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Louisiana and Texas Oil & Gas Law: An Overview of the Differences*

*Patrick H. Martin*** and
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I. INTRODUCTION—SCOPE OF ARTICLE

There is more that separates Louisiana and Texas than the Sabine River. Our two states have followed different paths to the law, as is soon discovered by any attorney who attempts to practice across state lines. Such attorneys find they must confront new terminology. Louisiana lawyers new to Texas may think a *remainder* is an after-Christmas sales item at Neiman-Marcus. A Texas lawyer, when faced with reference to a *naked owner* in Louisiana law, perhaps will conjure up the sort of legal practice that William Hurt had in drafting a will for Kathleen Turner in *Body Heat*. The terms apply to types of interest which are virtually the same. Our purpose in this presentation is to highlight certain features of the legal systems of the two states that make them distinct from one another, and also to go over certain areas in which they are not terribly different.

II. BACKGROUND—ORIGIN OF LEGAL SYSTEMS

Both Louisiana and Texas began their existence as colonies with their legal systems based on a civil code. Both developed oil and gas at about the same time. The same companies have developed petroleum in both states in similar types of geologic formations using similar contracts and financing arrangements. Yet there are fundamental differences in their basic premises regarding oil and gas law.

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A. *Texas*

Because Mexico was a colony of Spain, the Spanish civil law was the first law of Texas. After the Mexican Revolution against Spain, the Spanish civil law continued in connection with the decrees and statutes of the government of Mexico. Texas declared its independence from Mexico in 1836, and for four years thereafter the Republic Texas retained the civil law as the rule of decision.[1] For a relatively brief period of time Texas law could be said to be an "odd mixture" of common law and Mexican civil law.[2] But Texas rejected the path followed by Louisiana, which was to embrace the civilian tradition. Texas adopted the common law of England as the rule of decision in 1840.[3] By the time oil and gas development began in Texas early in this century, the common law was firmly entrenched. The civil law antecedents of Texas law have had very little influence on Texas oil and gas law. Lands in Texas have been granted by the Kingdom of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas. This fact has affected title to land but the effect has seemed to be more in the area of surface water rights and easement issues than oil and gas.[4]

Justice Daniel, dissenting in the well-known case of *Sun Oil Co. v. Whitaker*,[5] attributed the majority's decision favoring the mineral estate's dominance over the surface estate to the Spanish-Mexican legal heritage. He said:

> The rule in Texas that a severed mineral estate is dominant and the surface estate servient had its genesis in the Spanish law under which the King held separate ownership of all minerals under both private and public lands. As with all royal patri-

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1. The Constitution of the Republic of Texas provided: "The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases, the common law shall be the rule of decision." Tex. Const. art. IV, § 13 (1836).

2. James W. Paulsen, A Short History of the Supreme Court of the Republic of Texas, 65 Tex. L. Rev. 237, 271 (1986).

3. The Spanish civil law was abolished by the Texas legislature in 1840. Act of Jan. 20, 1840, 1840 Laws of Tex. 3, reprinted in 2 Laws of Tex. 177 (Gammel 1898).

4. The statutes in force in the Republic of Texas before the introduction of the common law are to be construed in the light of the Mexican civil law, and the validity and legal effect of contracts and of grants of land made before the adoption of the common law must be determined according to the civil law in effect at the time of the grants. Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404 (1932); State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App. 1961), aff'd, 163 Tex. 381, 355 S.W.2d 502 (1962) (adopting opinion of the Court of Civil Appeals); Kraft v. Langford, 565 S.W.2d 223 (Tex. 1978); In re the Adjudication Of Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250 (Tex. 1984), rev'g 645 S.W.2d 596 (Tex. Civ. App. 1983).

5. 483 S.W.2d 808 (Tex. 1972).

> monies, the sovereign's separate and severed mineral ownership on private lands rendered the surface estate servient and subject to any use the King might find necessary to mine for and produce the minerals on or beneath the lands of his subjects.[6]

It is true that Texas, as a republic and in the period following its entry into the Union, followed the Spanish and Mexican civil law practice of reserving the minerals from all public lands that were sold or otherwise conveyed. However, minerals were released to the surface owners of the land by provisions included in the state's Constitutions of 1866, 1869, and 1876, and by statutes in 1879 and 1895.[7] In the period 1895 through 1931, the state's reserved rights in minerals in lands conveyed to private parties were relinquished to the extent of fifteen-sixteenths, and the leasing of such minerals is governed by the Texas Relinquishment Act,[8] about which we need say no more.

As indicated, the real development of Texas oil and gas law has been in this century. The first oil well in Texas was drilled near Oil Springs in Nacagdoches County in 1866.[9] There were small amounts of production of oil in Texas in the late 1880's and early 1890's. In 1894 oil was discovered near Corsicana and led to commercial production. The biggest increase in production came in 1901 with the Spindletop gusher near Beaumont. The early Texas cases did look to precedents in other states in which production had already taken place.

B. Louisiana

The Starting Point. The initial inquiry into developing an appreciation for differences in Louisiana law must begin with the origins of the Louisiana Civil Code.[10] The preference of Louisianians for a civil code arises from the historical forces associated with the conception of

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6. Justice Daniel himself goes on to observe: "The same general doctrine applied at common law under crown ownership of all minerals." 483 S.W.2d 808, 816 n.4 (Tex. 1972), citing Cowan v. Hardeman, 26 Tex. 217 (1862).

7. H. Philip (Flip) Whitworth, Leasing and Operating State-owned Lands for Oil and Gas Development, XVI Tex. Tech L. Rev. 673 (1985); Tex. Const. of 1866 art. VII, § 39; Tex. Const. of 1869 art. X, § 9; Tex. Const. art. XIV, § 7.

8. Tex. Nat. Res. Code Ann. ch. 52, subch. F (§§ 52.171-.186) (Vernon 1978 & Supp. 1989).

9. Robert E. Hardwicke, Legal History of Conservation of Oil in Texas, ABA, Legal History of Conservation of Oil and Gas, 214, 217 (1939).

10. Shael Herman, David Combe, and Thomas Carbonneau prepared the pamphlet, The Louisiana Civil Code: A Humanistic Appraisal. The European antecedents of the Civil Law of Louisiana are provided as overviews of and are drawn in part from the pamphlet and from John H. Merryman, The Civil Law Tradition (1969). Louisiana property law in this paper derives in part from A Short Course on Louisiana Property Law and Mineral Law, a 1985 lecture series by Professor Thomas A. Harrell, Director of the Mineral Law Institute, Paul M. Hebert Law Center, Louisiana State University.

the Louisiana Civil Code. Among the developments important to the shaping of Louisiana Law are the following events:

1. 1699—Pierre le Moyne, Sieur d'Iberville explores the Mississippi and establishes a royal French colony at Ocean Springs, Mississippi;
2. 1712—France grants a charter to Antoine Crozat providing him with a monopoly in all commercial matters over Louisiana;
3. 1717—Crozat surrenders his royal charter;
4. 1718—Jean Baptiste le Moyne, Sieur de Bienville establishes New Orleans;
5. 1762—France secretly cedes Louisiana to Spain;
6. 1768—Local French inhabitants revolt against Spanish rule;
7. 1769—Don Alejandro O'Reilly takes possession of Louisiana for Spain;
8. 1801—Spain retrocedes Louisiana to France by the Treaty of San Ildefonso;
9. 1803—On November 30, Spain formally transfers Louisiana to France;
10. 1803—On December 20, Laussat, a French colonial prefect, transfers Louisiana to the United States;
11. 1804—Congress divides the Louisiana Territory into the Territory of Orleans and the District of Louisiana;
12. 1804—French Assembly enacts the French Civil Code (or Code Napoleon);
13. 1808—March 31, Louisiana Legislature enacts Digest of the Civil Law Now in Force in the Territory of Orleans;[11]
14. 1823—Louisiana Legislature passes act adopting projet of Civil Code; and
15. 1825—The Louisiana Civil Code is adopted, written entirely in French.

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11. A digest is a summary or compilation of preexisting law designed to make that law known and available; however, prior law remains authoritative. By contrast, a true code replaces prior law and itself becomes the definitive and final statement of the law. There is lively scholarly debate as to which system, French or Spanish, Louisiana most borrowed from. Professor Batiza of Tulane has argued for the primacy of French sources, Rodolpho Batiza, The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance, 46 Tul. L. Rev. 4 (1971); Professor Pascal of LSU has argued that Spanish sources were more important in areas where the two systems differed, Robert A. Pascal, Sources of the Digest of 1808: A Reply to Professor Batiza, 46 Tul. L. Rev. 603 (1972). See also, Joseph Modeste Sweeney, Tournament of Scholars Over the Sources of the Civil Code of 1808, 46 Tul. L. Rev. 585 (1972). A recent discussion that illustrates the latitude the civilian tradition has given to the Louisiana judiciary is Kenneth M. Murchison, The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence, 49 La. L. Rev. 1 (1988).

Civil Law Systems. Preference of Louisianians and civilians generally for a civil code developed over many, many years. The term code has its derivation in the Latin word codex, which means a slice of a tree trunk utilized for writing. The first of the modern codes was the Code Napoleon of 1804. But for centuries, legal scholars had been evidencing their preferences for codal based law and writing codes. Ancient Babylonian civilization produced the Code of Hammurabi. The civil law tradition of compiling and codifying Roman law is traceable since 533, with the introduction of the first three books of the Institutes of Justinian (Of Persons, Of Things, and Of Obligations). The Roman law influenced codification of law in Europe in a variety of codes such as the Visigoth Code and other barbarian codes written between the sixth and ninth centuries and the Customs of Paris. Such codes for the most part collected the law in existence without changing or rearranging the law. In striking contrast, the Code Napoleon embraced and embodied sweeping changes in politics, social perspective, and legal technique. It provided comprehensive, logical organizations of general principles of law to be applied by the process of deduction and extended by analogy to new circumstances. The Code Napoleon was spread throughout Europe by Napoleon's conquests. It was the most influential of the civil law national codes and was the basis of the Austrian Civil Code of 1811, the Italian Civil Code of 1865, the Spanish Civil Code of 1888, and the German Civil Code of 1900. Other comprehensive codes were compiled in Belgium, Romania, Bulgaria, Japan, Egypt, and many countries in Latin America. The Louisiana Civil Code is very much a part of this modern code tradition, and indeed preceded many of the other civil code systems of Europe.

