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Mineral Rights

Patrick H. Martin
Louisiana State University Law Center, patrick.martin@law.lsu.edu

MINERAL RIGHTS

*Patrick H. Martin**

INTRODUCTION

Litigation on mineral rights topics continues to be dominated by cases arising as a result of the depressed conditions of both the oil and natural gas industries. The gas "bubble" has spawned years of litigation over gas takes and pricing, while the bankruptcies of drilling and service companies have led to continuing controversies over application of lien laws.

I. LEGISLATIVE DEVELOPMENTS

There was relatively little legislative activity in the 1987 regular session that directly involved oil and gas law and regulation. Only a couple of acts will be noted here.

Act No. 363[1]—Cyclic Injection Projects

Act number 363 adds subsection D to section 5 of title 30 of the revised statutes.[2] This addition provides for approval by the Commissioner of Conservation of cyclic injection projects. A cyclic injection is defined in the act as "a single-well process in which a production well is injected with a substance for the purpose of enhanced recovery. After a shut-in period, the well is returned to production. This procedure may be performed repeatedly on one or more wells in a reservoir."[3] Approval of a project may result when the Commissioner makes a finding that the project will not drain any different area of the reservoir than that being drained by the project well prior to initiation of the project. Approval of a cyclic injection project will not cause a change in the boundaries, tract participations or other aspects of any unit previously formed under the provisions of title 30.

Act No. 895[4]—LEAP: Spudding Date and Set-Asides for Women-Owned Businesses

The Louisiana Economic Acceleration Program (LEAP) which was adopted in 1985 to provide an exemption from severance taxes for

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* Professor of Law, Louisiana State University.

1. 1987 La. Acts No. 363.
2. 1987 La. Acts No. 363. To be codified at La. R.S. 30:5(D).
3. 1987 La. Acts No. 363.
4. 1987 La. Acts No. 895.

certain wildcat and development wells has been amended to specify that to qualify for the program the well has to have been spudded after January 1, 1986. The Act was also amended to provide that to qualify for its benefits the drilling operator must have "certified that, to the maximum extent possible, at least ten percent of the operator's service contracts related to the well have been made available to minority-owned businesses and that at least five percent have been made available to women-owned businesses."[5]

II. Conveyance Problems; Interpretation of Agreements

Gas Purchase Contracts

In *PGC Pipeline v. Louisiana Intrastate Gas*[6] the Fifth Circuit Court of Appeals held that credit for spot market sales was not to be implied into a settlement agreement amending a gas purchase contract, where there was a breach of a take-or-pay clause. Although a take-or-pay contract is considered an alternative obligation under the Louisiana Civil Code, breach of the alternative obligation contract does not force the buyer to forfeit its choice as to future deliveries.

PGC (seller) and LIG (buyer) entered into gas purchase contracts in 1980 and 1981, each containing a take-or-pay clause. In November 1983 they executed a settlement agreement which amended certain provisions of the contracts. In 1985 the buyer ceased all takes of gas from the seller and had paid no take-or-pay money since the November 1983 settlement agreement. The seller brought suit against the buyer alledging breach. The defendant buyer asserted that the 1980 and 1981 agreements allowed credit for gas sold on the spot market and that the same provision should be found to be implied in the 1983 settlement agreement. The district court granted summary judgment for the seller, awarded damages for past breaches, ordered specific performance for the future, and held that the buyer had lost the "pay" option for the remainder of the contract. The buyer appealed, and the court affirmed in part and reversed in part.

The district court properly interpreted the contracts. The 1983 settlement agreement eliminated the credit provision by abandoning a concept of "gas tendered to but not taken by Buyer" in favor of a percentage of deliverability test, which in general was more favorable to the buyer. A take-or-pay contract is considered an alternative obligation under article 1808 of the Louisiana Civil Code, but this does not mean that breach of the alternative obligation contract forces the

5. To be codified at La. R.S. 30:148.2(1)(d); La. R.S. 47:648.1(1)(d).
6. 791 F.2d 338 (5th Cir. 1986).

buyer to forfeit its choice as to future deliveries. A demand for performance is a prerequisite for forfeiture of choice, and under the clause, the buyer is granted a new choice each month. The seller has no right to force the buyer to relinquish its option prior to the time of choice. Thus, the district court was affirmed as to liability for past breaches, but reversed in regard to future deliveries.

A gas purchase contract was also the subject of litigation in *Pogo Producing Co. v. Sea Robin Pipeline Co.*[7] The trial court granted a preliminary injunction in favor of the producer/seller of gas against the pipeline company on six gas purchase contracts, requiring the purchaser to take and pay for the annual minimum quantity of the contract each year, and to take and pay for the minimum monthly quantity of the contract each month. The purchaser appealed, asserting that the contracts were not enforceable as the five year terms of the contracts had expired.

The appellate court affirmed, ruling that the contracts contemplated deliveries of gas after expiration of the contracts, entitling the seller to specific performance in the event of the purchaser's breaches. The "post-expiration" provision of the contract was made in contemplation of regulatory requirements that the seller continue to sell to the pipeline company unless abandonment were permitted. Mutuality of obligation arose from this provision. The court further concluded that the take-or-pay provisions constitute alternative obligations under Louisiana law.[8] After the expiration of the five year term, there was no longer an option for the purchaser to take-or-pay, thus, the provision became simply one of take-and-pay. Irreparable injury was threatened under the circumstances, so the issuance of a preliminary injunction was within the discretion of the trial court.

In yet another take-or-pay case, *Paragon Resources, Inc. v. National Fuel Gas Distribution Corp.*,[9] the Fifth Circuit upheld the trial court determination that an arrangement in which the seller waived a take-or-pay provision was intended to be only temporary. Once the period of waiver had passed, the take-or-pay obligation resumed.

Take-or-Pay: Rights of Lessor to Share as Royalty

Two Federal district courts in Louisiana have issued conflicting decisions on the right of the lessor to receive a royalty on monies paid to the lessee by a gas pipeline company under take-or-pay clauses of gas purchase contracts. The issue is a very important one that has significance beyond federal leases. Because of the gas "bubble" that

7. 493 So. 2d 909 (La. App. 3d Cir. 1986).
8. See La. Civ. Code art. 1808.
9. 797 F.2d 264 (5th Cir. 1986).

the United States gas market has experienced since 1982, there have been numerous payments to gas producers and settlements of claims under take-or-pay clauses of gas purchase contracts. Is the lessor entitled to a share of the money from such payments? The issue is likely to produce as much litigation, and with rulings equally varied, as the "market value" issue that has produced law suits for two decades.

In *Mesa Petroleum Co. v. U.S. Department of the Interior*,[10] the district court for the western district of Louisiana ruled that the lessee of the United States was not obligated to pay royalty to the lessor on monies paid to the lessee by the pipeline company under a take-or-pay clause of a gas purchase contract. In this case, the plaintiff lessee of federal government lands on the Outer Continental Shelf brought a declaratory judgment action seeking a declaration that it had no obligation to pay a royalty to the lessor on monies paid to the lessee by a pipeline company under a gas purchase contract, after the Minerals Management Service issued a demand letter for payment of overdue royalties on such monies. Plaintiff asserted it owed royalty only on production under the lease and relevant statutes. The court held for the plaintiff; the order of the Interior Department demanding payment of royalties was set aside.

Royalty, the court reasoned, is commonly understood as a right to receive a share of production. The lease provides for royalty on production. Payment of money under a take-or-pay clause of a gas purchase contract is a payment in lieu of taking production. The Interior Department regulation comprehends royalties accruing only as natural gas is severed from the ground and sold. No royalty is owed except on production.

In an unreported decision, a federal district court in the eastern district of Louisiana held to the contrary under essentially the same facts. In *Diamond Shamrock Exploration Co. v. Hodel*,[11] the court ruled that royalties were owed on take-or-pay payments. The court ruled that under the applicable statutes and regulations, take-or-pay payments are part of the gross proceeds from the disposition of gas on which the companies are required to pay a royalty. Royalty, according to the court, is payable on all the normal components of the value, regardless of the ability of the buyer and seller to separate, by contract, into discrete payments, the various components of the value of gas sold.

Recalculation of Price

In a pricing dispute between a seller and a buyer of natural gas, the appellate court ruled in *Union Texas Petroleum Corp. v. Mid*

10. 647 F. Supp. 1350 (W.D. La. 1986).
11. Civ. A. No. 86-537 (E.D. La. 1987).

Louisiana Gas Co.[12] that the buyer had determined that the seller's suggested "calculated price" was unacceptable. As a result, the buyer then had the right under the contract to pay for the gas at the Natural Gas Policy Act (NGPA) section 102 price and to recoup amounts paid over this as payment of a thing not due. Because the contract was applicable, there was no basis for recovery in quantum meruit by the seller.

Plaintiff Union Texas was one of five working interest owners in the Kizer well. In 1978 all five agreed to sell the well's gas to defendant Mid Louisiana. Because of the Natural Gas Policy Act, they amended their agreement in October, 1978 to provide for a price based on the "calculated price" from an average of other wells in the same field. If this price was unacceptable to the buyer, then it could advise the seller that it was unacceptable and pay the NGPA section 102 rate, with the seller having the right to give notice of termination.

On behalf of all working interest owners, the operator of the well met with the defendant buyer to determine the "calculated price." The buyer advised the operator that the price suggested was unacceptable and then proposed a price based on a fifteen year contract. The buyer began paying in accordance with this proposal at a price higher than the NGPA section 102 price in anticipation of all sellers agreeing to the proposal. Union Texas, alone, declined to sign the fifteen year agreement because it had previously committed the gas to another party after March 1981. Mid Louisiana then informed Union Texas of its intent to recoup the amount above the section 102 price. Union Texas continued to deliver, under protest, its share of the gas to Mid Louisiana until March 1, 1981. Union Texas then filed suit for an accounting and a determination of the proper price to be paid for the gas delivered from December, 1979 to March, 1981. The matter was submitted to a commissioner who issued a report favoring the plaintiff, concluding that a "calculated price" had not been determined and that the price to be paid was the price paid under other agreements in the field.

