supplies are furnished, and the fact that portions of the lease are included in conservation units does not divide the lease insofar as the Act is concerned. The court further held that application of the Act is not unconstitutional; it involves no fundamental federal right and affects no suspect class.

V. Interruption of Prescription

Interruption of Liberative Prescription—"Single Operation"

The Mineral Code requires that to interrupt the ten-year liberative prescription one must commence efforts to obtain production in paying quantities in good faith from the servitude tract or land unitized with the servitude tract.[61] Good faith is specified by the Code to require that the operations be "conducted in such a manner that they constitute a single operation although actual drilling . . . is not conducted at all times."[62] In *Malone v. Celt Oil, Inc.*,[63] the second circuit held that the drilling of a well through a unitized sand at a location not on the mineral servitude tract within the ten year prescriptive period was not sufficient to interrupt liberative prescription, where no effort was made to evaluate the unitized sand or produce from it until after the prescriptive period had run. In so holding, the court found that the actions to obtain production from the unitized sand subsequent to the running of prescription were not part of a single operation commenced within the ten-year

59. 489 So. 2d 1326 (La. App. 1st Cir.), cert. denied, 493 So. 2d 1217 (La. 1986).

60. The court here adopted the holding and reasoning of the federal district court in JHJ Ltd. I v. Chevron U.S.A., Inc., 617 F. Supp. 729 (M.D. La. 1985).

61. La. R.S. 31:29 (1975).

62. La. R.S. 31:29(3) (1975).

63. 485 So. 2d 145 (La. App. 2d Cir.), cert. denied, 488 So. 2d 692 (La. 1986).

period in a good faith effort to obtain production from the servitude tract or from land unitized with it.

The plaintiffs in *Malone* sold certain property to Malone reserving an undivided one-half interest in the minerals in October, 1970. Malone sold all his interest (surface and mineral) to defendant Hudson, who leased to defendant Celt, who in turn made certain assignments of interest in the lease. The tract burdened by the plaintiffs' servitude was included in a unit for the Haynesville sand, and in September, 1980, a well was commenced on property included in the same Haynesville unit, but not on the property in question. The well was being drilled with the Smackover sand as its objective, a sand below the Haynesville. Production was had from the Smackover for a short time, but the well was plugged back to the Haynesville in March and April, 1981, and on April 24, 1981, production from the Haynesville sand was commenced. The plaintiffs sought to share in the Haynesville unit production and filed suit for recognition of their servitude and right to share. The defendants asserted that the servitude had prescribed. The trial court ruled for the defendants and the plaintiffs appealed. The court of appeal affirmed, noting that although the well was drilled through the Haynesville sand and logging tests were run on the well within the 10-year prescriptive period, the objective of the well was the Smackover formation. Thus, the subsequent efforts which successfully obtained production from the Haynesville unitized sand were operations separate from the drilling to the Smackover. Under the Mineral Code, said the court, the liberative prescription of ten years is only interrupted by operations commenced within the ten years which are conducted in such a manner that they constitute a single operation to obtain production from the servitude tract or land unitized with the servitude tract. The operations subsequent to the cessation of production from the Smackover sand did not meet this test.

The court in *Malone* gives an able discussion of the relevant cases, *Matlock Oil Corp. v. Gerard*[64] and *Bass Enterprises Production Co. v. Kiene*.[65] Here the well which was commenced within the ten-year period was seeking to obtain production from the Smackover sand and not from the sand which was unitized with the servitude tract. The court ruled that mere logging will not be sufficient to make the off-servitude tract well an effort to obtain production commenced within the ten-year period. To rule otherwise could result in a servitude being extended by a well without production attributable to the servitude tract for many years.

64. 263 So. 2d 413 (La. App. 2d Cir.), cert. denied, 262 La. 969, 265 So. 2d 241 (1972).

65. 437 So. 2d 940 (La. App. 2d Cir. 1983).

This would defeat the principles implicit in liberative prescription.

Acknowledgment as an Interruption of Prescription

The case of *Kalmn, Inc. v. Walker Louisiana Properties*[66] decided an issue of whether an acknowledgment of a servitude had taken place which had the effect of interrupting prescription. The court held that acts of the landowner in executing a sale, in signing a lease and in signing an acknowledgment were sufficient under pre-Mineral Code law to interrupt prescription of a mineral servitude.