To better understand the civil law system, it may be helpful to observe that it developed from several distinct sub-traditions. In addition to Roman civil law, these include canon law and commercial law.

Roman Civil Law. The most ancient sub-tradition in the civil law system is directly traceable to Roman law as compiled and codified under the Emperor Justinian in the sixth century A.D. The Institutes of Justinian codified the law of persons, the family, inheritance, property, torts, unjust enrichment, contracts, and the remedies by which interests falling within these categories were judicially protected. Although the rules actually in force have changed, sometimes drastically, since the introduction of the Institutes in 533, the first three books of the Institutes and the major nineteenth century civil codes, of which the Code Napoleon is archtypical, all deal with the same sets of problems and relationships. The subject matter of these civil codes are almost identical with the subject matter of the first three books of the Institutes of Justinian. The substantive areas of law that they cover are what a civil lawyer calls "civil law." The strongly held belief that this group of substantive law areas is a related body of law that constitutes the

fundamental content of the legal system is ingrained in all parts of the world that have received the civil law tradition.

Canon Law. The second oldest element of the civil law tradition is the canon law of the Roman Catholic Church. Canon law and its procedural rules were developed by the Church for its own governance and to regulate the rights and obligations of its members. In many ways, canon law mirrored Roman civil law. Roman civil law was the universal law of secular society, the empire, from which the authority of the emperor was derived. Similarly, canon law was the universal law of the spiritual domain, directly associated with the authority of the pope. Each initially had its own sphere of application and a separate set of courts, civil courts for Roman law and ecclesiastical courts for canon law. However, over the centuries the two courts' jurisdictions overlapped. Before the Reformation, ecclesiastical courts commonly exercised civil jurisdiction in family law and succession matters and over certain criminal matters. The study of canon law became joined with the study of Roman civil law in Italian universities, with a joint degree conferred (a Juris Utriusque Degree or Doctor of Both Laws) that is still granted in some universities in the civil law world. Because the two systems were studied together, there was a tendency for each to influence the other, particularly in the areas of family law and successions, criminal law and procedure. By the time that ecclesiastical courts were stripped of their civil jurisdiction, many substantive and procedural principles developed in ecclesiastical courts had been adopted by civil courts.

Commercial Law. The third sub-tradition of civil law is commercial law. Commercial law of Western Europe had its principal development in Italy during the time of the Crusades. Italian merchants formed guilds and established rules for the conduct of commercial affairs. Medieval Italian towns became commercial centers and the rules developed within these towns were influential in the development of commercial law. In contrast to Roman civil law and canon law, which were dominated by scholars, commercial law was the pragmatic creation of practical men engaged in commerce. Application of commercial law and its interpretation occurred in commercial courts, in which the judges were merchants who were more likely to have been more concerned with the needs of commerce and the interests of merchants. They were less interested in the sanctity of compilation in the mold of Justinian or the canonists. Commercial law that developed out of the activities of the guilds and of the maritime cities became international in character and penetrated throughout the commercial world. Eventually, the common commercial law of Europe was incorporated into commercial codes adopted throughout the civil law world in the eighteenth and nineteenth centuries.

Roman civil law, canon law, and commercial law are the principal historical source of the concepts, institutions, and procedures of modern civil law systems. From these come the five basic codes that are typically

found in a civil law jurisdiction: the civil code, the commercial code, the code of civil procedure, the criminal code, and the code of criminal procedure. The civil law system found today in Louisiana is archtypical insofar as it embraces all of the five basic codes; however, much in the manner that specialized commercial laws developed in other civil law systems, in Louisiana special treatment has been given to minerals.

Despite the rich heritage of the Louisiana Civil Code, Louisiana oil and gas law is like Huey Long. Long used to say he was *sui generis*.[12] So is Louisiana's regime of mineral rights. The law of Eighteenth and early Nineteenth Century Spain and France from which Louisiana's legal system is derived was not developed with any thought to oil and gas exploration and production.

Drilling for oil took place in Louisiana as early as 1866. Anthony Lucas, who discovered the Texas Spindletop Field at Beaumont in January 1901, actually had started looking for oil in Louisiana in 1893. He was a mining engineer who had come to oversee the salt mines at Avery Island and saw the potential for oil in relation to the salt domes. Failures in Louisiana drove him to Texas where he was much more successful. The success at Spindletop led others back to Louisiana where in September 1901 at Jennings, only 90 miles from Beaumont, oil was discovered.[13]

When oil and gas exploration did begin in Louisiana the courts were left with the responsibility for fashioning a body of law governing the rights for development of petroleum. The Civil Code of Louisiana had not been drafted with any thought to minerals.[14] The legislature did not enact a specific body of mineral law until 1974.

The earliest book on Louisiana mineral law was published in 1922. Its author, George G. Dimick of the Shreveport bar, made the following observation:

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12. T. Harry Williams, Huey Long 414 (1969): "Huey himself liked to pretend he was too different to be classified. On one occasion, in his hotel suite in New Orleans, while he dozed on a bed, a group of visiting reporters fell to analyzing his personality. He finally roused himself and ended the discussion. 'Oh, hell,' he said, 'say that I'm *sui generis* and let it go at that.'"

13. Kenny A. Franks and Paul F. Lambert, Early Louisiana and Arkansas Oil 17-21 (1982).

14. Colonel John H. Tucker spoke of the mineral law of Louisiana as being explicable by the aphorism "au-dela du code civil mais par le code civil"—beyond the civil code but through the civil code. He said, "Louisiana developed its mineral law quite logically by following the practice indicated, arriving at the basic decision that the sale or reservation of mineral rights by the owner of the immovable to which it applied created a real right in the nature of a predial servitude, to which the rules relating to predial servitude would be applied as near as may be." Tucker, Foreword, Louisiana Civil Code, vii (Yiannopoulos ed. 1981). A more developed exposition by Colonel Tucker of the Civil Code foundations of Louisiana's mineral law is his article entitled Au-dela du Code Civil mais par le Code Civil, 34 La. L. Rev. 957 (1974).

> The discovery of oil in Louisiana found the State with no mining laws, as that industry was unknown in this section. The few antiquated sections of the Codes and statutes which might apply were evidently casual and accidental expressions and illustrations enacted without the remotest idea that they would ever apply to the production of oil and gas.[15]

Harriet S. Daggett, the noted authority, dedicated her treatise on Louisiana oil and gas law to the Louisiana judiciary during the years 1900 until 1939 for their role in shaping Louisiana mineral law. She observed:

> The law of oil and gas is new and without precedent. . . . [T]he courts of Louisiana were without aid from the legislature. They could receive little from counsel, though the members of the Louisiana Bar who are concerned in these issues have not been unmindful of the complexity of the problems. The decisions of other states were of small value because Louisiana is a civil-law state with an old civil code. The French, Spanish, and Roman sources furnished no precedents because the problem was unknown to those forefathers. The judiciary has ever been a determining factor in defining frontier interpretation of new social and economic policies. The history of legal thought cannot neglect the role of judge-made law. Louisiana jurisprudence on oil and gas is a continuing tribute to the patience, research, wisdom, and fairness of the members of the bench of the state.[16]

In the first reported Louisiana oil and gas case, *Escoubas v. Louisiana Petroleum and Coal Oil Co.*,[17] the Louisiana Supreme Court was called upon to interpret an agreement executed on October 5, 1865, granting rights to one party for a term of ten years stipulating that such party should have "the entire, absolute and undivided control of all petroleum, mineral, oil or other similar products existing beneath the surface of the land" owned by the other party in Calcasieu Parish, Louisiana, and "the right to bore, dig and mine for said petroleum or similar product, to extract the same, to prepare it for market by refining or otherwise, to transport, sell and dispose of said petroleum in any way he might see fit, and in general to have and enjoy all the mineral rights of the parties of the first part in and in reference to said land." The grantee agreed to pay $20,000 cash, by November 1, 1865, and in the event of oil or petroleum being found in "workable quantity," to pay to the grantor one-half of the gross product of such oil or petroleum.

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15. George G. Dimick, Louisiana Law of Oil and Gas 3 (1922).
16. Harriet S. Daggett, Mineral Rights in Louisiana xxxiv-xxxv (1939).
17. 22 La. Ann. 280 (1870).

The dispute was over failure of the grantee to carry on the search for petroleum pursuant to the term of the agreement. The Louisiana Supreme Court, faced with its first oil and gas lease case, fashioned its decision by referring to established law of conventional obligations and immovable property. The case was decided in favor of the landowners who were held to be entitled to declare a forfeiture of the contract by suit and claim possession of their lands without a formal putting in default.[18] The *Escoubas* case is an example of the manner in which mineral law, the development of the body of law governing minerals in Louisiana before the adoption of the Mineral Code, was reposed in decisions of courts, principally, the Louisiana Supreme Court.

A hazard of this method of legal development was a degree of doctrinal inconsistency and unpredictability that appeared in some cases,[19] and occasional application of principles ill-suited to the industry.[20] It is not surprising that comprehensive legislation was seen as desirable.

A proposed Mineral Code appeared as early as 1938 after Mr. Sidney Herold was appointed by the governor to head a Commission to propose such a code.[21] The Louisiana Law Institute, with the concurrence of the Mineral Law Section of the Louisiana Bar Association, undertook a project for adoption of a Mineral Code under the direction of Professor Eugene Nabors of the Tulane Law School.[22] That work was completed by Professor George W. Hardy of the LSU Law School after he was appointed Reporter in July, 1963.[23] The legislature enacted the Mineral Code in 1974, effective January 1, 1975.[24] The Mineral Code has removed from question some areas of existing judicial decisions that may have been of doubtful authority. Because the Code is now statute rather than

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18. Id. at 284.