The trial court adopted this reasoning and the defendant buyer appealed contending that the contract price was the section 102 price which it had paid. The appellate court reversed and rendered. Applying the pricing clause, the buyer determined that the "calculated price" was unacceptable and so advised the seller. The commissioner and trial court erred in finding that there had never been a "calculated price" to apply. Although the buyer paid a higher price than the section 102 price for a time in anticipation of all sellers agreeing to a long term contract, it had the right to recoup this overpayment as payment of

12. 503 So. 2d 159 (La. App. 4th Cir.), writ denied, 506 So. 2d 1228 (1987).

a thing not due. Thus, the buyer fully complied with the contract. Because the contract was applicable and complied with, there was no reason to apply a theory of quasi-contract to allow the seller to get a higher price than the contract price.

Limitation of Warranty: Cover-All Clause of Lease

The cover-all clause in a lease granted in 1976 was held in *Bergeron v. Amoco Production Co.*[13] to apply to two brothers' interest in land inherited from their father in 1954, though the interest had not been described in the lease because it was believed to belong to their mother. The mother's lease on this interest had contained a warranty clause which limited warranty to return of royalties. This provision was held not to cover the brothers' interest once they inherited the mother's rights under the lease.

Lester and Bennett Bergeron, the two brothers, and their mother, Caroline Bergeron, had granted four leases covering six contiguous tracts of land. These were later acquired by Amoco and Gulf. One lease, granted by the mother alone, covered a forty acre tract. After her death, which occurred soon after the lease was granted, the brothers learned that she had only owned 513/2880ths and that they had actually owned 2367/2880ths at the time the lease was granted. They had inherited 2367/2880ths from their father in 1954 and later inherited their mother's interest. They brought suit against Amoco and Gulf contending the 2367/2880 interest was not subject to a lease. The lessees' counterclaimed for a declaration that the brothers' interest was covered by the warranty clause in the mother's lease, which they had inherited from her, or by the cover-all clause in another lease, which the brothers had granted as to their undivided interest in a contiguous tract.

The district court held for the plaintiff brothers on their claim that the warranty clause of the lease of their mother did not cover their 2367/2880ths interest. The court, however, ruled for the lessees on their counterclaim that the cover-all clause in another lease operated to bind the brothers' 2367/2880ths interest.[14]

On appeal by the lessors, the district court judgment was affirmed. The lease by the brothers on an undivided interest in a contiguous tract contained a cover-all clause which operated to include under the lease all land owned by the brothers in the sections of land covered by the lease. It was the clear intent of the brothers to lease any and all interest they had in any of the six tracts. Thus, the lease had to be reformed to reflect the intent of the parties.

13. 789 F.2d 344 (5th Cir. 1986).
14. Bergeron v. Amoco Prod. Co., 602 F. Supp. 551 (M.D. La. 1984).

Restriction on Operations on Land Personal to Lessor

The case of *Ashby v. IMC Exploration Co.*[15] held that a correction deed with a reservation of mineral rights deprived the purchaser of land of any claim to the minerals. In addition, a lease clause prohibiting operations within 300 feet of a dwelling was held not to be a stipulation pour autri and, thus, a subsequent owner of land who did not acquire mineral rights could not raise the issue of violation of the clause. The court ruled further that negligence is not a necessary precedent for recovery of damages under article 11 of the Mineral Code.

In 1958 J. E. Adcock granted a mineral lease now held by the defendant. Plaintiff Ashby purchased the land from an heir of the lessor in 1975, without reservation of mineral rights by seller. In 1979, the seller and purchaser entered into a second conveyance regarding the property in which the heir reserved all mineral rights. Ashby also sold a portion of the property to plaintiff Faulk. In 1981 defendant drilled a well on the property. Plaintiffs subsequently brought suit for cancellation of the lease on the ground that the defendant violated a lease clause prohibiting drilling operations within 300 feet of a rent house on the property. Defendant asserted that the plaintiffs had no rights to minerals, that they could not assert the lease clause restricting operations, and that defendant was not liable for damages.

The trial court held for the defendant and the plaintiffs appealed, wherein, the court of appeal affirmed. The 1979 deed was a correction deed with a reservation of the minerals which deprived the plaintiffs of any mineral interest in the property. The 300 foot restriction in the lease was part of the contract between the lessor and lessee, and was not a stipulation pour autri for the benefit of the landowner. The lessee's use of the land was reasonable. In addition, negligence is not a necessary precedent for recovery of damages under article 11 of the Mineral Code[16] which provides that both the owner of land burdened by a mineral right and the owner of the mineral right must exercise their respective rights with reasonable regard for those of the other.

The court's treatment of two issues in the instant case are worth noting. The court holds that a lease restriction on operations within a specified distance of a dwelling located on the property leased cannot be asserted by a subsequent purchaser of the property who does not acquire the mineral rights. The reason for this was that upon examination of the instrument, an intent was evidenced to create only a personal obligation in favor of the lessor, not a limitation that inured to the benefit of whomever was the owner of the property. The dissent

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15. 496 So. 2d 1334 (La. App. 3d Cir. 1986), aff'd, 506 So. 2d 1193 (1987).
16. La. R.S. 31:11 (1975).

noted that the result was troublesome. The lease is a real right and burdens purchasers of the land, but under the court's approach the purchaser of the land cannot assert any restrictions. But if the lease is a real right, its extent is defined by the instrument creating it. The purchaser of land takes the land subject to whatever is in the lease and no more. The court by its approach enlarges the right burdening the land. With whom will the purchaser of land negotiate when he takes land subject to an outstanding lease? How is one to determine from the public record what is and is not personal?

The second point of interest in the court's opinion is its treatment of article 11 of the Mineral Code. It provides that both the owner of land burdened by a mineral right and the owner of the mineral right must exercise their respective rights with due regard to the rights of the other.[17] The trial court had limited this to a standard of negligence but the court here reads the article more broadly.[18]

Parol Evidence

Although parol evidence may not be used to prove title to a mineral royalty, an issue of fact existed in the pleadings in *Clingan v. Doughty*[19] as to whether the term of a royalty had expired. Thus, the appeals court held that the trial court erred in dismissing the claim to a royalty for failure to state a cause of action.

Plaintiffs in 1972 sold to the defendants a tract of land less and except "'the royalty interest which they presently own'" in a specified well in a specified producing unit.[20] In 1982 the lessee shut in the unit well, and under the terms of the lease had sixty days in which to begin good faith efforts to restore production. Plaintiffs alleged that they verbally agreed with the lessee and the defendants that the lessee would be given more than sixty days to commence operations. In addition, as part of this agreement the defendants would give the lessee a new lease and the plaintiffs would be reconveyed a one-eighth (4/32ds) royalty for that which apparently would terminate under the lease. Defendants did not convey a royalty under the new lease, and the plaintiffs brought suit for declaration of their ownership of such a royalty of 4/32ds. The defendants filed an exception of no cause of action on the grounds that the plaintiffs were trying to establish title to a mineral right through parol evidence. The trial court sustained

17. Id.

18. For a discussion of this subject see Morgan, Correlative Rights: Surface Owner vs. Mineral Owner, 26th Institute on Mineral Law 141 (1980).

19. 491 So. 2d 469 (La. App. 3d Cir. 1986).

20. *Clingan*, 491 So. 2d at 473.

the exception and dismissed the suit. The plaintiffs appealed, wherein, the appellate court reversed and remanded.

Under one possible interpretation of the conveyance in 1972, said the court, the reservation was of a royalty that did not expire with the lease. Thus, the plaintiffs might continue to have a royalty interest and need not rely on an oral agreement to reconvey. The case was remanded for resolution of the ambiguous 1972 conveyance.

Royalties in Louisiana, as in other states, may arise from a lease or independently of a lease. A royalty created out of a lease terminates when the lease terminates.[21] In addition, a royalty which is created on land owned by another or from a mineral servitude of another exists independently of a lease and does not necessarily expire when the lease terminates; however, such royalty is subject to the rules of prescription.[22]

In the principal case, the parties and the trial court apparently regarded the royalty in question as a royalty created by a lease in favor of a lessor which terminated when the lease in which it was created terminated. The appellate court, however, evidently thought that the royalty in question could be regarded as a royalty which existed independent of any lease. This would not be incorrect if the deed of December 7, 1972 which conveyed a fifty acre tract of land and which reserved "'unto vendor, their heirs, successors and assigns, the royalty interest which they presently own in and to'"[23] oil and gas from the specified well and specified division order was intended to establish a new royalty. But if "'the royalty interest which they presently own'"[24] was all that was reserved and if that royalty was dependent on the lease, then the court's decision that the royalty survived the lease is simply incorrect.

The court creates an ambiguity where none evidently exists; the court observes that the reservation clause makes no mention of the lease. The phrase "which they presently own" evidences no intent to create a new royalty right, but only to except from warranty and conveyance one already in existence. If all of this arose from a lease, as appears implicit in the decision, then the court's analysis is clearly wrong and there is no ambiguity to be resolved by resort to parol evidence. The court appears to go out of its way to find an ambiguity that does not seem to have entered into the case in the pleadings or at the trial court level.