In *Kalmn*, a landowner brought suit to cancel a one-half mineral interest on a tract of land, alleging that the servitude had expired under the liberative prescription of ten years. The defendants alleged that prescription had been interrupted by certain acts of the landowner and by production. In 1924, Calcasieu National Bank sold the land to Estes with a reservation of a 1/16th mineral interest. In 1930, Estes, in a "sale" instrument, recognized, clarified and amended the 1924 reservation to provide for a one-half mineral interest rather than a 1/16th. In 1935, Estes joined with the Calcasieu Bank in executing a mineral lease. In December, 1942, two pertinent transactions occurred: the former Mrs. Estes quitclaimed and renounced her interest in the property, and Estes executed an "acknowledgment" of the servitude. There were operations on and production from the property since December, 1942, that were stipulated to be sufficient to interrupt prescription.

The trial court held that the acts of Estes in 1930, 1935 and 1942, had the effect of interrupting prescription. The plaintiff appealed and the court of appeal affirmed, finding that the 1930 instrument was not merely a correction instrument, but instead a present sale or at least an acknowledgment of the servitude and interruption of prescription. At the time of the 1935 joining in the signing of the lease by Estes, the law provided that by joining in the lease the signing party recognized all of the rights of his co-lessors which had the effect of an acknowledgment interrupting the then-accruing prescription, thus the 1942 act clearly had the effect of acknowledging and interrupting prescription.

If the *Kalmn* case were being decided under the Mineral Code today, the result would probably be different. Under the regime of liberative prescription, an interruption must be effected within ten years of the creation of the right or the last action which had the effect of an interruption. Here the only act between 1930 and 1942 was the joint signing of the lease by the landowner Estes. This act would probably not meet the requirements of an acknowledgment imposed by articles 54 and 55 of the Mineral Code.[67]

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66. 488 So. 2d 340 (La. App. 3d Cir. 1986).

67. La. R.S. 31:54-55 (1975). The Comments to article 56 of the Mineral Code discuss the "joint lease" cases and how the Mineral Code has dealt with that line of cases.

Interruption of Prescription by Operations of a Third Party

The second circuit held in *Producers Oil & Gas Co. v. Nix*[68] that drilling operations by a lessee of a landowner will not interrupt prescription on a servitude unless the drilling party is acting on behalf of the servitude owner or the servitude owner adopts the operations in the manner prescribed by the Mineral Code. In that case, the plaintiff brought an action in 1984 against the landowner and lessees of the landowner to be recognized as the owner of a servitude for 1/16th of the minerals on a tract of land. The interest had been created in 1941 and kept in effect until 1972 when the well then producing ceased to produce. A landowner leased the property in 1979, and a lessee reworked wells on the land and restored production. The defendants asserted that the plaintiff's interest had prescribed under the liberative prescription of ten years, there having been no activity on the land on behalf of the plaintiff in the period between 1972 and 1982. The plaintiff asserted that the drilling operations and production by the defendant lessees served to interrupt prescription in its favor. The trial court ruled that the actions of the lessees had not interrupted prescription as to the plaintiff's interest. The plaintiff appealed, and the court of appeal affirmed, holding that the actions of a lessee of a landowner do not inure to the benefit of a servitude owner where there is no relationship between the lessee and the servitude owner. The court noted that the jurisprudence was to the contrary before 1975, but held that Mineral Code articles 42 through 53[69] changed the law; a servitude owner who wishes to obtain the benefits of the drilling activities of a party who is a stranger to him must now follow the procedures for an adoption specified in those articles.

The case is a reflection of the fact the the Mineral Code has legislatively overruled the case of *Nelson v. Young*.[70] The court in *Producer's Oil & Gas Co.* observed that the Mineral Code does not impair a vested right because the expectation that laws about liberative prescription will not change is not a vested right.