19. Compare DeMoss v. Sample, 143 La. 243, 78 So. 482 (1918) and Calhoun v. Ardis, 144 La. 311, 80 So. 548 (1919) with Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922).

20. Gulf Refining Co. v. Glassell, 186 La. 190, 171 So. 846 (1936) (discussed in text accompanying infra note 250); Tyson v. Surf Oil Co., 195 La. 248, 196 So. 336 (1940).

21. Sidney L. Herold, Bench and Bar: Symposium on the Proposed Louisiana Mineral Code, 12 Tul. L. Rev. 552 (1938). The Commission of seven was appointed pursuant to Act 170 of 1936. They were charged by the statute to prepare a draft to be known as A Code of the Oil, Gas and Mineral Laws of the State of Louisiana. The act was a joint resolution submitted to the people at the general election of 1936 and was adopted as a constitutional amendment.

22. Eugene A. Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute, 25 Tul. L. Rev. 30, 155, 303, 485 (1950, 1951), 26 Tul. L. Rev. 23, 172, 303 (1951, 1952); Louisiana State Law Institute, Seventh Biennial Report, 1952.

23. George W. Hardy, III, Report to the Annual Meeting of the Louisiana State Law Institute, 1964.

24. 1974 La. Acts No. 50; La. R.S. 31:1 et seq.

a body of judicial decisions, the principles embodied in the articles will not be capable of being changed by judicial decision even when the courts are no longer persuaded of the wisdom of the judicial decisions which were codified.[25]

The Mineral Code is a specialized extension of the Civil Code.[26] The Civil Code or other laws are applicable in instances in which the Mineral Code "does not expressly or impliedly provide for a particular situation."[27] The courts do have occasion to go to the Civil Code for matters not expressly resolved by the Mineral Code.[28]

There is a stylistic difference between certain provisions of the Mineral Code and the Civil Code. Typically a code expresses the most general of principles, leaving it to a court to apply the broad principles to a specific set of facts. Much of the Mineral Code is in this tradition. But there are portions of the Mineral Code that go into rather more detail, more like a typical statute that attempts to cover all circumstances that may arise. For example, in dealing with liberative prescription, Article 29 of the Mineral Code provides that "prescription of nonuse running against a mineral servitude is interrupted by good faith oper-

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25. A particular example of this is in Andrus v. Kahao, 414 So. 2d 1199 (La. 1982). The ownership of the right to receive bonus and delay rental was at issue. The sellers of a tract of land had retained an undivided one-half interest in the minerals; the purchasers received the other one-half interest together with the executive rights to all minerals. When the purchasers exercised the executive rights by leasing the land, they retained all bonuses and delay rentals. The owners of the nonexecutive one-half interest brought suit claiming one-half of the bonus and delay rental. Defendants filed an exception of no cause of action based on the assertion that the executive right owner has an exclusive right to bonus and delay rental unless specifically granted or reserved to the nonexecutive owner in the act of sale. The district court and the court of appeal maintained this exception and dismissed the plaintiff's claim. On its first decision the Louisiana Supreme Court reversed, stating that while the holdings below were in accordance with Article 105 of the Mineral Code, the rights in question arose before the Mineral Code became effective and it thus did not apply. The Louisiana Supreme Court also held that to the extent that the decisions below were in accordance with the jurisprudence prior to the Mineral Code, Ledoux v. Voorhies, 222 La. 200, 62 So. 2d 273 (1952), Mount Forest Fur Farms of Am., Inc. v. Cockrell, 179 La. 795, 155 So. 228 (1934), those cases were overruled so that the case could be heard on its merits as to the intent of the parties. On rehearing, however, the court decided that the earlier decisions had created rules of property which had been relied upon for many years by those dealing with mineral rights in Louisiana. They should not be overruled, concluded the court, particularly since the legislature had codified them by their passage of Article 105 of the Mineral Code. Hence, the court reversed its initial decision and affirmed the courts below.

26. La. Civ. Code art. 561, comment (a).

27. La. R.S. 31:2 (1989).

28. E.g., Davis Oil Co. v. Steamboat Petroleum Corp., 583 So. 2d 1139 (La. 1991); Amoco v. Thompson, 516 So. 2d 376 (La. App. 1st Cir. 1987), writ denied, 520 So. 2d 118 (1988); Darby v. Rozas, 580 So. 2d 984 (La. App. 3d Cir. 1991); Hinckley v. Hinckley, 583 So. 2d 125 (La. App. 4th Cir. 1991); Succession of Doll v. Doll, 577 So. 2d 802 (La. App. 2d Cir.), writ granted, 582 So. 2d 845 (1991).

ations for the discovery and production of minerals." This would have been sufficient in itself to guide a court, together with existing jurisprudence, to resolve questions of good faith in individual circumstances. But the article goes on to provide that good faith means:

> that the operations must be
> (1) commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth,
> (2) continued at the site chosen to that point or depth, and
> (3) conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.

From the comments to Article 29 it is clear that the redactors were attempting to codify the case law. But in doing so, they may well have provided a set of requirements that go beyond good faith. For example, a servitude owner's lessee might in good faith commence a well within the ten year liberative prescription period to drill to a depth at 15,000 feet. At 8,000 feet the drilling party might encounter heaving shale or some such obstacle that would make further drilling at that point impossible. The driller then might move the rig over a few hundred yards and again attempt the well to the 15,000 feet depth, at a time beyond the ten years, and indeed complete the well successfully. Does such an operation constitute a "good faith operation" within the meaning of Article 29? Or again, let us say the drilling party encounters not heaving shale at 8,000 feet but instead an unexpected formation of oil which is found and completed as a producing well beyond the ten year period, though the operations were commenced within ten years. Because the well did not continue to the depth at which the driller had expected to get production, would this fail to be a "good faith operation" and therefore not constitute a use of the servitude? There are several areas of the Mineral Code where the specificity of the Code has caused or can cause problems.[29]

The Mineral Code is somewhat indebted to Texas precedent for some of its provisions. There are several instances in which the Comments refer to Texas cases for standards that are clearly meant to be followed in application of the Code articles. But one might question whether the

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29. See Rodgers v. CNG Producing Co., 528 So. 2d 786 (La. App. 3d Cir.), writ denied, 532 So. 2d 180 (1988), where the court had to deal with the difficult language of the Mineral Code articles that try to write a specific after-acquired title doctrine. The Mineral Code attempts a detailed set of exceptions to the rule of Hicks v. Clark, 225 La. 133, 72 So. 2d 322 (1954), in which the Louisiana Supreme Court held that a reversionary interest may not be an article of commerce. The rule of Hicks v. Clark is codified in Article 76 but the exceptions of Articles 77-79 would eat up the rule.

Louisiana courts are following the Mineral Code and the Texas precedents in these instances.

The Comments to Article 10 of the Mineral Code, which state, "A person with rights in a common reservoir or deposit of minerals 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,"[30] cite with approval the Texas case of *Eliff v. Texon*.[31] In so doing the Mineral Code seemed to be backing away from the proposition of the 1932 Louisiana Supreme Court decision in *McCoy v. Arkansas Natural Gas Co.*[32] which followed an earlier Louisiana case to the effect that because there is no ownership in place of oil and gas an owner of the right to produce the minerals could not recover for lost oil or natural gas when the negligence or "bad judgment" of the adjacent producer causes a loss of oil or gas from under the land.[33]

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30. La. R.S. 31:10 (1989).

31. The Comments to La. R.S. 31:10 state: "an owner of rights in a common source of supply has been protected against negligent waste of the common resource, as for example by a blowout which due care could prevent. *Eliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558 (1948)."

32. 175 La. 487, 143 So. 383 (1932).

33. The *McCoy* court upheld a judgment dismissing a suit on an exception of no cause or right of action:

> The fact that the plaintiffs in this case are the owners of all of the lands within a radius of a mile from the well complained of does not except the suit from the rule stated in *Louisiana Gas & Fuel Co. v. White Bros.*, 157 La. 728, 103 So. 23; that is, that a landowner has no right or cause of action for damages against an owner of adjoining land for negligently permitting a well near the line to blow out and allowing the gas to escape; the only remedy being an action to enjoin the waste.

157 La. at 494, 143 So. at 385. The court went on to say:

> The judgment rendered in this case must be affirmed, unless we intend now to overrule the decision rendered in *Louisiana Gas & Fuel Co. v. White Brothers, supra*. We do not rest our decision in this case altogether upon the proposition that a landowner does not actually own the oil and gas beneath the surface of his land, but has only the right to drill for the oil and gas and to become the owner of such as he may bring into his possession. That right is as well entitled to the protection of the law as is the ownership of corporeal property. It is conceivable, therefore, that a case might be presented where a landowner would be entitled to damages for loss or impairment of his oil or gas rights by some fault of a neighbor on his own land. But the fault in such a case would have to consist of something more than a mere exercise of bad judgment on the part of the neighbor in drilling on his own land, and the loss sustained by the complaining neighbor would have to be measurable, approximately, if not exactly, in money. An illustration of a case where such damages could be estimated would be one where the market value of the plaintiff's land or mineral rights is impaired by the fault of his neighbor. We rest our affirmance of the judgment appealed from in this case upon the fact that, according to the plaintiffs'

Several cases since the adoption of the Mineral Code could have applied Article 10 and the *Eliff v. Texon* precedent to allow damages for loss of oil or gas from the negligence of the adjacent landowner or producer. But they have declined to do so and have followed the rationale of the *McCoy* decision.