21. La. R.S. 31:126 (1975).
22. La. R.S. 31:80, 85 (1975).
23. *Clingan*, 491 So. 2d at 473.
24. Id.

In *Phillips Oil Co. v. OKC Corp.*,[25] the trial court and court of appeals refused to allow parol evidence to be used to bring about a reformation of a farmout agreement where the party which alleged error had signed the agreement after five weeks of review. The language of the farmout, explained the court, clearly provided for the party making the farmout to have a reserved interest for the entire area subject to the lease agreement, and not just a portion of it as contended by the party seeking a reformation. Summary judgment was appropriate, ruled the court, even assuming that there was an antecedent agreement and that there was a material variance between it and the written instrument. But the record could not support a reasonable finding that a mutual mistake was made, such that the written instrument did not express the true intent of the parties at the time the farmout was made.

Operating Agreement

The case of *Lancaster v. Petroleum Corp. of Delaware*[26] grew out of a well blowout. The well which the defendant operated blew out on March 15, 1977 from causes other than negligence by the operator. On March 21, 1977, the defendant operator notified the non-operators that it was immediately resigning as operator and would plug and abandon the well unless another took over as operator. The plaintiffs claimed that the operator under the operating agreement had to provide written notice ninety days in advance of resignation.

The court of appeal agreed that the resignation without ninety days notice was a breach of the agreement. Plaintiff Lancaster sustained a loss of interest in the well from the breach, as it had to give up a portion of its "back-in" interest (right to share in production after well costs have been recouped) to secure another operator on such short notice. This interest in the well had a value[27] even though the well ultimately did not pay out. This value could be established by expert testimony, and the court of appeal adopted the estimate given by plaintiff's expert in the trial. Although the court found the defendant's breach of contract to be in bad faith, there was no contractual or statutory provision for attorney's fees; thus, the court could not award such fees.

25. 812 F.2d 265 (5th Cir. 1987).

26. 491 So. 2d 768 (La. App. 3d Cir. 1986).

27. The court relied on Fite v. Miller, 192 La. 229, 187 So. 650 (1939), a case involving breach of a duty to drill a well.

Anti-Washout Clause of a Sublease: Binding Effect on Sublessee Without Privity of Contract

In *Robinson v. North American Royalties, Inc.*,[28] the Pettijeans had leased 579 acres to Robinson who thereupon subleased the entire acreage to North American Royalties with reservation of one percent of all production. The sublease contained an extension clause, or "anti-washout" provision, which provided that the overriding interest would also apply to any new mineral leases acquired by the sublessee or its successors or assigns covering any of the 579 acres covered by the original lease, if such leases were acquired within one year of the expiration of the original lease. North American subleased to the Stone Oil Corporation sixty percent of its interest in the Pettijean lease only insofar as said lease covered land located within a certain production unit established by the Commissioner of Conservation. North American decided not to maintain the Pettijean lease outside the unit, and it expired. Within one year of the expiration, Stone took a new lease on a portion of the Pettijean acreage that was outside the unit. Robinson made a claim against North American, Stone, and David Bintliff stating that he was entitled to a one percent interest out of this new lease under the terms of the "anti-washout" clause.

The trial court ruled in favor of the defendants on the ground that there was "no cause and/or right of action" for Robinson since there was no privity of contract between him and Stone, relying on *Berman v. Brown*.[29] Robinson appealed and the court of appeal affirmed in part, reversed in part, and rendered judgment.[30] The *Berman* case has been overruled legislatively by article 128 of the Louisiana Mineral Code;[31] thus, even without privity of contract, the sublessee is responsible for performance to the sublessor. But this is only to the extent of any interest acquired by the sublessee. The court ruled that since Stone as sublessee only acquired rights in those parts of the original Pettijean lease that were within the conservation unit, it was not bound by the anti-washout provision as to acreage outside that unit. On appeal from this decision to the Louisiana Supreme Court, the case was remanded for amendment of the plaintiff's petition and introduction of the farmout agreement.[32]

On the remand the trial court granted summary judgment for the defendant Stone. This was affirmed by the court of appeal for the

28. 463 So. 2d 1384 (La. App. 3d Cir. 1986).
29. 224 La. 619, 70 So. 2d 433 (1953).
30. Robinson v. North Am. Royalties, Inc., 463 So. 2d 1384 (La. App. 3d Cir. 1985).
31. La. R.S. 31:128 (1951).
32. Robinson v. North Am. Royalties, Inc., 470 So. 2d 112 (La. 1985).

third circuit in *Robinson v. North American Royalties, Inc.*[33] Stone was held not to be a successor or assign of North American by virtue of its farmout agreement. Since the suspensive condition of drilling a well on the acreage outside the unit was never fulfilled, Stone did not become a successor or assign of North American. Where there is no privity of contract between the owner of an overriding royalty and the holder of the working interest, the anti-washout provision of an agreement creating the royalty cannot apply.

Bankruptcy—Compromise

A compromise agreement by a bankruptcy trustee was set aside by the district court after objections from members of the creditors' committee, and this action was affirmed by the Fifth Circuit Court of Appeals in *In re Emerald Oil Co. v. Bennett*.[34] Emerald purchased a one-quarter working interest in a lease for $50,000 in April, 1979. At about the same time, Emerald purported to assign one-half of this interest to the wife of one of the principals of Emerald for $100 and other valuable consideration. This assignment was recorded in February, 1980 after there were strong indications that a well presently being drilled would produce gas in significant quantities. The following month the well was completed and an expert estimated at that time that the wife's interest after tax was worth more than three million dollars. Five days after this estimate was furnished, Mrs. Bennett paid Emerald $175,000 for her share of the drilling costs of the well. A month later, on May 16, 1980, Emerald filed for protection under Chapter 11 of the Bankruptcy Code.

The trustee in bankruptcy sought to recover the interest of Mrs. Bennett as a fraudulent conveyance and filed three adversary proceedings related to this. The trustee subsequently sought to compromise the three adversary proceedings, allowing Mrs. Bennett's estate to continue to own a portion of the interest. The bankruptcy judge approved the compromise. On appeal to the district court, the court reversed the approval and remanded. After the bankruptcy judge again approved the compromise, the district court again reversed, holding that the bankruptcy court had abused its discretion in approving the compromise.

The Fifth Circuit upheld this ruling stating that the trustee not only had a strong case for avoiding a transfer but probably could do so as a matter of law. While the transfer was initiated in April, 1979, Mrs. Bennett's title was perfected only through the recordation of the

33. 509 So. 2d 679 (La. App. 3d Cir. 1987).
34. 807 F.2d 1234 (5th Cir. 1987).

assignment which occurred less than ninety days prior to the bankruptcy filing. Louisiana law would not recognize an equitable interest in the property under these circumstances. The interest was acquired for an unreasonably low sum and the transfer was made at a time when the debtor was insolvent.

Mineral Royalties: Separate Property Upon Death

In *Succession of Doty*,[35] the court was called upon to determine the character of royalty payments under a mineral interest of the decedent that had been separate property upon entering into a second marriage. At his death, his mineral interest was under lease and there was production. In the succession the widow asserted that the royalties under the lease continued to be community property after death. Two children from the first marriage contended that the mineral interest was separate property and thus all royalties arising after the decedent's death had to be treated as separate property. The court ruled that although the royalties were community property during the marriage, the nature of the property interest continued to be separate and upon decedent's death the royalties were no longer to be treated as fruits enjoyed by the community. Failure of the husband to file a reservation of fruits during the existence of the community had no bearing upon the subject after his death.

III. State Lands and Procedural Issues

Effect of Prior Supreme Court Characterization of Water Body as Navigable

Where the Louisiana Supreme Court has characterized Grand Lake as a lake for determination of rights of other landowners in prior litigation and where no material issue of fact in the present proceeding as to whether the same body of water was involved, it was appropriate for the trial court to grant summary judgment for the state. This was the ruling of the court of appeal for the first circuit in *McCormick Oil & Gas Corp. v. The Dow Chemical Co.*[36]

In this case an oil company had leases from two different lessors or lessor groups, the state and private landowners. The company filed a concursus proceeding to determine which lessors had the right to royalties attributable to land (accretion, alluvion or dereliction) which was between the low water mark and the high water mark of a certain

35. 496 So. 2d 543 (La. App. 1st Cir. 1986).
36. 489 So. 2d 1047 (La. App. 1st Cir. 1986).

water body known as Grand Lake. If the water body were a lake, the state owned the former lake bed up to the high water mark; if a stream, the riparian landowners had the right to the land through the rules of accretion.

After the suit was filed, the Louisiana Supreme Court in a different case with other private landowners ruled that Grand Lake-Six Mile Lake was a navigable lake in 1812 and thus the state of Louisiana owned the rights to land and minerals up to the high water mark.[37] The state then moved for summary judgment in this proceeding based on the ruling in *State v. Placid Oil Co.* that the water body in question was a lake. The trial court granted the summary judgement and the private lessors appealed, wherein, the appellate court affirmed. The prior ruling of the Louisiana Supreme Court rendered invalid the private lessors' claim that the water body was a stream. No issues of fact remained and thus summary judgment was appropriate.

The court in the principal case gives what amounts to a res judicata effect to a determination by the Louisiana Supreme Court that a particular water body was a lake and not a stream even though the same parties were not involved. This avoids the possibility of the anomaly of a particular water body changing from a lake to a stream and then back to a lake from case to case.

Effect of Compromise by State

Compromise agreements between the state and a group of private claimants to land, both having leased a disputed area to the same lessee, has no legal effect on the lessee who was not a party to the agreements and such lessee has a claim for breach of warranty against the state and private lessors as decided in *Chevron U. S. A., Inc. v. Lorio.*[38] In the same case the court held that an act of the legislature which fixed the boundary of the bottom of a water body was not unconstitutional as an alienation of mineral rights because property was acquired by the act, and the act was not a special or local law requiring publication of notice of the intention to introduce such a bill.