Liberative Prescription for Royalty Interests Partially in a Unit

A question of impairment of vested rights involving liberative prescription was also raised in *Adobe Oil & Gas Corp. v. MacDonell*.[71] Here the court ruled that Mineral Code article 89,[72] which provides that ten-year liberative prescription is not interrupted by production from a unit

68. 488 So. 2d 1099 (La. App. 2d Cir. 1986).
69. La. R.S. 31:42-53 (1975).
70. 255 La. 1043, 234 So. 2d 54 (1970).
71. 480 So. 2d 961 (La. App. 3d Cir. 1985).
72. La. R.S. 31:89 (1975).

well when the well is not located on the royalty tract, is applicable to royalty rights created prior to the 1975 effective date of the Mineral Code.

In *Adobe* the plaintiff oil company instituted a concursus proceeding to determine ownership of rights to production attributable to certain acreage included in a unit created in 1980. One group of claimants were successors in interest to royalty deeds dated 1954 and 1955, and another group were owners of the land. The lands covered by the royalty deeds had been partially included in a unit in 1956, the unit well for which was not on the lands burdened by the royalties. The landowner group asserted that the royalty interests had prescribed on the acreage outside the unit established in 1956 under ten-year liberative prescription. The royalty deed group asserted that prescription had not accrued. The trial court held for the royalty interest owners. On appeal the third circuit affirmed in part and reversed in part. Article 89 of the Mineral Code[73] provides that production from a unit interrupts prescription only as to that portion of the tract included in the unit if the unit well is on land other than that burdened by the royalty. The court held that this provision is applicable to rights arising prior to the effective date of the Mineral Code unless it would impair vested rights. The state of the pre-code jurisprudence was conflicting, said the court, and thus the royalty owners had no vested rights which would prohibit the retroactive application of article 89.

VI. Tort Cases Involving Oil and Gas

Liability of a Mineral Lessee for Crop Damages

Two cases have been decided that involved the liability of a mineral lessee for damages to a farming lessee whose farm lease from the same landowner was unrecorded. The standard applied is that, while there are no damages owed by the mineral lessee under the mineral lease's contractual provision for damages where the provision does not constitute a stipulation pour autrui, the lessee may owe damages to the farming lessee for the fair market value of damages to his crops to the extent that the mineral lessee's exercise of its rights were unreasonable.

The first of these cases, both of which involved the same lease language, was *Broussard v. Northcott Exploration Co.*[74] In that case a farming lessee under an unrecorded surface lease sought damages from a mineral lessee whose lease was recorded for damages to his crops. The mineral lease provided that "the Lessee shall be responsible for all surface

73. Id.
74. 481 So. 2d 125 (La. 1986).

damages *of the Lessor* caused by the Lessee's operations."[75] The trial court held that this clause was a stipulation pour autrui allowing the farming lessee to recover from the mineral lessee. Reversing the trial court, the third circuit ruled that the quoted provision only applied to the lessor's damages.[76] The court also ruled that the plaintiff could not recover in tort. The plaintiff farming lessee appealed and the supreme court remanded, finding that the court of appeal was correct in ruling that the clause in question did not create a stipulation pour autrui, but ruling that the oil and gas lessee could be held liable under Civil Code article 2315 if it were determined that the lessee had exercised its lease rights unreasonably. The court noted further that although the oil and gas lessee could not be a tortfeasor merely because he exercised his rights under the mineral lease (because of the operation of the Public Records Doctrine), he was entitled to destroy only so much of the farming lessee's crop as was required to allow him to reasonably exercise his contractual right. The court also ruled that damages for future years' losses could not be recovered because the farming lessee had only a year-to-year lease that was subject to cancellation at any time.

It may be noted that the court observed that while the farming lessee could not recover from the mineral lessee, "he may against his landlord under LSA-R.S. 9:3203."[77] Would the mineral lessee then be liable to the lessor under the clause quoted from the lease in the case?

The second case holding that a farmer under an unrecorded verbal lease may seek damages from an oil and gas lessee for the lessee's negligent conduct, but not under the oil and gas lease clause for damages to the lessor when the clause does not amount to a stipulation pour autrui, was *Gaspard v. Whitson*.[78] The court of appeal found this case identical to *Broussard v. Northcott Exploration Co.* and remanded the case to the trial court for a determination of which of the damages found by the trial court (which had initially ruled that the contract provision was a stipulation pour autrui), if any, resulted from the unreasonable exercise of contractual rights.[79]

75. Id. at 127 (emphasis by the court).

76. Broussard v. Northcott Exploration Co., 469 So. 2d 392 (La. App. 3d Cir. 1985).

77. Id. at 129.

78. 487 So. 2d 1249 (La. App. 3d Cir. 1986).