In *Veazey v. W.T. Burton Industries, Inc.*,[34] the plaintiffs brought a claim for "negligent breach of contract" against their mineral lessee. Their claim arose from a lease executed in 1964 which was subsequently acquired by the defendant. A well was drilled by the defendant in 1965 and then abandoned in a manner which the plaintiffs alleged was negligent and unlawful under the conservation regulations of the state causing injury and loss to plaintiffs. A different company, under a 1977 lease from the plaintiffs, drilled a well and discovered that two gas reservoirs discovered by the defendant in its 1965 drilling had been completely depleted and wasted as a result of the defendant's failure to plug and isolate them. The plaintiffs alleged that the value of the gas and condensate that could have been recovered was not less than $25 million. The trial court dismissed the suit on the ground that the petition failed to state a cause of action. The appellate court affirmed, stating that "regardless of whether plaintiffs [alleged] a breach of a contractual obligation or of a duty in tort, there [was] no cause of action because the allegations as to damages [were] too speculative."[35] The Louisiana Supreme Court overruled the affirmation of the defendant's exception of no cause of action and remanded the case for further proceedings, but the court gave no discussion of principle and thus did not articulate a reason for remanding. There is no further indication of the disposition of the case.

In a more recent case where the *McCoy* approach was followed, the Louisiana Supreme Court let the lower court decision stand. This was in *Coon v. Placid Oil Co.*[36] Here an appellate court held that 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. The court of appeal ruled 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

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> allegations, the negligence complained of consisted merely of the defendant's using bad judgment in the opinion of the plaintiffs, and the loss complained of was, manifestly, more a matter of uncertainty and speculation than of fact or estimate.

175 La. at 498-99, 143 So. at 386.

34. 407 So. 2d 59 (La. App. 3d Cir. 1981), rev'd and remanded, 412 So. 2d 88 (1982) (mem.).

35. 407 So. 2d at 59.

36. 493 So. 2d 1236 (La. App. 3d Cir.), writ denied, 497 So. 2d 1002 (1986).

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. This avoidance of speculation in damages may reduce considerably the effect of Mineral Code article 10.

On another front in which the drafters tried to follow Texas precedent, the Mineral Code also pretty much rejected a line of jurisprudence regarding the meaning of production in paying quantities when the Code was adopted, although the Comment rather coyly states that what the Mineral Code does is merely to alter the articulation of the jurisprudential view.[37] The pre-Code cases looked to the amount of royalties paid to the lessor to see if the royalties constituted "serious consideration" for the continuation of the lease. Under Article 125 of the Mineral Code, the courts are no longer to look at the amount of royalty from the lessor's viewpoint but only from the lessee's viewpoint as to its reasonableness in continuing production. The Mineral Code adopted the standard reflected in the leading Texas case of *Clifton v. Koontz*.[38] Article 124 provides:

> When a mineral lease is being maintained by production of oil or gas, the production must be in paying quantities. It is considered to be in paying quantities when production allocable to the total original right of the lessee to share in production under the lease is sufficient to induce a reasonably prudent operator to continue production in an effort to secure a return on his investment or to minimize any loss.[39]

In the case of *Smith v. West Virginia*,[40] the court of appeal was faced with a question of whether there was production in paying quantities. The court noted the small amount of royalty being paid to the lessor and compared it to the royalty being paid to a lessor in a 1941 case.[41] The court did not even cite Article 125 of the Mineral Code, an article that declares how Article 124 is to be carried out. Fortunately, the Louisiana Supreme Court reversed, but on other grounds.

III. Fundamental Property Concepts and Their Consequences

A. Ownership—Louisiana and Texas Contrasted

Theory of Ownership. Ownership in Louisiana is allodial, that is, freehold. "Estates" in the common law sense of the word are neither

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37. La. R.S. 31:124, comments (1989).

38. 325 S.W.2d 684 (Tex. 1959).

39. La. R.S. 31:124 (1989). The Comments to this article state in part: "The manner in which the test for production in paying quantities is stated in Article 124 is articulated well in the decision of the Texas Supreme Court in *Clifton v. Koontz*, 325 S.W.2d 684, 691 (1959)" and quote the standard from the Texas case.

40. 365 So. 2d 269 (La. App. 2d Cir. 1978), rev'd on other grounds, 373 So. 2d 488 (1979).

41. 365 So. 2d at 274, citing Parten v. Webb, 197 La. 197, 1 So. 2d 76 (1941).

part of Louisiana civil law, nor does the law embrace any division between legal and equitable title. All things are "owned" in the same manner. Ownership of land and of an automobile are analytically identical. Under the Louisiana Civil Code ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing.[42]

The historical underpinnings of Louisiana law provided by the Roman civil law with its strong emphasis on the individual and his autonomy establish private property and liberty of contract as fundamental institutions that should be limited as little as possible. The Roman civil law was basically a law of property and contract. In contrast to the common law, civil law systems emphasize different concepts of order in the holding and disposition of property. The civil law places property in the hands and under the control of the living. Civil law promotes commercialization of all property, including land, whereas the common law adheres to notions born in the age of feudalism. By the late eighteenth century, in civil law one acquired ownership and complete title to land, but in common law jurisdictions one still spoke of having an "interest" or an "estate" in real property. Despite the demise of primogeniture and the development of free alienability, the fee-simple estate, partible descent, and the convergence of real and personal property, many of the old concepts, terminologies, interests, and forms of action rooted in the classic English common law have persisted.

In Louisiana, with its simpler allodial land holding system, the introduction of law that imported the antiquated feudal doctrine of tenures was unacceptable. In the early 1800's real property under Louisiana law could be contrasted for its simplicity, unity, precision and clearness with the intricacy, complexity, uncertainty and indistinctness of the law of real property prevailing in common law America of the same period. The entire thrust of the civil law is to identify the owner with the thing owned, whereas common law tends to keep them separate. Modern civil law embodies the Roman civil law concept of absolute dominion while the common law continues to wrestle with more fragmented notions of property, the relativity of title, competing claims of present and future property holders and the differences between legal and equitable ownership.

As early as the Digest of 1808, Louisiana barred the *fidei commissa* and *substitution*, the rough civil law equivalents to the common law devices that created "future interests." In contrast to the common law trust (whereby a method was established that enabled the private individual to control the disposition of his property long after his death), the Digest of 1808 required that transferees be alive at the time of an act of transfer. This made dispositions in favor of the unborn impossible,

42. La. Civ. Code art. 500.

and it provided no way in which the control of property might be denied its owner of full age and sound mind.

Unlike the common law, the Louisiana Civil Code establishes no estates in land of various durations. Under the Civil Code a thing always has an absolute owner; limited rights of enjoyment such as usufruct, habitation and servitude are mere encumbrances, burdens or charges on absolute ownership. Before the French revolution, substantial proportions of land could not be given away, either by an act during life or by will. By means of a "fidei commissa substitution," a grantor could transfer property to his grantee with a limitation in the form of a stipulation that the grantee would transfer it to a third person upon the happening of a special condition. If the grantor controlled the direction of an asset in the first grantee's hands, he could control its movement to a second, third and fourth grantee as well. Anglo-American lawyers would recognize these restrictions on property transfers as a problem of mortmain or "dead hand" control, which the common law sought to regulate by means of the rule against perpetuities.

Fidei commissa substitutions were not the only blocks on the free use of assets. Under the doctrine of *retrait lignager*, families often enjoyed the power to frustrate the efficient use of an estate by taking it back long after it had been sold to a third party. Sometimes a grantor of land, instead of selling it outright for a lump sum, transferred it under a perpetual lease for a perpetual rent, rather like a "fee farm" in England. The drafters of the Civil Code in Louisiana, like their French counterparts, took a number of steps to overcome the perpetual removal of property from commerce. They provided that leases were contracts, not interests in lands; they had to be established for certain periods, not in perpetuity. Like the French Civil Code, the Louisiana Civil Code outlaws both the *retrait lignager* and the *fidei commissa* substitutions.

Classification of Things—Terminology. The Louisiana Civil Code establishes a variety of classifications.[43] The *movable-immovable* classification is similar to the distinction between the common law classifications of *realty* and *personalty*. Land is classified as an *immovable*.[44] Certain rights in or over land are also classified as immovable rights.[45] Everything else is *movable*.[46] That is, anything not immovable is movable. Things are also classified as *common*, *public*, or *private things*. Common things, such as air or the high seas, may not be owned by anyone.[47]

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43. La. Civ. Code art. 448.
44. La. Civ. Code art. 462.
45. La. Civ. Code art. 470.
46. La. Civ. Code art. 475.
47. La. Civ. Code art. 449.

Public things are those "owned" by public bodies.[48] Public things that belong to the state are running waters, the waters and bottoms of navigible water bodies, the territorial sea, and the seashore. Private things are those not in the public domain.[49] The *corporeal-incorporeal* classification corresponds to the common law classifications of property into *tangible* and *intangible* property. That which has physical existence is *corporeal*. Rights and obligations are *incorporeal*.

Classification of Rights. Rights may be *real* or *personal*. The term real right does not refer to rights in immovable (or "real") property. Rather the terms refers to rights in or to things generally—i.e., "property" rights as distinguished from "personal" (contractual) rights. Real rights may thus be held in movables as well as immovables.[50] Real rights confer direct and immediate authority over a thing. Restriction of the application of the term real rights to interests in immovable property is only meaningful within the framework of the Louisiana Code of Civil Procedure sections on "real actions," which are only available to holders of real rights in immovable property. Although the object of a real right may be either a movable or an immovable, real rights in movables are not protected by the nominate real actions of the Louisiana Code of Civil Procedure.

Composition of Ownership. Ownership of a thing is a right composed of certain elements. The owner of a thing may use, enjoy and dispose of the thing within the limits and under conditions established by law.[51] Classic civil law composition of the right of ownership contains the following elements derived from Roman law:

1. *Usus*—The exclusive right of the owner of the thing to use or possess the thing, or perhaps, more properly, to exclude others from the enjoyment of a thing.
2. *Abusus*—The right of the owner of the thing to alienate the thing.
3. *Fructus*—The right of the owner of the thing to enjoy the revenues or profits of the thing.

Other than for theoretical and analytical purposes, these classifications of elements of the composition of the right of ownership are of virtually no modern practical significance; however, these elements of ownership are useful concepts that provide assistance in understanding the origin of civilian terms such as "usufruct" (akin to life estate) and "fruits" (income or revenues).