Lessee Chevron had taken a lease from the Lorios for a one-eighth royalty on a tract of land and had taken another lease from the state of Louisiana for a one-sixth royalty in the same area around False River. After production had commenced, Chevron invoked a concursus proceeding to determine to which party it actually owed royalties and reserved its rights to seek a refund of money deposited in the court

37. State v. Placid Oil Co., 300 So. 2d 154 (La. 1974).
38. 496 So. 2d 611 (La. App. 1st Cir.), writ denied, 498 So. 2d 754 (1986).

(at the higher royalty rate payable under the state lease) if it were determined that the Lorios were the proper claimants. The state and the Lorios compromised their differences and moved for summary judgment to dismiss the proceedings. Chevron opposed this motion seeking instead a determination of rights and a refund. After the trial court granted summary judgment to dismiss the proceedings, Chevron appealed. The first circuit reversed and remanded for further proceedings, holding that a party can invoke a concursus proceeding and deny liability to a claimant.[39] On remand the trial court held that the compromise agreements, under which the Lorios and the state agreed that the state lease would control and that the full amount on deposit would be divided among themselves, were not binding on Chevron and that Act 285 of 1975[40] was not unconstitutional. The state appealed and the court of appeal affirmed.

The compromise agreements between the state and the Lorios did not determine ownership and thus could not be binding on the lessee Chevron which was not a party to the compromises. Because the state only owns the bed of False River to the ordinary low water mark, the Act, which fixed the state boundary at a point above this, did not alienate a water bottom in violation of the Louisiana Constitution of 1974. Because the Act affected the ownership of state property which is a concern to all citizens of the state, the Act is not a special or local law for which there must be publication of notice of intent to introduce such a bill.

Alienability of Mineral Rights Through Compromise Agreement

In *American Lung Association of Louisiana, Inc. v. State Mineral Board*,[41] the Louisiana Supreme Court ruled that the Louisiana constitutional proscription of alienation of mineral rights from state lands was not violated by a compromise of a lawsuit involving land donated by a private party to the state with a restriction on the use of the land in the donation.

In 1924 the predecessor of plaintiff American Lung Association of Louisiana, Inc. donated two tracts of land to the state without reserving mineral rights. The land was to be used as a sanatorium for tuberculosis victims. After the number of tuberculosis patients decreased, the state began to use the land and facilities for other purposes. In 1975 plaintiff filed suit against the state through the Louisiana Health and Human Resources Administration to revoke the donation

39. Chevron U.S.A., Inc. v. Lorio, 442 So. 2d 1157 (La. App. 1st Cir. 1983), writs denied, 444 So. 2d 1244 (1984).

40. 1975 La. Acts No. 285.

41. 507 So. 2d 184 (La. 1987).

on the ground that the land was no longer being used for the purpose for which it was donated. The parties settled the suit in 1977 with a portion of the land being returned to the plaintiff. In 1979 the plaintiff granted a mineral lease on the tract in question. In 1983, the State Mineral Board took steps toward leasing the same property. Thereupon, plaintiff filed a petition to quiet title to the tract and to enjoin the state from leasing the property. The courts below dismissed the plaintiff's claim on the grounds that the state was prohibited from selling or exchanging any minerals rights under the Louisiana Constitution[42] and that plaintiff had not obtained legislative authorization to sue the Mineral Board.[43]

The Louisiana Supreme Court reversed. The purposes for the prohibition on selling mineral rights is to prevent the plundering of valuable state assets by the few and to preserve valuable state assets for future generations. These purposes were not present here. A compromise, said the court, is something entirely different from a sale or an exchange, and does not contravene the constitutional provision. As to the legislative authorization, the court gave retroactive effect to a legislative resolution passed after the institution of the suit.

The result of the decision in *American Lung Association* does not seem objectionable. If anything, the decision could increase rather than decrease the mineral holdings of the state. That is, should the case have gone the other way, then potential donors of land and minerals to the state would be on notice that despite a violation of their restrictions on the use of land donated to the state, the state would retain at least a part of the donation. A donor recognizing this would be less likely to donate land with minerals. Thus, the decision makes donations more likely, and this is likely to benefit the state.

Concursus Proceeding Involving the State—Default

Shell Oil provoked a concursus proceeding joining as defendants the Minvielle family and the state of Louisiana in 1968, and filed amending petitions in 1969 and 1970. The state failed to file an answer. In 1984 the trial judge ordered all defendants to file answers within ten days of publication of his order. Again, the state failed to file an answer and the court entered judgment in favor of the Minvielles. Nearly a year later the state filed a motion to annul the judgment because of the failure of the Minvielles to confirm a judgment by default in a suit against the state.[44] The trial court and court of appeal

42. La. Const. art. IX § 4(A).

43. See American Lung Ass'n, Inc. v. State Mineral Bd., 490 So. 2d 343 (La. App. 1st Cir. 1986), rev'd, 507 So. 2d 184 (1987).

44. La. Code Civ. P. art. 1704 (1970).

held in *Shell Oil Co. v. Minvielle*[45] that the requirement of confirmation of default judgments against the state provided in article 1704 of the Code of Civil Procedure is inapplicable in a concursus proceeding.

Limitation of Actions: Personal Actions

The Plaquemines Parish Commission Council (Council) brought an action to recover overriding mineral interests affecting its lands. These interests were acquired by defendant Delta Development, Inc. (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 then filed a peremptory exception of prescription. The trial court ruled for all defendants, holding that the suit was a personal action subject to ten years prescription. On the plaintiff's appeal, the fourth circuit affirmed. An action to recover overriding mineral rights and for an accounting because of fraud and violation of fiduciary duty is a personal action which prescribes in ten years, held the fourth circuit in *Plaquemines Parish Commission Council v. Delta Development Co., Inc.*[46] The ten years commenced to run in 1941 when the Council's predecessors investigated the circumstances surrounding the leases. Although a levee district is the "state" for the purpose of determining whether acquisitive prescription of mineral rights can run,[47] the levee district is not the "state" for the purpose of constitutional immunity from liberative prescription which is applicable to personal actions. There is no constructive trust established under Louisiana law for the Council arising from a breach of fiduciary obligations. The Commission Council appealed.

The Louisiana Supreme Court reversed.[48] Under the doctrine of contra non valentem prescription was suspended. The court found that the Council and its predecessor were "effectually prevented" from availing themselves of their cause of action by the affirmative acts of concealment, misrepresentation, legal challenges and fraudulent conduct

45. 491 So. 2d 785 (La. App. 3d Cir. 1986).
46. 486 So. 2d 129 (La. App. 4th Cir. 1986), rev'd, 502 So. 2d 1034 (1987).
47. Dynamic Exploration, Inc. v. LeBlanc, 362 So. 2d 734 (La. 1978).
48. Plaquemines Parish Comm'n Council v. Delta Dev. Co., Inc., 502 So. 2d 1034 (La. 1987).

on the part of Leander Perez, Sr., and by the further affirmative concealment on the part of his public official sons who succeeded him. Thus, the exception of prescription was erroneously sustained by the lower courts.

Possessory Action

The right to maintain a possessory action was at issue in *Graham v. McRae Exploration, Inc.*[49] Plaintiffs (Graham heirs and their lessees) brought a possessory action against defendants (Gladney heirs and their lessees) alleging that Graham had purchased ten acres of property from Gladney in 1942. Gladney granted a mineral lease to the disputed property in 1974. In 1976 the property was included in a compulsory unit formed by the Commissioner of Conservation and production was obtained from the unit, though the unit well was not on the disputed property. The plaintiffs brought the possessory action in 1980, more than one year after the leasing, drilling, and production occurred. Plaintiffs sought to be recognized as possessors and to receive a full accounting for the minerals taken from the property. Defendant lessees of the Gladneys answered and filed a reconventional demand asking the court to recognize the validity of their leases and filed a third party claim against the Gladneys for return of the bonus and royalties if the plaintiffs should be successful. They also filed an exception of no cause of action and/or liberative prescription, claiming that the plaintiffs failed to file their possessory action within one year of the alleged disturbance of possession. After the trial court granted summary judgment on this exception, the Gladneys also filed an exception of no cause of action claiming that the plaintiffs were not entitled to assert a possessory action because of failure to file within one year of the alleged disturbance of possession. The trial court also sustained this exception and dismissed the plaintiff's suit with prejudice. Plaintiffs appealed and the second circuit reversed and remanded.

Production from the unit was a disturbance in fact of the plaintiffs' mineral rights and the trial court correctly found that because the plaintiffs had failed to bring a possessory action as to the mineral rights within one year of the disturbance, they are barred from doing so.[50] But the disturbance as to the mineral rights did not disturb the

49. 493 So. 2d 705 (La. App. 2d Cir. 1986).

50. La. R.S. 31:156 (1975). The court properly recognized that the execution of a lease constituted a disturbance in law but did not interrupt corporeal possession. La. Code Civ. P. art. 3659. Montgomery v. Breaux, 338 So. 2d 314 (La. App. 3d Cir. 1976), writ denied, 341 So. 2d 410 (1977); Thevenet v. Clause, 302 So. 2d 649 (La. App. 3d Cir. 1974).

right of possession of the surface, and the plaintiffs had not lost the right to bring a possessory action of the surface of the property.

IV. Lease Maintenance

Implied Covenant of Development

An oil and gas lease was cancelled by the federal district court as to acreage outside a unit for failure to develop as a reasonable prudent operator in *Goodrich v. Exxon Corp.*[51] A judicial determination clause of the lease was held not to apply; application of the clause would be a vain and useless thing, said the court, where the lessee had made an express decision not to develop the lands outside the unit.