79. For language which was held to be a stipulation pour autrui, see Andrepont v. Acadia Drilling Co., 255 La. 347, 231 So. 2d 347 (1969), and Hargroder v. Columbia Gulf Transmission Co., 290 So. 2d 874 (La. 1974). For a procedural stage of another case involving an assertion of a third party beneficiary claim, where the claimant was a royalty owner asserting rights under a gas purchase contract between a lessee and a gas pipeline, see Amoco Prod. Co. v. Columbia Gas Transmission Corp., 490 So. 2d 1135 (La. App. 4th Cir. 1986).

Seismic Operations

In *Ard v. Samedan Oil Corp.*,[80] Mr. and Mrs. Ard brought a suit for trespass against a seismic company and the oil company for which it was doing seismic work. They sought damages for property damage, mental anguish, humiliation and embarrassment. The evidence showed that a trespass had occurred, that there was damage to a fence, and that the plaintiffs' cattle had escaped plaintiffs' property and had gone to neighboring property causing neighboring landowners to complain. Nevertheless, no evidence was presented at trial as to the defendant oil company's involvement. The trial court awarded the plaintiffs a total of $30,000 in general damages, including $250 in property damages, against the seismic company and the oil company. The defendants appealed and the court of appeal reversed the judgment against the oil company on the basis that the plaintiffs offered no evidence or testimony to support allegations against the oil company, and reduced the general damages against the seismic company to $5,000, ruling that the trial court abused its discretion in awarding $30,000 in general damages based on the limited evidence of damage.[81]

The plaintiffs appealed the court of appeal's reduction of the award, and the supreme court amended and affirmed, agreeing that the trial court did abuse its discretion in awarding $29,750 in general damages. Lowering the award to the highest point which was reasonably within the discretion afforded the trier of fact, the court held that awards of $10,000 and $7,500 to Mr. and Mrs. Ard would compensate them for their general damages.

Seismic blasting operations were the source of damages in *Dykes v. Peabody Shoreline Geophysical & Transporation Insurance Co.*[82] Despite expert testimony that explosion could not possibly cause the damages at issue, the court held that the evidence established that seismic blasting caused the damages complained of, though there was insufficient proof as to the extent of a portion of the award for mental anguish of one party.

In *Dykes*, the plaintiffs in three consolidated suits brought claims for property damages and general damages for inconvenience, mental anguish and invasion of privacy against the defendant Peabody Shoreline Geophysical arising from the defendant's seismic blasting operations. Five charges that were supposed to detonate at 30-second intervals went off at once. The plaintiffs testified that the property damage manifested itself subsequent to the blast. The defendant offered expert testimony that it was a total impossibility for the blast to have caused the damage com-

80. 483 So. 2d 925 (La. 1986).

81. Ard v. Samedan Oil Corp., 475 So. 2d 384 (La. App. 1st Cir. 1985).

82. 482 So. 2d 662 (La. App. 1st Cir. 1985).

plained of. The trial court ruled for the plaintiffs and the defendant appealed. The court of appeal affirmed, holding that the plaintiffs adequately carried their burden of proving a causal connection between the explosion and the damages, and noted that the defense of impossibility has been used with little success in blasting cases. The court held that there was adequate proof as to the quantum of damages by the plaintiffs, except as to a $20,000 award to one plaintiff whose property damage was only $1,227.95; this award was reduced to $2,500 for mental anguish, inconvenience and trespass, plus the $1,227.95.

Lessor's Interference with Well Equipment

The case of *Auster Oil & Gas, Inc. v. Stream*[83] arose from actions of a lessor who, suspecting a mineral lessee of stealing oil from the lease, had private investigators, with state police observing, insert microchips in the lease well equipment to try to trace oil movement. In a claim under 42 U.S.C. § 1983, the fifth circuit ruled that it was improper for the district court to dismiss for failure to state a claim, where the court's basis was that a lessor had a right to take such actions under the lease or the Louisiana Mineral Code.