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48. La. Civ. Code art. 450.
49. La. Civ. Code art. 453.
50. La. Civ. Code art. 476, comments.
51. La. Civ. Code art. 477.

Principles of Ownership. Ownership is the right by virtue of which a thing is subjected perpetually and exclusively to the acts and will of a person.[52] The right of ownership may exist only in favor of a natural person or a juridical person.[53] Once acquired it cannot be lost by inaction although it may be acquired by adverse possession by another.[54] Once vested it is presumed to continue and, to overcome such presumption, it must be proven that someone else has acquired the thing. Perpetual fragmentation of ownership cannot exist nor may perpetual burdens be imposed upon ownership (with some exceptions for public rights). Consequently, two perpetual "fee estates" cannot be created in the same land. Every burden on or division of ownership is terminable.

Resolutory condition and real rights. The right of ownership may be subject to a resolutory condition, one of the types of conditions to an obligation that is dependent upon an uncertain event. If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, then the condition is resolutory.[55] The ownership of a thing may be burdened with a real right in favor of another person as allowed by law.

Ownership is exclusive. The same thing cannot be owned by two persons, except as co-owners in indivision.[56] Although Louisiana law defines ownership as a right in a thing to the exclusion of all others, and it follows that two persons cannot be owners of the whole of the same thing, nothing prevents them from being owners in common. Undivided co-ownership is similar to joint tenancy; only one form of co-ownership exists. Ownership may be dismembered or divided in very limited ways. Ownership may be burdened by imposing servitudes or other burdens or charges upon the land. This is the basic mode of dividing ownership.

Servitudes may be *personal* or *predial.*[57] A personal servitude is a charge on a thing for the benefit of a person. The three types of personal servitudes are *usufruct*, *habitation* (the nontransferable real right of a natural person to dwell in the house of another), and *rights of use* (a personal servitude conferring in favor of a person a specified use of property less than full enjoyment).[58] The *usufruct* thus is a

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52. 3 Marcel Planiol et Georges Ripert, Traite pratique de droit civil francais 220 (2d ed. Picard 1952). La. Civ. Code art. 477, comment (b).

53. La. Civ. Code art. 480.

54. La. Civ. Code art. 481.

55. La. Civ. Code art. 1767.

56. La. Civ. Code art. 480.

57. La. Civ. Code art. 533. *Mortgages* and *Privileges* are charges over land. Louisiana uses a form of the "lien theory" of mortgages and liens; however, effective January 1, 1990, Louisiana adopted a form of Article 9, Secured Transactions, of the UCC and now has as part of its law the concept of consensual liens or security interests.

58. La. Civ. Code art. 534.

"personal" servitude and is essentially a common law life estate; it is a real right of limited duration on the property of another.[59]

The *predial servitude* is a charge over land (the servient estate)[60] in favor of another tract of land (the dominant estate).[61] *Building restrictions* are viewed as a special form of predial servitude.[62] Louisiana law recognizes certain *natural servitudes*, such as the right of drainage of water from land,[63] and *legal servitudes*, limitations on ownership established by law for the benefit of the general public or for the benefit of particular persons.[64] Certain charges are not strictly real but are also not purely personal. While primarily regulated by the rules of contract, they are protected from interference by registry. The principal examples of these are leases, options and contracts to sell.

There are several statutorily created exceptions to the Civil Code system. In addition to mineral rights, special laws regulate timber sales and condominiums.

Significance of Ownership of Land. Although much has changed in recent years, the system of property law in Louisiana continues to exhibit certain vestiges of a strong eighteenth century view that land is the foundation for family order and the status of a person. Under this system land is not viewed as an article of commerce to be easily bought and sold, and family interests are given dominance over individual rights. This is evidenced by Louisiana's system of forced heirship, rules restricting donations and gifts, and community property.

Modes of Acquisition. Because of the emphasis upon the perpetuity of ownership in Louisiana law, the analysis of transfer of title tends to be considered from the acquirers' point of view—that is, how does one acquire ownership? The methods of acquiring ownership that are generally encountered are by transfer from the owner—by sale, exchange or donation. Land is not "conveyed" by deed but is sold. Sales of movables and immovables are based on the same principles. One sells land by the same contract and in the same way—in terms of theory—

59. La. Civ. Code art. 535.

60. Here the word *estate* is present, meaning a distinct corporeal immovable, as translated from the French "heritage" occurring in the Digest of 1808, the Louisiana Civil Code of 1825 and the Code Napoleon.

61. La. Civ. Code art. 646. The two tracts of land must belong to different owners.

62. Comment (e) to La. Civ. Code art. 651 suggests that restraints on the use of property may be predial servitudes or *sui generis* real rights in the nature of building restrictions.

63. La. Civ. Code art. 655.

64. La. Civ. Code art. 659. Examples of legal servitudes are the right of passage for the benefit of enclosed tracts of land, obligations imposed by law on owners of property to keep buildings in repair so that neither their fall nor that of any part of their materials may cause damage to a neighbor or to a passer-by (establishes liability without regard to negligence), and servitudes relating to common walls.

as one sells an automobile. Donations are classified as *inter vivos* or *mortis causa*. Louisiana considers a will (testament) as a form of donation mortis causa.

As in the common law, property may be acquired by adverse possession. This is referred to as *acquisitive prescription* in Louisiana. Ownership is acquired by peaceful possession of a thing for the requisite time. The Louisiana and Texas approaches will be compared below.

Property may also be acquired by operation of law. Heirship is the most common. In case of intestacy, property is ordinarily considered to pass by operation of law to one's heirs. A succession (estate) proceeding may be useful to give proof of the fact or to pay debts, but is in theory irrelevant to the transfer of ownership. There are also involuntary transfers, such as tax sales, execution upon judgments, expropriation or eminent domain.

Ownership of property may arise by *accession*. This is the term used to refer to the process by which one thing becomes incorporated into another so as to lose its separate identity and become a part of the other. It comprehends the idea of "fixtures" but is broader in scope.

B. Capacity

In Texas, as in Louisiana, practical and legal problems concerning capacity to execute oil and gas leases and to enter into transactions affecting real property, including oil and gas interests, frequently are encountered by producers, operators, landmen, title examiners and other energy industry participants. Questions concerning capacity that are encountered in connection with determining whether an oil and gas lease was executed by a juridical person with capacity or a transaction was entered into by such a person are likely to involve issues concerning the capacity of (a) husband and wife, (b) minors, (c) co-owners, (d) successive interests, (e) parties in representative capacities, (f) trustees, (g) agents and attorneys-in-fact, (h) corporations, (i) partnerships, and (j) unincorporated associations. Because of certain distinctive rules, the principles relating to co-owners and successive interests will be discussed in greater depth in a separate section.

General Principles. Generally, under Louisiana law, all natural persons enjoy legal capacity to have rights and duties.[65] A natural person who has reached the age of majority (presently eighteen years of age) has capacity to make all juridical acts, unless otherwise provided by legislation.[66]

Governing Law. The Mineral Code provides, in general terms, that capacity to create a mineral right is established by the laws governing

65. La. Civ. Code art. 27.
66. La. Civ. Code arts. 28 and 29.

capacity to alienate immovables, but more specifically, the authority of a tutor, curator, succession representative, or trustee to create a mineral right on property subject to his administration is governed by the laws applicable to each.[67]

1. Husband and Wife

Texas: In connection with the capacity and power of husband and wife, at least one attribute of minority may be overcome in Texas by marriage. Unless a statute or the Texas constitution expressly prohibits, regardless of age, every person who has been married in accordance with the Texas law has the power and capacity of an adult, including the capacity to contract.[68] With regard to the separate property of spouses, each spouse has the sole management, control and disposition of his or her separate property.[69] Under a regime similar to the head and master regime formerly in force in Louisiana, under now repealed Texas law, both the husband and the wife were required to join in conveyances of the wife's separate realty and separate acknowledgment of the wife, privily and apart from the husband, was required.[70] Under current law, except for community property over which one spouse has the sole management, control and disposition (property that he or she would have owned if single), community property is subject to the joint management, control and disposition of the husband and wife, unless the spouses provided otherwise by power of attorney in writing or other agreement.[71] During marriage, each spouse has the sole management, control and disposition of those elements of community property that he or she would have owned if single, including, without limitation: (i) personal earnings, (ii) revenue from separate property, (iii) recoveries for personal injuries, and (iv) the "increase and mutations" of, and the revenue from, all property subject to his or her sole management, control and disposition.[72] Although one spouse has no authority to alienate or encumber the other spouse's interest in elements of community property classified as joint management community property, a Texas court of appeals has held that a husband has the right to convey his one-half interest in non-homestead joint management community property without the concurrence of his wife.[73]

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67. La. R.S. 31:19 and 20 (1989). See generally Jerry A. Brown, Right, Capacity, and Authority to Enter into Mineral Transactions, 13 L.S.U. Min. L. Inst. 33 (1966).

68. Tex. Fam. Code Ann. § 4.03 (Vernon 1975).

69. Id. § 5.21.

70. See Tex. Rev. Civ. Stat. art. 1299 (1897) (repealed 1963).

71. Tex. Fam. Code Ann. § 5.22(c) (Vernon 1975).

72. Id. § 5.22(a).

73. Williams v. Portland State Bank, 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ dism'd).

Louisiana: In Louisiana, the concurrence of both husband and wife is required for the alienation, encumbrance, or lease of community immovables, including mineral rights.[74] Prior to December 12, 1979, the effective date for decision in *Kirchberg v. Feenstra*,[75] the husband could administer the effects of the community and alienate them by an onerous title, without the consent of his wife. However, the decision in *Kirchberg v. Feenstra* rendering this unconstitutional as to a particular mortgage, and the subsequent enactment of 1979 Louisiana Acts, No. 709, effective January 1, 1980, created a suspense period from December 12, 1979 until January 1, 1980. Within that suspense period, acts of alienation or encumbrance of community property executed by the husband alone should be approached with caution due to the uncertainty concerning whether the applicability of the *Kirchberg* rationale will be extended, in general, beyond acts of mortgage and, in particular, to any specific instances other than that certain mortgage before the *Kirchberg* Court.[76] The Louisiana Civil Code provides for a means to dispense with the necessity for the concurrence of a spouse; however, in the absence of such renunciation of the right to concur, both spouses must execute mineral leases or other agreements affecting mineral rights that are classified as community property.[77] A mineral lease that covers only lands classified as separate property need only be executed by the spouse owning such separate property.[78]

2. Minors

Texas: In connection with transactions involving minors, in Texas, if the minor is unmarried, generally, the deeds and contracts of minors are voidable.[79] The age of majority in Texas is eighteen years.[80] The Texas Probate Code provides that the provisions, rules and regulations that govern decedents' estates also govern guardianships, when the same

74. La. Civ. Code art. 2347.

75. 609 F.2d 727 (5th Cir. 1979), aff'd., 450 U.S. 455, 101 S. Ct. 1195 (1981).