Lessors of 1245 acres of land brought suit against the lessee for cancellation of the lease for failure to develop the acreage as a reasonably prudent operator. A fieldwide unit had been established in 1958 in which there had been very extensive development and production until the filing of the suit. The court held the lease was cancelled as to acreage outside the geographic boundaries of the unit. Without a Pugh clause, a lease is held in its entirety by unit production. However, the lessee must continue to develop the land as a reasonable prudent operator. Here the facts established that there had been reasonable development of the unit acreage, but that the lessee had not developed and had no plans for development of the acreage outside of the unit.

In this situation, a "judicial determination" clause requiring a prior judicial determination followed by an opportunity to develop for some specified period was not given effect as it would have been a vain and useless thing. Further, the lessors' demand for cancellation of the lease as to all minerals within the limits of the unit lying below the deepest producing horizon was denied. However, the lessors' demand for cancellation as to all remaining lands under the lease was granted. A successful plaintiff in a suit for dissolution of a mineral lease for failure to comply with its obligations is entitled to attorney's fees even if the dispute is in good faith.

The legal standard which the court is applying in the instant case is not entirely clear. Normally the lessor has the burden of proving that the lessee has not developed the leased premises as a reasonably prudent operator. This often is accomplished by the lessor showing the likelihood or prospect of production in paying quantities or that

51. 642 F. Supp. 150 (W.D. La. 1986).

another operator is willing to drill on the undeveloped acreage.[52] Apparently, the court here shifted the burden to the lessee to show why it had not developed acreage outside the unit once it was shown there had been no outside development. The court was satisfied that once it became clear that the lessee had no plans for development of the acreage outside the unit, the lease should be cancelled as to that acreage. If this is the court's standard, then it would seem that the court should have cancelled the lease below the deepest producing horizon of the unit, as well as the acreage outside the geographic confines of the unit, if the lessee had no plans to drill to a greater depth.

A second case involving the implied obligation to develop as a reasonable, prudent operator was *Morrison v. D & L Partnership*.[53] The lessor had sought in this case to obtain a reformation of the lease of six residential lots. The lease he granted had replaced earlier leases that had contained six month primary terms; the printed primary term had been crossed out and six months had been written in on those leases. In the new lease, the ten year primary term had not been crossed out. The lessor testified that he thought the lease was for six months, but the court did not allow reformation because of the public records doctrine and the rights of a third party had intervened.[54] However, the lessor had also sought relief under the implied obligation of the lessee to develop as a reasonable, prudent operator. The court observed that there was no initial consideration for the lease and that there was no obligation to drill or to pay a delay rental from year to year under the lease. Under the circumstances, the court said that it would be contrary to public policy to allow the lessee to escape the requirement of development for ten years. It would take the property out of commerce and thwart the purpose of mineral leasing. After reviewing the activities and intentions of the operators, the court concluded the lease to be cancelled even though it was still in its primary term.

Implied Development—Necessity of Putting in Default

At issue in *Taussig v. Goldking Properties Co.*[55] was the necessity of the lessor putting the lessee in default of its implied lease drilling obligations prior to maintaining suit. The trial court found that the lessees had abandoned the leases because of their failure to undertake

52. See Humble Oil and Refining Co. v. Romero, 194 F.2d 383 (5th Cir. 1952); Nunley v. Shell Oil Co., 76 So. 2d 111 (La. App. 2d Cir. 1954); Vetter v. Morrow, 361 So. 2d 898 (La. App. 2d Cir. 1978).

53. 499 So. 2d 988 (La. App. 3d Cir. 1986).

54. La. R.S. 9:2721 (1965); McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909).

55. 495 So. 2d 1008 (La. App. 3d Cir. 1986).

additional development. The court treated this as an active breach which obviated the need to put the lessee in default. The court of appeal held that the trial court erred in its holding. The attorneys for the lessors made demands for lease cancellation, not for development. Thus, the demands were not a putting in default. A demand for cancellation is not a substitute for placing in default.[56] The Mineral Code has no provision defining abandonment of a lease; thus, the court felt it necessary to look to the Civil Code for treatment of the subject.[57] The trial court's conclusion that a passive breach had been transformed into an active breach obviating the necessity of placing in default under Civil Code standards was erroneous. The court of appeal stated: "Since the duty to develop is an implied obligation, the jurisprudence has consistently held that a breach of this duty is passive, and a formal placing in default is required before judicial intervention may be sought."[58] Physical plugging and abandonment of the five wells did not constitute proof of abandonment of the Mallett Bay lease. Internal communications of the companies was inconclusive as to lease non-development.

Continuous Drilling Clause: Depth Limitation Clause

An oil and gas lease containing both a continuous operations clause (allowing lease maintenance beyond end of primary term by operations) and a depth limitation clause (limiting what depth could be held by production after end of primary term) was held in *Massie v. Inexco Oil Co.*[59] to be maintained beyond the primary term by operations, such that the depth limitation clause applied only when acreage was held beyond the primary term solely by production.

Suit for cancellation of a mineral lease was brought by the lessor as to his interest. The defendant claimed that the lease was held as to all depths under the continuous drilling clause of the lease. The lessor asserted that the continuous drilling clause was limited by a clause which operated as an absolute cut-off at the end of the primary term requiring the lessee to release all depths 100 feet below the deepest productive depth when the lease was being maintained only by production. The district court granted judgment for the plaintiff lessor, interpreting the clause as an absolute cut-off at the end of the primary term and declaring that no additional rights existed under the continuous drilling clause to explore deeper depths when the lease was being

56. Id. at 1015, citing Brown v. Sugar Creek Syndicate, 195 La. 865, 197 So. 583 (1940).
57. La. Civ. Code arts. 1931-1933.
58. *Taussig*, 495 So. 2d at 1014.
59. 798 F.2d 777 (5th Cir. 1986).

held by production at the end of the primary term.[60] The defendant lessee appealed and the Fifth Circuit reversed and remanded. The depth limitation clause here relates to holding the lease beyond the primary term by production, not to other means by which the lessee may hold the lease beyond the primary term, such as by continuous operations as was the case here. The language of the depth limitation clause was not the clear, unmistakable language necessary to negate the right to hold the lease by continuous operations.

Lease Cancellation and Double Damages for Bad Faith Nonpayment of Correct Royalty

Leases were cancelled and damages for actual damages plus double actual damages properly were awarded where evidence established intentional improper and incorrect payment of royalties to lessors in the case of *Wegman v. Central Transmission, Inc.*[61] There was also liability under a gas purchase contract for failure to calculate properly the price and quantity of gas.

Plaintiffs, the lessors and grantor in a gas sales contract, brought suit against defendant Central Transmission, Inc. (CTI) and a related limited partnerships controlled by CTI seeking to recover royalties on leases and to collect amounts due under a gas purchase contract. Involved were three tracts of land. Two and one-half of these lands were under lease to CTI and the other one-half was under a gas purchase contract with CTI. An agreement supplemental to the leases and the gas purchase contract was entered into by CTI and the plaintiff Wegman. The agreement provided for the amount of royalty to be paid, being dependent on the pricing of the gas if a sale might be obtained from the city of Monroe. CTI assigned the leases to its related limited partnerships and then CTI purchased the gas from its limited partnerships. CTI then sold the gas to IMC Pipeline (IMC) with CTI transporting the gas through a gathering system purchased from Wegman which CTI extended one-third of a mile.

After learning of irregularities in accounting and payment of royalties, plaintiffs brought suit. The jury concluded that the plaintiffs were not being paid for the quantity of gas actually produced by their wells and that the defendant had exceeded the contractually permissible deduction for line loss. Further, the jury found that the defendants consciously misled the plaintiffs about the identity of the purchaser of the gas and that this had a direct bearing on the price. They also found that the defendant CTI incorrectly stated the price on which

60. Massie v. Inexco Oil Co., 614 F. Supp. 880, (W.D. La. 1985).
61. 499 So. 2d 436 (La. App. 2d Cir. 1986), writ denied, 503 So. 2d 478 (1987).

royalties should have been based and incorrectly set forth the amount of production from the wells. Finally, they found that royalties due plaintiffs should be based on the price for which CTI sold gas to IMC.

The trial court entered judgment for plaintiffs, awarding double the royalties due (though entering judgment NOV on a different method of calculation than the jury's), interest and attorneys fees, and cancelling the leases. The defendants appealed, asserting that the claims had prescribed under the one year prescriptive period for torts, that an agreement was incorrectly applied and interpreted, and that a wrong determination as to market value was made.

On appeal, the second circuit amended and affirmed as amended. The plaintiffs' claim sounded in contract and thus had not prescribed. Even if it were in tort, the prescriptive period was interrupted by payments made by defendant in response to a demand letter; partial payment is acknowledgment sufficient to interrupt prescription. The interpretation and application of the agreement in question was reasonable according to the court. The evidence clearly showed that the contracts between CTI and its limited partnerships did not establish fair market value. The use of CTI's gathering system did not constitute a true transportation cost and, thus, the jury was correct in denying defendant a credit. Market value is a question of fact, and there was ample evidence to support the jury determination of market value. There was also adequate evidentiary foundation for the jury's determination as to the measurement of the quantity of gas produced.

The trial judge did not err in entering judgment allowing calculated damages by taking the amount established as actual damages, doubling this amount, and then adding it to the amount of actual damages resulting in an award that was three times the amount of actual damages. The jury apparently wished to award the maximum amount of monetary damages, but had not properly calculated such damages. The award of attorney's fees was incorrect to the extent that it awarded attorney's fees related to the gas purchase contract portion of the litigation; attorneys fees are available only for failure to pay royalties due under a lease. Although dissolution of a lease is not favored, it should be granted when the conduct of the lessee is such that the damages remedy is inadequate to do justice. Here there was adequate support for the jury's finding that the remedy of damages was inadequate to do justice. The judgment was amended to correct the amount of attorney's fees and to provide legal interest on the attorney's fee award from the date of judgment until it was paid.