The plaintiff oil and gas lessee, Auster, brought a claim for violation of civil rights under color of state law[84] against its lessor, a related entity, and a state trooper. The lessor had suspected the plaintiff of oil theft and hired a private investigator to insert microchips into the well equipment surreptitiously which would enter into the oil and then could be traced. State police officers observed the entry onto the well site and equipment for the insertion of the microchips. The insertion was unsuccessful, and there was damage to the well equipment and blockage of a pipeline which delayed Auster's transportation and sale of the oil. The district court granted a motion to dismiss the claim against the lessor and related entity on the grounds that Auster had not alleged facts sufficient to establish the "state action" required by section 1983, that state remedies would adequately compensate the plaintiff for any property damage suffered, and that the lease authorized the lessor to investigate the plaintiff's activities. The court later denied a motion to amend to cure any defects in the original pleading.

The plaintiff appealed. The fifth circuit reversed and remanded, holding that the original complaint alleged facts that would support a finding that the dismissed parties acted under color of state law, that the complaint sufficiently alleged an unreasonable search and seizure, and that a provision of the lease allowing the lessor or her representatives access to the

83. 764 F.2d 381 (5th Cir. 1985).
84. 42 U.S.C. § 1983 (1982).

premises for observing all operations did not entitle defendants to intrude surreptitiously upon the well site and interfere with the lessee's operations. The court also noted that article 177 of the Mineral Code,[85] which allows a co-owner of a lease to prevent waste, likewise does not authorize surreptitious interference with the operations; rather it allows a co-owner of a lease to conduct its own operations. It was also error, said the court, not to allow the plaintiff to amend.

VII. Conservation Cases; Pooling and Unitization

The Louisiana Supreme Court ruled in *Nunez v. Wainoco Oil & Gas Co.*[86] that where a unit opertor has drilled the unit well in accordance with the orders and regulations of the Commissioner of Conservation at the optimum location in the unit, such a well will preclude a suit by the landowner in trespass even though the well bore may enter the landowner's property at a subsurface location.

In July, 1980, the Commissioner of Conservation established a drilling and production unit which included land owned by the plaintiff Nunez. The defendant Wainoco had a lease on property adjacent to plaintiff's which was also included in the unit. The defendant commenced a well on its lease in September, 1980. A directional survey run a few weeks later revealed that the well had penetrated the plaintiff's property at a subsurface location. The well was completed as the unit well in December, 1980, and its location and unit boundaries were confirmed in June, 1982. The plaintiff brought suit in the parish where the land was located against defendant Wainoco, claiming a trespass and seeking removal of the well and damages. The trial court ruled that the unit was a collateral attack on an order of the Commissioner of Conservation and dismissed it. The plaintiff thereupon filed suit against the Commissioner, Wainoco and other defendants in the 19th judicial district where the office of the Commissioner is located. The plaintiff moved for summary judgment on the issue of his right to an injunction. The trial court granted summary judgment in favor of the Commissioner of Conservation, dismissing him as a defendant, and granted partial summary judgment in favor of the other defendants, affirming the Commissioner's refusal to order removal of the well. The plaintiff appealed. The court of appeal affirmed the dismissal of the Commissioner, but ruled that the Commissioner's order could not authorize drilling on unleased property without consent of the landowner and remanded for a determination of whether a trespass took place and, if so, whether it was in good faith.[87]

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85. La. R.S. 31:177 (1975).

86. 488 So. 2d 955 (La. 1986). The author in discussing this case should disclose that he was the Commissioner of Conservation at the time this suit was being litigated and actively took part in it.

87. Nunez v. Wainoco, 477 So. 2d 1149 (La. App. 1st Cir. 1985).

On the appeal of the defendants, the Louisiana Supreme Court reversed. The enactment of conservation regulation statutes, held the court, supersedes the general concept of ownership of the subsurface of land. Thus, since a unit had been created by order of the Commissioner of Conservation, a legally actionable trespass had not occurred. One should note footnote 29 of the opinion[88] in which the court acknowledges that damages may be required to be paid even if there is no actionable trespass if there is damage or measurable inconvenience. In the *Nunez* case, there was no occasion to apply this since the intrusion was two miles beneath the surface with no observable consequences to the landowner and the landowner was receiving his proportionate share of production from the unit.

88. 488 So. 2d at 964-65 n.29.