76. Cf. South Cent. Bell Tel. Co. v. Eisman, 430 So. 2d 256 (La. App. 5th Cir.), writ refused, 437 So. 2d 1154 (La. 1983) (servitude agreement in favor of South Central Bell Telephone Company executed in April, 1980, by the husband alone; after analysis of La. Civ. Code arts. 2317, 2347 and 2353, effective January 1, 1980, the court held that the unmistakable thrust of these articles, insofar as servitude agreements are concerned, is that contracts signed by only one spouse are *relatively* null and that the agreements become *absolutely* void and of no effect unless confirmed by the other spouse (emphasis in original)); Coburn v. Commercial Nat'l Bank, 453 So. 2d 597 (La. App. 2d Cir.), writ refused, 457 So. 2d 681 (1984) (mortgage confected without the wife's consent is absolutely null and of no effect).

77. La. Civ. Code arts. 2347 and 2348.

78. La. Civ. Code art. 2341.

79. 14 Tex. Jur. 3d Contracts 16 (1981).

80. Tex. Civ. Prac. & Rem. Code Ann. § 129.001 (Vernon 1986).

are applicable and not inconsistent with any of the provisions of the probate code.[81] Guardians for minors may be appointed upon judicial determination of certain facts, including determinations by the court that the person for whom a guardian is to be appointed is a minor, that venue is proper, that the person to be appointed guardian is not disqualified to act as such and that the rights of the persons or property will be protected by the appointment of a guardian.[82] Under the provisions of the Family Code, except in instances in which a guardian of the minor's estate has been appointed, or as otherwise provided by judicial order or by an affidavit of relinquishment of parental rights,[83] the parent of the child is obligated to manage the estate of the child.[84]

Louisiana: If the mineral lease or agreement evidencing a transaction covering other mineral rights is to be executed by an unemancipated minor (a person under the age of eighteen, without the disabilities of minority judicially removed), under circumstances identified in the Civil Code, the minor must be represented by a tutor or tutrix, who will administer the property of the minor under judicial supervision.[85] Under provisions of the Louisiana Code of Civil Procedure, in instances in which it appears to be in the best interest of the minor, and after compliance with provisions of the Code of Procedure, a tutor may be judicially authorized to grant a lease covering property of the minor, including mineral leases, and the term of the lease may extend beyond the anticipated duration of the tutorship.[86] Although advertisement is not necessary as part of the application by the tutor or tutrix for court approval, special consideration should be given to venue in connection with any proceeding in which judicial approval of execution of a lease by a tutor or tutrix is concerned. Venue is jurisdictional and may not be waived.[87] An unemancipated minor is deemed to have the domicile of his tutor.[88] According to the Louisiana Code of Civil Procedure, proceedings relative to a tutorship subsequent to the confirmation or appointment of a tutor who is domiciled in the state shall be brought in the parish of his domicile.[89] Unlike the effect of marriage on the capacity of a minor under Texas law, in Louisiana a minor becomes

81. Tex. Prob. Code Ann. § 108 (Vernon 1980).
82. Id. § 114.
83. Tex. Fam. Code Ann. § 15.03 (Vernon 1975).
84. Id. § 12.04(4).
85. La. Civ. Code arts. 246 et seq.
86. La. Code Civ. P. arts. 4268 and 4271.
87. La. Code Civ. P. art. 44.
88. La. Civ. Code art. 39.
89. La. Civ. Code art. 4034. Cf. Hammond v. Gibbs, 176 So. 2d 465 (La. App. 2d Cir. 1965) (any action taken by a court of improper venue relating to tutorship is an absolute nullity).

emancipated by marriage and such emancipation is irrevocable; however, although a married minor below the age of sixteen has the power of administration of his patrimony, the minor is not permitted to alienate, affect, or mortgage any of the minor's immovable property without court approval.[90]

3. *Parties in Representative Capacities*

a. *Texas*

Successions. When an estate of a decedent is involved, Section 37 of the Texas Probate Code establishes the same doctrine in Texas as the principle, *le mort saisit le vif*, in Louisiana. The Louisiana Civil Code provides that "[a] succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds."[91] Although the doctrine under Louisiana law excludes particular legatees, in Texas, when a person dies, his estate vests immediately in his devisees and legatees if he died testate or in his heirs-at-law if he died intestate, subject to the payment of debts of the testator or intestate, except in instances exempted by law.[92] Upon completion of the procedure required for a personal representative of the estate to qualify and issuance of Letters Testamentary or of Administration, the executor or administrator shall have the right to possession of the estate as it existed at the death of the testator or intestate and shall recover possession of and hold such estate in trust to be disposed of in accordance with the law.[93] Since title vests immediately in the devisees or heirs-at-law upon the death of the decedent, it is necessary to record the appropriate probate instrument in the county or counties in which the mineral interests may be located to reflect the passing of title to the devisees or heirs.[94] Certified copies of a will and order admitting the will to probate in proceedings conducted in Texas may be recorded in counties in which the decedent owned real property as evidence of title. If such proceedings are conducted in the county in which the mineral interest is situated, since the probate records maintained by the county clerk constitute constructive notice and will form part of the chain of title to such interest, it is unnecessary to record the probate proceedings in the deed records.[95] Under Texas law, the

90. La. Civ. Code arts. 365, 373, 382 and 383.

91. Cf. Article 724, Code Napoleon (embodies the principle that the dead give seisin to the living).

92. La. Civ. Code art. 940; Tex. Prob. Code Ann. § 37 (Vernon 1980).

93. Tex. Prob. Code Ann. §§ 37, 232-233 (Vernon 1980).

94. Id. § 89.

95. Tex. Prop. Code Ann. §§ 13.001-.002 (Vernon 1984).

execution of a mineral lease has been characterized by the courts as the same as a sale of real property.[96] Clearly, an independent executor may exercise all powers prescribed in a will, including the power to sell and lease minerals. Questions have arisen among members of the title bar concerning whether an independent executor has authority to execute a mineral lease, absent express authority in the will, possibly due to an incorrect interpretation of the case of *Marshall v. Hobert Estate*;[97] however, under Section 188 of the Probate Code and the rule of the case of *Dallas Services*,[98] a purchaser of a mineral lease from an independent executor during administration should be protected provided that the estate has not been closed pursuant to the provisions for closing an independent administration of Section 151 of the Probate Code. Frequently, out of caution concerning the closing of an independent administration, title examiners will require the ratification of a mineral lease by the devisees.

Trusts. The Texas Trust Code is found in Sections 111.001 et seq. of the Property Code. The Property Code also authorizes creation of "blind trusts," or conveyances to "Sam Jones, Trustee," provided that the conveyance does not identify a trust instrument or disclose the name of any beneficiary.[99] A trustee under a blind trust may convey, transfer and encumber the title of the property subject to the trust without subsequent question by a person who claims to be a beneficiary or who claims by, through or under an undisclosed beneficiary of the blind trust.[100] A person who actually and in good faith pays to a trustee money that the trustee is authorized to receive is not responsible for the proper application of the money according to the trust.[101] Powers of trustees are set forth in Sections 113.001 et seq. of the Property Code. In Texas, the Property Code provides that "[a] power given to a trustee by this subchapter does not apply to a trust to the extent that the instrument creating the trust, a subsequent court order, or another provision of this subtitle conflicts with or limits the power."[102] Furthermore, the Property Code provides that "[e]xcept as provided by Section 113.001, a trustee may exercise any powers in addition to the

96. See, e.g., Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 524 (Tex. 1982); Avis v. First Nat'l Bank of Wichita Falls, 141 Tex. 489, 494-95, 174 S.W.2d 255, 258 (1943) and citations at id., 174 S.W.2d at 258.

97. 315 S.W.2d 604 (Tex. Civ. App.— Eastland 1958, writ ref'd.).

98. Dallas Services for Visually Impaired Children, Inc. v. Broadmoor II, 635 S.W.2d 572 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (authority of the independent executor to convey real property which was upheld and should also apply to the execution of a mineral lease).

99. Tex. Prop. Code Ann. §§ 101.001 and 114.082 (Vernon 1984).

100. Id. § 101.001.

101. Id. § 114.081(a).

102. Id. § 113.001.

powers authorized by this subchapter that are necessary or appropriate to carry out the purposes of the trust."[103] In connection with mineral transactions, Section 113.012 of the Property Code authorizes a trustee to undertake a range of mineral transactions, including negotiating and making oil and gas leases; pooling and unitizing part or all of the land; and entering into farmout contracts or agreements. The authority granted by the Property Code is not limited to the types of transactions generally entered into by lessors. The Code states that "[a] trustee may enter into mineral transactions that extend beyond the term of the trust."[104] The foregoing provisions of the Property Code evidencing the authority generally available under Texas law notwithstanding, a copy of the trust instrument should be examined in instances in which a conveyance identifies the trust or discloses the name of a beneficiary to confirm that no limiting provisions are contained in the trust instrument that restrict the authority of the trustee to execute mineral leases or enter into mineral transactions and that the trust has not terminated as to the interest of one or more beneficiaries.