Based on the facts found by the jury, there seems to be little reason for questioning the court's conclusion that while the Louisiana Mineral Code disfavors dissolution of leases for improper payment of a royalty, lease cancellation was an appropriate remedy in the principal case. One might note the treatment of the issue of doubling of damages under article 140 of the Mineral Code which provides: "If the lessee fails to pay royalties due . . . the court may award as damages double the amount of royalties due . . . ."[62] The jury apparently thought this meant if $1.00 was owed then the damages awarded could be $2.00. The trial court, however, read it as providing that if $1.00 was owed then the damages that could be awarded would be $1.00 actual damages plus $2.00 more as damages for a total of $3.00. Apparently the parties did not disagree with the trial court's reading of the manner of calculating the doubling of damages, and the court of appeal affirmed the approach.

Royalty: Deduction of Marketing Expenses

Unless the parties agree otherwise, the cost of marketing the gas once it has been produced is shared by the lessor and lessee under a market-value lease. This was the ruling in *Merritt v. Southwestern Electric Power Co.*[63] where the court held that the compression costs in the case were post-production costs and were properly deductible under the lease.

Lessors brought suit for cancellation of a lease and for damages after the lessee began deducting compression charges from the royalty payments. The trial court ruled in favor of the lessors holding that no charges could be made against their royalty for compression and ordering a refund of prior charges, but rejecting cancellation of the lease and other damages. The defendant appealed and the court of appeal reversed. Under the lease, royalty was to be paid on the market value at the well. There was no market at the mouth of the well here because of the low pressure of the gas. Compression was necessary to make the gas marketable; it was an element of the marketing function. Louisiana follows an approach of reconstructing market value for a royalty by beginning with the gross proceeds and deducting therefrom any additional costs of taking gas from the wellhead to the point of sale. As stated earlier, unless the parties agree otherwise, the cost of marketing the gas once it has been produced is shared by the lessor and lessee under a market-value lease. Here, the compression costs were post-production costs and were properly deductible under the lease.

Effect of Unit Established by Commissioner of Conservation on Acreage Outside of Unit When Unit Well is Off the Leased Tract

A pooling clause in a lease that provided for division of the lease upon exercise of the pooling power (if unit well was not on leased

62. La. R.S. 31:140 (1975).
63. 499 So. 2d 210 (La. App. 2d Cir. 1986).

tract) was held not to apply to pooling resulting from an order of the Commissioner of Conservation in *Mathews v. Goodrich Oil Co.*[64] In *Pearson v. Larry*,[65] the same lease provision was at issue with essentially the same facts. The trial court erroneously concluded that the leased acreage had been "divided" under a lease clause by the creation of a compulsory unit. As in *Mathews*, the lease clause in *Pearson* was to apply only to voluntary units. Thus, the trial court was reversed. Although the lessee executed a release of the outside acreage after the action was instituted, this fact could not make the lessees liable for damages and attorney's fees for failing to release the acreage within thirty days of demand for release,[66] as provided under the Mineral Code.[67]

Cessation of Drilling Clause—Retained Acreage

A question of leased acreage retention was raised in *Miami Corp. v. Exxon Co., USA*.[68] The lease was granted in 1980 and covered more than 2,000 acres. It contained a clause obligating the lessee, after discovery of oil gas or other minerals, to "conduct drilling or reworking operations upon the leased premises, with not more than one hundred twenty (120) days elapsing between cessation of actual drilling or reworking of one well and the beginning or actual drilling or reworking of another."[69] Failure to drill or rework continuously under this provision was intended to result in an automatic termination of the lease, except for the portion saved by an acreage retention clause incorporating a size related to the unit size. The court held that all acreage not in a unit terminated under this provision after 120 days had elapsed from the last cessation of drilling. The court rejected a claim that a provision containing a sixty day notice requirement along with an opportunity by the lessee to comply with the lease obligations allowed the lessee to retain additional acreage under the facts. The sixty day provision, explained the court, "simply means that Miami [the lessor] could not file suit to require delivery of a recordable release of the leased premises until sixty days after it had made formal written demand of the release."[70]

64. 471 So. 2d 938 (La. App. 2d Cir. 1985).
65. 505 So. 2d 913 (La. App. 2d Cir. 1987).
66. La. R.S. 31:206 (Supp. 1987).
67. La. R.S. 31:207 (Supp. 1987).
68. 509 So. 2d 39 (La. App. 1st Cir. 1987).
69. Id. at 41.
70. Id. at 42.

V. Oil Well Lien Act—Lessor's Lien

Prescription—OCS

Oil Well Lien Act issues continue to be a source of litigation though recent Louisiana Supreme Court decisions and legislation could lessen these issues in the future. A split among several circuits of the courts of appeal on an important provision of the Louisiana Oil Well Lien Act was resolved by the Louisiana Supreme Court last fall. The split occured as to the issue of whether failure to file a record notice of the lien within the 180 day period specified in the Act[71] resulted in loss of the privilege or merely loss of ranking of the privilege. Stated differently, is the 180 day period a prescriptive period? The Supreme Court ruled in *Louisiana Materials Co. v. Atlantic Richfield Co.*[72] that it was not a 180 day prescriptive period and, thus, a lien could be asserted by parties who gave notice up to a year after the furnishing of services or supplies. Nonetheless, the 180 days is now a prescriptive period by virtue of Act 191 of 1986 of the legislature.[73]

In *St. Mary Iron Works v. McMoran Exploration Co.*,[74] it was held that the Louisiana Oil Well Lien Act, rather than the Louisiana Private Works Act, applies to structures on the Outer Continental Shelf (OCS) adjacent to Louisiana. A lien was valid under the Act even though there was no proper place for filing the lien for recordation.

Coburn sold materials to St. Mary Iron Works and CSI performed electrical work for St. Mary Iron Works, all as part of the construction of an offshore crew living quarters which upon completion was moved to federal lands of the OCS adjacent to Louisiana coastal waters. St. Mary filed bankruptcy proceedings shortly after completion, and three days later Coburn and CSI filed liens in Louisiana parish records. In bankruptcy proceedings, St. Mary took the position that Coburn and CSI were unsecured creditors since the liens were not filed within the sixty day filing period specified in the Louisiana Private Works Act. Coburn and CSI maintained that the Louisiana Oil Well Lien Act applied, and under it they had 180 days in which to file. The bankruptcy court and the district court ruled that the Private Works Act applied and that as a result the liens had not been timely filed. On appeal to the Fifth Circuit, the court of appeals initially affirmed these deci-

71. La. R.S. 9:4862 (Supp. 1987).

72. 493 So. 2d 1141 (La. 1986). The background developments and the holding of the case are discussed in Martin, Developments in the Law, 1985-86—Mineral Rights, 47 La. L. Rev. 347, 363-65 (1986).

73. 1986 La. Acts No. 191.

74. 809 F.2d 1130 (5th Cir. 1987).

sions,[75] but then granted a rehearing in light of the decision from the Louisiana Supreme Court in *Louisiana Materials Co. v. Atlantic Richfield Co.*[76] Following that decision, the Fifth Circuit reversed and remanded. Louisiana law applies on the OCS as surrogate federal law.

The Louisiana Act does have application on the OCS. Under the Louisiana Supreme Court decision, the recording of a lien is not necessary for the lien to be effective under the Oil Well Lien Act. The case was remanded for further proceedings not inconsistent with this. The court declined to speculate on the effect of the 1986 act amending the Oil Well Lien Act to require recordation within the specified time in order to preserve the lien privilege; there will be no place in which to file when the OCS lands area is involved.

The Fifth Circuit is applying state law, as it must, in the manor it existed at the time the rights in question arose as interpreted by the Louisiana courts. One should note, as the Fifth Circuit does in footnote 5,[77] the passage of Act 191 of 1986[78] by the Louisiana legislature. Act 191 amends sections 4862 and 4865 of Title IX of the Louisiana Revised Statutes.[79] It is now 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.

It was subsequent to this amendment that the Louisiana Supreme Court ruled in *Louisiana Materials Co. v. Atlantic Richfield Co.*[80] that the 180 day period had not been a prescriptive period prior to this amendment and, thus, a lien could be asserted by parties who gave notice up to a year after the furnishing of services or supplies. This was the rule that the Fifth Circuit had to apply to the facts of the instant case. Nonetheless, the 180 days is now a prescriptive period by virtue of Act 191 of 1986,[81] and the courts will have to reach a different result from the reported case on cases arising after this amendment as to the issue of the necessity of filing. One should also note that the court in *Louisiana Materials Co.* did not rule specifically on the applicability of the Louisiana Oil Well Lien Act to the OCS. But this may not affect the ruling of the Fifth Circuit because as the Fifth Circuit suggests, the Louisiana statute can apply regardless of the intent of the Louisiana legislature; it is the Federal OCS Lands

75. St. Mary Iron Works, Inc. v. McMoran Exploration Co., 802 F.2d 809 (5th Cir. 1986).

76. 493 So. 2d 1141 (La. 1986).

77. *St. Mary Iron Works*, 809 F.2d at 1135 n.5.

78. 1986 La. Acts No. 191.

79. La. R.S. 9:4862, 4865 (Supp. 1987).

80. 493 So. 2d 1141.

81. 1986 La. Acts No. 191.

Act that makes Louisiana law applicable to the OCS, not the Louisiana statute itself.

Another Louisiana court of appeal decision has also recently taken up the issue of the applicability of the Louisiana Oil Well Lien Act to the OCS. This was *Genina Marine Services, Inc. v. ARCO Oil & Gas Co.*[82] This case involved the filing of a lien for furnishing vessels in connection with drilling and production of offshore wells. The court held Louisiana's Oil Well Lien Act is applicable to property located on the OCS off the Louisiana coast. It further held that under the Oil Well Lien Act, suit must be filed within one year of the last day on which services were performed, however, the case was remanded for determination if proceedings against another party in bankruptcy court interrupted this prescriptive period.

Defendant ARCO contracted with Briley Marine for boat services in connection with wells off the Louisiana coast on the federal OCS and Briley Marine in turn contracted for the services with plaintiff Genina. ARCO paid Briley but Briley failed to pay Genina. Genina did not file a notice of privilege until thirteen months after the performance of the services. Suit was not filed until twenty-five months after the services. The trial court granted defendant ARCO's motion for summary judgment seeking dismissal on the ground that the wells were on the OCS and that the Louisiana Oil Well Lien Act was therefore inapplicable. Plaintiff appealed, and on appeal the defendant also raised the exceptions of prescription and no cause of action. The court reversed and remanded.

Louisiana law applies to leases on the federal OCS unless it is in conflict or inconsistent with federal law. As discussed earlier, the Louisiana Supreme Court has ruled in *Louisiana Materials Co.* that failure to record a privilege within the time limit expressed in Louisiana Revised Statutes 9:4862 forfeits the priority but not the privilege.[83] But the supreme court did not decide what prescriptive period does apply. The court of appeal here adopts the same position regarding prescription as *Genina Marine Services, Inc. v. Mark Producing Co.*[84] and *I. E. Miller of Eunice, Inc. v. Source Petroleum, Inc.*[85] which have held that in regard to unrecorded liens or liens filed beyond the time period specified in Louisiana Revised Statutes 9:4862 (90 days in this case, 180 days after August 30, 1983),[86] suit must be filed within one year of the last day on which services were preformed. The case was

82. 499 So. 2d 257 (La. App. 1st Cir. 1987).
83. 493 So. 2d 1141. La. R.S. 9:4862 (Supp. 1987).
84. 490 So. 2d 1158 (La. App. 3d Cir. 1986).
85. 484 So. 2d 239 (La. App. 3d Cir. 1986).
86. La. R.S. 9:4862 (Supp. 1987).

remanded for further proceedings to determine if prescription as to ARCO was interrupted by Genina's proceeding against Briley Marine in bankruptcy court.

Who is a "Furnisher"?

The case of *Texas Pipe and Supply Co. v. Coon Ridge Pipeline Co., Inc.*[87] presented the issue of who may assert a lien under the Act. Here Bell Supply Company agreed to provide the defendants' predecessor with pipe for construction of a pipeline. Bell in turn contracted with Texas Pipe for the pipe supplies. Bell Supply was apparently paid for the pipe but did not pay Texas Pipe before filing for Chapter 11 protection. The defendants, owners of interest in the pipeline, signed guarantees in order that Texas Pipe would remove a lien it had filed against the pipeline. They resisted payment, however, on the ground that Bell was the furnisher of the pipe and had already been paid, and that Texas Pipe was not entitled to any lien rights under Louisiana Revised Statutes 9:4861.[88] The trial court and court of appeal ruled that Texas Pipe was a "furnisher" of materials within the meaning of the Act even though there was no contractual relationship with the defendants.[89] The court apparently placed considerable reliance on the fact that it was Texas Pipe that actually delivered the materials to the pipeline work sites and that the pipe which was delivered was used in the building of the pipeline.

A similar issue as to who is a "furnisher" was involved in *P & A Well Service Inc. v. Blackie's Power Swivels, Inc.*[90] A renter of drilling equipment, Blackie's, filed a lien notice against mineral leases where a drilling contractor, P & A, was performing services. Blackie's had rented the equipment to Fishing Tool and Fishing Tool in turn had rented the equipment to P & A. The contractor, P & A, then filed suit for cancellation of the lien. The court agreed with P & A that Blackie's was not a "furnisher" within the meaning of the statute because Blackie's had not furnished P & A with any equipment. The case of *Oil Well Supply Co. v. Independent Oil Co.*[91] was distinguished on the ground that while there had been no contractual relationship in that case, the party seeking to establish the lien had furnished materials and supplies directly to the oil well contractor.

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87. 506 So. 2d 1296 (La. App. 2d Cir. 1987).
88. La. R.S. 9:4861 (Supp. 1987).
89. The court relied on Oil Well Supply Co. v. Indep. Oil Co., 219 La. 936, 54 So. 2d 330 (1951).
90. 507 So. 2d 280 (La. App. 3d Cir. 1987).
91. 219 La. 936, 54 So. 2d 330 (1951).

Seizure of Movables of Third Party by Lessor

The court of appeal found an absence of express law in the Mineral Code governing the rights of third parties upon seizure of their movables by a lessor for nonpayment of rent or other lease obligations in the case of *Vaught v. Ratliff*.[92] Here Ratliff was doing work on a lease for the lessee of plaintiffs and had a truck, a mud pump, a set of tongs, and various tools on the lease site. When the plaintiffs brought suit against the lessee for unpaid royalties and damages, they seized Ratliff's movables pursuant to their lessor's privilege provided in the Mineral Code.[93] Ratliff intervened to seek dissolution of the writ of sequestration insofar as it affected his property. He asserted that the Civil Code allowed such a remedy.[94] The trial court denied his intervention, stating that the Mineral Code covered the subject and excluded operation of the Civil Code provision. The court of appeal reversed. While the Mineral Code did not conflict with the Civil Code article in question, the court of appeal said there was an absence of any treatment of the rights of third parties in the Mineral Code provisions and that such treatment should be considered by the legislature rather than covered by judicial emendation. It did find, however, that the seizure deprived Ratliff of tools and instruments necessary for the exercise of his trade, calling or profession, and that this was covered by the general exemptions from seizure and sale.[95]

VI. Interruption of Prescription

Mineral Servitudes: Obstacle to Use; Suspension of Prescription

A landowner's efforts to prevent access to and drilling on land burdened by a mineral servitude was held in *Corley v. Craft*[96] to have created an obstacle to use of the servitude thereby suspending the accrual of liberative prescription.

Corley sold a tract of land to Craft reserving the minerals in 1972. In 1973 Corley granted a lease on the tract, and the lessee in 1974 discovered gas but shut the well in while awaiting a pipeline connection. In 1984 the current lessee sought to drill a second well to interrupt prescription within the ten year period required by Louisiana law after the landowner refused to grant a pipeline right-of-way. The landowner undertook several actions to prevent access to or drilling on the tract;

92. 509 So. 2d 647 (La. App. 3d Cir. 1987).
93. La. R.S. 31:146 (1975).
94. La. Civ. Code art. 2707.
95. La. Civ. Code art. 2705. La. R.S. 13:3881 (Supp. 1987).
96. 501 So. 2d 1049 (La. App. 2d Cir.), writ denied, 503 So. 2d 18 (1987).

he cut the only access road, blocked the entrance after another access road was laid, and then confessed to unlawfully dumping waste on the property in order that the Department of Environmental Quality would block drilling. The lessor-servitude owner and her lessee brought suit for declaration that prescription had been suspended, for damages, and for injunctive relief. A jury returned a verdict for the defendant landowner, but the trial judge entered judgment NOV for the plaintiffs, granting plaintiffs 120 days from the date of final judgment in which to interrupt prescription. Defendants appealed, wherein, the appellate court amended and affirmed.

Under the Mineral Code, if the owner of a mineral servitude is prevented from using it by an obstacle that he can neither prevent nor remove, the prescription of nonuse does not run as long as the obstacle remains. Here a continuous chain of obstacles within the contemplation of the Mineral Code was created thereby suspending the accrual of liberative prescription. But the facts showed that only about ten days remained before accrual of prescription when the obstacles were established. The trial court granted 120 days extension in recognition of "gear-up" time needed to take actions necessary to interrupt prescription, but the court of appeal amended this to forty-five days.

VII. Tort Cases Involving Oil and Gas

Claim of Improper Completion of Well and Excessively Large Pit

The court ruled in *Fuller v. Franks Petroleum, Inc.*[97] that the evidence supported jury findings that defendant lessee did not complete a well improperly and did not use an excessively large pit; however, the court of appeal reversed the judgment below that the lessee had paid royalties and instead rendered a decision awarding royalties plus interest and attorney's fees.

Plaintiff lessors brought suit against their lessees seeking damages and lease cancellation based on claims that the lessees failed to operate as a prudent operator and failed to pay royalties timely. The plaintiffs asserted that the operator improperly completed the well by allowing it to be shut in without removing all fract water, thereby allowing the creation of a permeability barrier, and that the operator used an excessively large pit, causing them loss of land for hay production. The jury found on all points for the defendants and the trial judge entered judgment accordingly. Plaintiffs appealed and as indicated, the court reversed in part and rendered. The jury's findings were well supported by the evidence as to the operation of the well. However,

97. 501 So. 2d 1024 (La. App. 2d Cir. 1987).

the evidence established that the defendant Franks had not stated a reasonable cause for not paying the condensate royalty within thirty days after demand as provided by statute after demand and had not paid the royalty. The presumption of due receipt of a communication through the mail was rebutted by the defendants' and plaintiffs' testimony. The court of appeal awarded to the plaintiffs the amount of royalties due plus interest from the date due and a reasonable attorney's fee to compensate for attorney's services only insofar as they related to the nonpayment of the relatively small amount of royalties for the period in question. The court noted this award would be the same even if it had concluded that the mailing of the checks had constituted payment.