Attorney-in-Fact. Under Texas law, a properly authorized attorney-in-fact may execute a mineral lease provided that the power of attorney contains an express authorization to execute mineral leases. Powers of attorney are strictly construed in Texas.[105] A power of attorney should be carefully reviewed prior to taking a lease from an agent to determine whether it contains express language authorizing execution of mineral leases. The examining attorney should also determine whether the power of attorney is recorded in the county where the property is situated, whether the principal was alive when the lease was executed by the agent was not revoked as of such time, and, unless the power of attorney complies with requirements of a durable power of attorney (including, a provision to indemnify and hold harmless any third party who accepts the power-of-attorney, who recognizes the authority of the attorney under the power, and who acts or transacts with such attorney in reliance thereon), whether the principal was competent at the time of the execution and delivery of the lease by the agent.[106]

b. Louisiana

Successions. If the transaction contemplated involves obtaining the signature of the proper succession representative, in Louisiana, as con-

103. Id. § 113.002.

104. Id. § 113.012(b).

105. Cf. Bean v. Bean, 79 S.W.2d 652 (Tex. Civ. App.—Texarkana 1935, writ ref'd) (court held that a general power to sell lands did not authorize the agent to sell and convey minerals under the subject land by lease or deed).

106. Tex. Prob. Code Ann. § 36A (Vernon 1980).

trasted with the independent executor arrangement utilized in Texas, all succession proceedings are subject to judicial supervision, including the granting of mineral leases. Consequently, the succession representative, whether an executor of a testate succession or an administrator of an intestate succession, must obtain court approval of all transactions, including the issuance of mineral leases.[107] Upon application to the court by the succession representative, the court may authorize the granting of mineral leases on succession property after compliance with advertisement and delay requirements of the Louisiana Code of Civil Procedure are met.[108] Any leases that may be proposed to the court for approval may be for a period greater than one year as may appear reasonable to the court; the order of the court approving the lease shall state the minimum bonus, if any, to be received by the executor or administrator of the estate under the lease and the minimum royalty to be reserved to the estate, which in no event shall be less than one-eighth royalty on oil; and the court may require alterations in the proposed lease as it deems proper.[109]

Curators. If in the proposed mineral transaction documents are to be executed that affect the property of an interdict (mentally deficient or mentally ill) under a regime that is similar to that of a minor, the property of the interdict is under the supervision of a curator or curatrix.[110] Generally, the relationship between an interdict and his curator in Louisiana is the same as that between a minor and his tutor as to the person and property of the interdict. To obtain authority to lease the property of an interdict one should follow proceedings established for the administration of the property as provided for the unemancipated minor.

Trustees. If the property to be leased or that is otherwise part of a transaction involving mineral rights is subject to a trust established under Louisiana law, a trustee may enter into leases of trust property, including oil, gas, and mineral leases, for such periods and with such provisions as are reasonable, whether or not the term of the lease exceeds the term of the trust, unless the trust instrument provides otherwise.[111] To determine the capacity of the trustee to execute mineral leases, the extent of the authority of the trustee provided for in the trust instrument must be examined for any limitation contained therein on the power to grant mineral leases.

Agents and Attorneys-in-Fact. In energy industry transactions, it is not uncommon to examine an instrument that has been executed by an

107. La. Code Civ. P. arts. 3081, 3091 and 3226.
108. La. Code Civ. P. arts. 3226 and 3229.
109. La. Code Civ. P. art. 3226.
110. La. Code Civ. P. art. 4554.
111. La. R.S. 9:2118 (1991).

agent or attorney-in-fact. Under the hybrid institution establishing the juridical character of the mineral lease in Louisiana, creating an amalgam between a sale and a lease and calling it a contract that is a real right, one may question whether civil law applicable to sales should be considered to determine whether an agent (mandatary) or an attorney-in-fact may be granted the authority to lease.[112] The power to lease, being of lesser effect than the power of sale, could be considered to be subsumed in the power to sell; however, since the mineral lease partakes of the nature of both a sale and a lease, practitioners have generally insisted that, as in the case of a sale, the authority to execute a mineral lease should also be granted expressly and in writing.[113] Since under the Louisiana Civil Code the grant of authority to an agent must be express for the purpose of buying or selling property, the description or its location not being required in the act of mandate, one may question whether the power to lease must be express.[114]

4. Corporations

Texas: In connection with mineral transactions in which a corporation is a party, Article 2.42(b) of the Texas Business Corporation Act (the "Corporation Act") provides:

> [a]ll officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws." The Corporation Act further provides that a "corporation may convey land by deed, with or without the seal of the corporation, signed by an officer or attorney in fact of the corporation when authorized by appropriate resolution of the board of directors. . . . Any such deed when recorded, if signed by an officer of the corporation, shall constitute prima facie evidence that such resolution of the board of directors was duly adopted.[115]

Louisiana: The requirement of express, written authority to execute leases or enter into transactions involving other mineral rights extends to an officer or agent of a corporation. Without authority granted by the articles of incorporation, by-laws or resolutions of the board of

112. See La. R.S. 31:16 (1989), Comment. La. R.S. 31:114 and 116 (1989).

113. See Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623 (1913).

114. See La. Civ. Code arts. 2996 and 2997.

115. Tex. Bus. Corp. Act Ann. art. 5.08 (West 1980 & Supp. 1991) [hereinafter the "Corporations Act"].

directors, an officer or agent of a corporation has no authority, merely by virtue of holding office, to bind the corporation.[116]

5. Partnerships

Texas: Partnerships are frequently the business entity in which energy industry participants transact business. Section 9 of the Texas Uniform Partnership Act (the "Texas Partnership Act") provides:

> [e]very partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority. An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.[117]

The Texas Partnership Act further provides:

> [w]here title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of Section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority. Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of Section 9.[118]

Louisiana: Partnerships also require special consideration in Louisiana. If a mineral rights transaction involves documentation to be executed by a partner in the capacity as a partner that requires alienation, lease or encumbrance of immovables of the partnership, one should

116. La. R.S. 12:82D (1969); see Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 So. 780 (1909).

117. Tex. Rev. Civ. Stat. Ann. art. 6132b § 9(1)-(2) (Vernon 1970).

118. Id. § 10(1)-(2).

inquire into and establish the authority of the partner who attempts to act as agent (mandatary) of the partnership by examining the articles of partnership and any power-of-attorney under which the agent proposes to proceed.[119] Under partnership law in Louisiana, a partner is a mandatary of the partnership for all matters in the ordinary course of its business other than the alienation, lease, or encumbrance of its immovables.[120]

6. *Unincorporated Associations*

Texas: In Texas, the limitations on owning real property imposed on an unincorporated association are strict in that without express or statutory authority an unincorporated association may not receive or hold title to real property.[121] Thus, as a general rule, a conveyance to an unincorporated association does not transfer title to it; however, the members of such association may hold property jointly as individuals and a grant to an association may be construed as a conveyance to its members in their individual capacity.

Louisiana: Any mineral transaction involving acts to be executed on behalf of an unincorporated association, such as a country church or a social or fraternal organization, that is not created pursuant to statutory authority, but exists and owns property should be attended to under the statutory provisions concerning unincorporated associations and private societies.[122]

C. *Public Records in Texas and Louisiana*

1. *Texas—Race-Notice*

The general recording statute in Texas provides that conveyances of real property or an interest in real property, such as mineral deeds and instruments creating or assigning leasehold or royalty interests, are void "as to a creditor or to a subsequent purchaser for a valuable consideration without notice," unless such instruments are in recordable form and filed for record as required by law.[123] To defeat a claim by a subsequent purchaser or creditor that it is a bona fide purchaser and is entitled to protection under the Texas recording statute, a party claiming under an unrecorded instrument must show that a subsequent

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119. See Bice v. Maxwell, 516 So. 2d 1189 (La. App. 2d Cir. 1987).

120. La. Civ. Code art. 2814.

121. Edwards v. Old Settlers' Ass'n., 166 S.W. 423 (Tex. Civ. App.—Austin 1914, writ ref'd).

122. La. R.S. 9:1051(A) (1991). See Jones v. Shreveport Lodge no. 122, B.P.O.E., 221 La. 968, 60 So. 2d 889 (1952).

123. Tex. Prop. Code Ann. § 13.001(a) (Vernon 1984).

purchaser or creditor had "notice." This can be (i) "actual notice" resulting from actual knowledge of the unrecorded claim; (ii) "constructive notice" resulting from the proper filing of an instrument of record; or (iii) "inquiry notice" resulting from actual or constructive notice of facts that would cause a reasonably prudent person to inquire further into such facts. Under this system, a person is deemed to have notice of facts that reasonable inquiry would have revealed. Under the *chain-of-title doctrine* in Texas, a purchaser is deemed to have knowledge of facts revealed by documents that appear in his chain of title.[124] This constructive knowledge extends to unrecorded documents that are referenced in a recorded instrument. In *Westland Oil Development Corp. v. Gulf Oil Corp.*,[125] the Texas Supreme Court held that where reference to an unrecorded agreement (a letter agreement containing an area of mutual interest provision) was made in a second unrecorded document (an operating agreement) and the second unrecorded document was described in a recorded instrument in a transferee's chain of title, the transferee was charged with the duty of inspecting the operating agreement, as a matter of law, and was further charged with notice of the letter agreement and the equitable claims arising under the letter agreement. The court said that "any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up this inquiry step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained."[126] The rule in the *Westland* case has been extended in a holding that a reference to an unrecorded operating agreement contained in a recorded conveyance in the chain-of-title to the oil and gas interests serving as collateral under a Deed of Trust makes the lien and security interest of the Deed of Trust subordinate to the lien of the operator under the operating agreement.[127]

2. *Louisiana—Pure Race*

The Civil Code provides that "ownership of an immovable is voluntarily transferred by a contract between the owner and the transferee

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124. See Alejandro M. Garro, The Louisiana Public Records Doctrine and the Civil Law Tradition 214-16 (Paul M. Hebert Law Center Publications Institute, 1989) [hereinafter "Garro"]; see, e.g., Stowe v. Head, 728 S.W.2d 120, 124 (Tex. App.—Tyler 1987, no writ); Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668, 670 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

125. 637 S.W.2d 903, 908 (Tex. 1982).