Improper Well Location: Damages

In *Toce Oil Co. v. Central Industries*,[98] the court ruled that an oil company (not the working interest owners) which hired the surveyor and others for drilling of the well was the proper party to bring suit for improper location drilling of the well and that a surveyor does have a duty to locate stakes properly and to remove stakes located improperly.

In this case, Toce Oil Company drilled a well and discovered it was drilled at an incorrect location. It brought suit against the surveyor that staked the well location, the boardroad contractor that prepared the incorrect site for drilling, and the contractor's insurer. The surveyor staked two correct locations and an incorrect location. The boardroad contractor found only the stake at the incorrect location and prepared its bid for drilling preparations there. After discovering that the well was drilled at the wrong location, Toce credited its investors for the well cost and then redrilled at the proper location.

The trial court ruled in favor of Toce for an amount representing 87% of the damages claimed (55% from the surveyor and 32% from the boardroad contractor and its insurer) and found Toce responsible for 13% of the negligence contributing to the drilling of the mislocated well on the basis that Toce should have realized that the well was incorrectly located after being put on notice by a call from a working interest owner who had observed the well and made inquiry about the location. The surveyor and the boardroad contractor appealed and the court of appeal affirmed. The oil company was the proper party to bring the suit, not the working interest owners, because the company was the party that entered into the contracts with the defendants. In addition, the surveyor has a duty to prepare the proper location and to remove any stakes that are not at a proper location; the client oil

98. 488 So. 2d 331 (La. App. 3d Cir. 1986).

company does not assume the risk of improper locations staked. The court did not set aside the percentage of negligence allocated by the trial court. The boardroad contractor's preparation of the wrong location for the drilling site was a cause-in-fact of the oil company's damages.

Blowouts

Where a neighboring well was injured by a blowout of a well on adjacent property, the owner of the blowout well was held not to be liable for damages that were merely speculative and thus not proven to a legal certainty. This occured in the case of *Coon v. Placid Oil Co.*[99] where the court also ruled that the drilling company working pursuant to a day contract, under the supervision of the well owner, was not liable for any damages arising from the blowout.

Plaintiff Coon was the lessee of other plaintiffs, the Kellys. He drilled a well that penetrated three potentially productive sands, the K-2, the K-3 and the S-2. He completed in the S-2 but encountered sanding difficulties after six months of production. He moved up hole and completed in the K-3, flaring gas for a short time in May 1981. Some 900 feet away on adjacent property, defendant Placid began drilling an offset to Coon's well. Then Placid began, with a rig under a day work contract from defendant Justiss, a second offset well some 450 feet from the Coon well. This second Placid offset well blew out. Coon shut in his well, and there was substantial surface and subsurface damage from the blowout which was found to be caused by inadequate mud. Plaintiffs brought suit against defendants Placid and Justiss for surface and subsurface damages. The trial court dismissed the claims against Justiss on the basis that Placid was supervising the drilling and was solely liable. The court awarded damages for loss of future income in favor of Coon for $724,402 and in favor of the Kellys for $145,775 for loss of future income, surface damages, mental anguish and inconvenience. Placid was also charged with expert witness fees. Plaintiffs and defendant Placid appealed, wherein, the court reversed and rendered in part and affirmed in part.

The court of appeal ruled that it is necessary for the injured claimant to prove damages so that they are sufficiently removed from the purely speculative realm to the sphere of reality. The plaintiffs failed to meet this burden, said the court, as to the oil sands and thus failed to prove their claim for loss of future income to a legal certainty. There was no error as to surface damages. Since supervisory responsibility was charged to Placid's supervisor at the rig and Justiss's

99. 493 So. 2d 1236 (La. App. 3d Cir.), writ denied, 497 So. 2d 1002 (1986).

employees only worked under his direction, Placid was soley liable. The expert witness fees which related to subterranean damages were not to be assessed.

As the court states in *Coon v. Placid*, the jurisprudence has often denied damages resulting from oil well blowouts because such damage awards are too speculative. This avoidance of speculation in damages reduces considerably the impact of the Mineral Code article 10 which provides: "A person with rights in a common reservoir or deposit of mineral may not make works, operate, or otherwise use his rights so as to deprive another intentionally or negligently of the liberty of enjoying his rights, or that may intentionally or negligently cause damage to him."[100] The comments to this article make it clear that the Mineral Code contemplates damages for reservoir damage resulting from well blowouts by its references to cases from other jurisdictions imposing liability in such circumstances. One might note the anomaly of the geological and other data pertaining to the plaintiff's well being of sufficient quality to induce the defendant to drill two offset wells, yet inadequate to sustain a judgment for plaintiff.

Implied Right of Lessee to Use Leased Premises for Disposal by Injection of Salt Water from Other Wells on Same Lease

The court of appeal for the third circuit, in *Leger v. Petroleum Engineers, Inc.*,[101] ruled that an oil and gas lessee had the implied right to use the leased premises for injection of salt water produced in conjunction with production of oil and gas on the same leasehold. The injection well was reasonably necessary for the accomplishment of the purposes of the lease.

Lessors brought suit against lessee for damages from disposal of salt water by the lessee through a well converted from a dry hole into an injection well on the property. The salt water injected came from two other producing wells on the same lease. The plaintiffs claimed that the injections were not authorized by the lease and were in fact prohibited by a clause providing for payment for damages to timber and growing crops. The trial court held for defendant, the plaintiffs appealed, and the court of appeal affirmed. The lessee under an oil and gas lease may make such use of the surface of the leased property and construct such works thereon as are reasonably necessary for the full exploration of the property and enjoyment of the leasehold interest. The injection well here was reasonably necessary for the accomplishment of the purpose of the lease: the production of oil and gas. The

100. La. R.S. 31:10 (1975).
101. 499 So. 2d 953 (La. App. 3d Cir. 1986).

surface damage clause deals only with payment of damages and restoration of the surface and has no application to the injection well.

Surface Damages

In *Edwards v. Jeems Bayou Production Co.*,[102] the plaintiff landowner brought suit against his mineral lessee for damages to the leased premises. A well drilled by the lessee had been shut-in for about two and one-half years at the time of suit. About four acres were taken up by the well site, pits had not been properly filled and the area around the well was in such rough condition it could not be worked by a bush hog or tractor. About two acres would be needed for operations when a purchaser for the gas became available. These conditions and a road left the twelve acre hay meadow too small for cultivation. The trial court awarded a total of $4,375 to the plaintiff for loss of hay ($1200), repair of fence ($35), loss of an oak tree ($140) and damage to the land ($3,000).

Damages were available to the landowner where the lessee's use of the land was unreasonable and where the lessee had failed to restore the land as nearly as was practical to its original condition.[103] Negligence, noted the court, is not necessary for the landowner to recover for damages. However, the court ruled that the lessee had the right to use so much of the land as was reasonably necessary for the drilling and operation of the well. No growing hay crop was destroyed and the landowner was not entitled to recover damages for the entire twelve acres as to future crops of hay. The award to the plaintiff was reduced to reflect this, when the court of appeal found that $2,000 would be adequate to cover the cost of restoring the part of the drill site not needed in the lessee's ongoing operations.

Trespass

Through a surveyor's error, a well was drilled on the property line dividing on one side a tract of land leased by defendant operator and on the other side land owned by the plaintiff. The operator did not participate in or supervise the surveying of the well and did not visit the site until after the well was drilled. The plaintiff landowners in *Reitzell v. Spooner*[104] brought suit for trespass against the defendant

102. 507 So. 2d 11 (La. App. 2d Cir. 1987).

103. The court relied on article 11 of the Mineral Code, La. R.S. 31:11 (Supp. 1987), which provides that the owner of land burdened by a mineral right and the owner of a mineral right must exercise their respective rights with reasonable regard for the rights of the other, and article 122 of the Mineral Code, La. R.S. 31:122 (1975), which provides that the mineral lessee will operate as a reasonably prudent operator.

104. 505 So. 2d 829 (La. App. 2d Cir. 1987).

for the well drilled on their property. The operator was held liable as he was the person who engaged the services of the surveyor and who instructed the drilling company to drill the well at the location staked by the surveyor. Thus, the defendant caused the trespass and had to respond in damages. The amount of the award was reduced because of incorrect calculation by the trial court.

VIII. Conservation Cases: Pooling and Unitization

Unit Operator—Notice to Non-Operators

By statute, the operator of a unit is required to report to other owners on a monthly basis the amount of oil or gas produced and the manner of disposal.[105] The statute further provides for cost itemization for wells within ninety days of well completion to owners of unleased interests.[106] It also provides for a penalty resulting from failure to report and for forfeiture of the right to demand contribution from the owners of the unleased owners.[107] In *Rivers v. Sun Oil Co.*, mineral interest owners brought suit for costs of production as a result of the operator's failure to comply with the statute.[108] The operator reconvened for alleged overpayment of royalties. The trial court found, and the appellate court affirmed, that the operator had not complied with the reporting requirements of section 103.1 of title 30 of the Louisiana Revised Statutes for drilling and for reworking operations. The demands by the plaintiffs were sufficient to satisfy the notice requirements of the statute. The plaintiffs had urged also that the trial court award penalties to them under section 104 of title 30. However, this section of the statute is criminal in nature and does not contemplate the possibility of fines being paid to mineral interest owners. The courts denied recovery to the defendant on its reconventional demand for overpayment of royalties.

105. La. R.S. 30:103 (1975).
106. La. R.S. 30:103.1 (1975).
107. La. R.S. 30:103.2 (1975). La. R.S. 30:104 (1975) provides for a criminal penalty for failure to comply with these requirements.
108. 503 So. 2d 1036 (La. App. 2d Cir. 1987).