126. Id. at 908, citing Loomis v. Cobb, 159 S.W. 305 (Tex. Civ. App.—El Paso 1913, writ ref'd).

127. MBank Abilene, N.A. v. Westwood Energy, Inc., 723 S.W.2d 246 (Tex. App.—Eastland 1986, no writ).

that purports to transfer the ownership of the immovable" and further provides that the "transfer of ownership takes place between the parties by the effect of the agreement and against third parties when the contract is filed for registry in the conveyance records of the parish in which the immovable is located."[128] An immediate transfer of ownership thus occurs between the parties to the agreement by the effect of the agreement alone. However, due to the problems associated with integrity, security and priority of transactions presented by the principle of immediate transfer of real rights (mineral rights included), the Civil Code requires that the transfer of ownership of immovables be accompanied by the following formalities to be effective as between the parties, (a) in all but specified instances, the transfer must be evidenced by a writing in the form of an authetic act or by act under private signature, and to be effective against third parties, (b) filing for registry of the instrument of transfer in parish where the property is located. As contrasted to other forms of recording acts of other states—pure-notice, race-notice (as in Texas) and period-of-grace—Louisiana follows a pure-race form of recording act. That is, if an immovable (including mineral rights) is sold to different transferees, the first to file the instrument of transfer for registry will prevail, regardless of knowledge or constructive notice.[129] Similarly if a mortgage covering the same immovable is granted to different mortgagees, the first to record will prevail; thus, for both conveyances and mortgages the rule of priority of transactions is that the first to record the instrument evidencing the transaction is the first in right.[130] Professor Redmann has pointed out that notice, constructive or actual, is "wholly irrelevant" to the public records doctrine of Louis-

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128. La. Civ. Code art. 517.

129. La. R.S. 9:2721, 2744, 2752, 2754 and 2756 (1991). See La. Civ. Code art. 2266 (1870), now La. R.S. 9:2756 (1991); cf. McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909) (unrecorded instruments affecting immovable property are ineffective even as to third persons with actual knowledge); but cf. Richardson Oil Co. v. Herndon, 157 La. 211, 102 So. 310 (1924) (actual knowledge of a pending suit affecting immovable property is as effective as the recording of a notice of lis pendens for the purpose of notice to third parties of the pending litigation, a departure from the Louisiana principle that actual knowledge is not equivalent to recordation); see also La. Code Civ. P. art. 3751; see generally William V. Redmann, Basic Law of Recordation, 23 L.S.U. Min. L. Inst. 1 (1977) [hereinafter, "Redmann"]; William V. Redmann, The Louisiana Law of Recordation: Some Principles and Problems, 39 Tul. L. Rev. 491 (1965); Garro, supra note 124, at 276-306.

130. See Redmann, supra note 129, at 4. However, pure-race is not the only rule of priority extant in Louisiana. In the instance of competing claims to a mineral lease by a privileged creditor under the Louisiana Oil, Gas and Water Wells Lien Act, as provided in La. R.S. 9:4862A(2), and a mortgage creditor, the privileged creditor is given a period of grace within which to record his notice of claim or privilege. Consequently, the claim of the privilege holder may outrank the claim of the mortgagee whose mortgage was recorded prior to the filing of the notice of claim or privilege. La. R.S. 9:4862A(2) (1991).

iana.[131] Regardless of the terms that Louisiana courts utilize to explain their reasoning, under the Louisiana recording statutes, it is clear that filing is both essential and sufficient to make an interest transferred in an instrument affecting an immovable effective against the world.[132] Reference to an unrecorded document in a recorded document has been held by at least two courts of appeal to be ineffective and thus not binding on third parties.[133] In a decision of the Louisiana fourth circuit, the court held that where the exercise of the renewal option under a lease was unrecorded, a third party purchaser of property covered by the lease was not bound by the extension of the lease attempted by means of an unrecorded exercise of such renewal.[134] Nevertheless, several cases have stated that recordation constitutes constructive notice to third parties, or that third parties are charged with knowledge or facts contained in recorded instruments involving immovable property.[135] Protection normally afforded by the public records doctrine has been sought

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131. See Redmann, supra note 129, at 7.

132. See Garro, supra note 124, at 296.

133. Judice-Henry-May Agency, Inc. v. Franklin, 376 So. 2d 991 (La. App. 1st Cir. 1979); Sklar Producing Co., Inc. v. Rushing, 262 So. 2d 115 (La. App. 2d Cir. 1972).

134. Julius Gindi and Sons, Inc. v. E.J.W. Enterprises, Inc., 438 So. 2d 594 (La. App. 4th Cir. 1983); but cf. Thomas v. Lewis, 475 So. 2d 52 (La. App. 2d Cir. 1985) (stating that a recorded lease containing an option to renew puts the purchaser on notice of a potential claim against the property, concluding that the exercise of an option to renew under a recorded lease need not be recorded to be effective against third parties, and following Port Arthur Towing Co. v. Owens-Illinois, Inc., 352 F. Supp. 392 (W.D. La. 1972)).

135. See Garro, supra note 124, at 296 nn.185 and 186. See Wells v. Joseph, 234 La. 780, 101 So. 2d 667 (1958). In *Wells* the Louisiana Supreme Court held that unrecorded redemption would be effective even as against third-party purchaser who had acquired property before recordation of redemption certificate and after termination of period during which redemption from tax sale could be effective; an examination of public records would have revealed to the purchaser that there were other claimants of title to property, that property stood of record in names of other parties besides his vendors, and that he would have to resort to lawsuit to establish his ownership. In Florida Gas Exploration Co. v. Bank of St. Charles & Trust Co., 435 So. 2d 535 (La. App. 5th Cir. 1983), the appeals court gave the following statement of the law after *Wells*:

> Under *Wells v. Joseph*, all persons are held to have constructive notice of the existence and contents of recorded instruments affecting immovable property and where a recorded instrument has language that fairly puts a third person "on inquiry as to the title and he does not avail himself of the means and facilities at hand to obtain knowledge of the true facts he is to be considered as having bought as his own risk and peril." Wells v. Joseph, 234 La. 780, 101 So.2d 667, 670 (La.1958); Judice-Henry-May Agency, Inc. v. Franklin, 376 So.2d 991, 992-993 (La.App. 1st Cir.1979); Brown v. Johnson, 11 So.2d 713, 715-716 (La.App.2d Cir.1942). Although the jurisprudence requires the third persons to avail themselves of the "means and facilities at hand" meaning any necessary public records, it does not require a search of unrecorded documents.

435 So. 2d at 538.

without success in cases in which an assumption of obligations under unrecorded documents involving immovable property has been involved. Under the Civil Code an obligee and a third person may agree on an "assumption by the latter of an obligation owed by another to the former."[136] Although the assumption must be in writing, and even though the obligations assumed are evidenced by agreements involving immovable property, the obligations assumed may be evidenced by unrecorded documents.[137]

D. The Mineral Estate vs. The Mineral Servitude

1. Texas: Ownership-in-Place (Corporeal)

The Texas courts long ago adopted the ownership-in-place theory of mineral rights.[138] The case of *Texas Co. v. Daugherty*[139] presented a question whether the interests or rights conferred upon the Texas Company, in virtue of a number of oil leases, constituted property subject to taxation in its hands. The court held that the instruments in question were not intended to create a mere franchise or privilege but to convey a real interest in property and that such interest could be conveyed. The interests created were thus subject to taxation separate from the land. Under Texas law, the minerals in place under the land are part of the land itself; they are subject to ownership in the same manner as the land.

At the same time, however, the ownership right in the minerals is subject to defeasance. It is subject to the Rule of Capture, stated by

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136. La. Civ. Code art. 1823.

137. Cf. Leisure Villa Investors v. Life & Casualty Ins. Co. of Tennessee, 527 So. 2d 520 (La. App. 3d Cir. 1988) (in an instance in which the assumption is that of the obligations under a mortgage, a party who had purchased property under an act containing an assumption of an existing first mortgage, contended that, inasmuch as the recorded mortgage did not contain the prepayment premium provisions set forth in the (unrecorded) mortgage note, it was not bound by the provisions of the unrecorded note; however, the third circuit, citing Wood v. LaFleur, 408 So. 2d 37 (La. App. 3d Cir. 1981), held that, having "become party to the mortgage by its assumption, plaintiff cannot be considered a third-party entitled to protection under the public records doctrine"). Accord Motwani v. Fun Centers, Inc., 388 So. 2d 1173 (La. App. 4th Cir. 1980) (since the obligations evidenced by an unrecorded agreement involving immovable property were contractually assumed by one party, the obligations contained in such unrecorded agreement became the obligations of such party and the public records doctrine was inapplicable); Gulf Oil Corp. v. Adams, 209 So. 2d 770 (La. App. 2d Cir. 1968) (court concluded that it had no knowledge of any law that forbids parties to contract about real rights and include specific obligations against the contracting parties by reference to a written, unrecorded instrument).

138. See A. W. Walker, Jr., Fee Simple Ownership of Oil and Gas in Texas, 6 Tex. L. Rev. 125, 127 (1928).

139. 107 Tex. 226, 176 S.W. 717 (1915).

the Texas Supreme Court in *Eliff v. Texon Drilling Co.*[140] as follows:

> That rule simply is that the owner of a tract of land acquires title to the oil and gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage. The non-liability is based on the theory that after the drainage the title or property interest of the former owner is gone.[141]

The ownership of real property in Texas law may be severed into separate surface and mineral estates, and upon such severance, the mineral estate is an estate in land.[142]

2. *Louisiana: Ownership of Right to Produce (Incorporeal)*

In contrast to Texas, Louisiana follows a theory of non-ownership-in-place of the minerals. The owner of the land owns only the right to produce the minerals. Since there is no ownership in place, the Rule of Capture naturally applies. Article 6 of the Mineral Code provides: "Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals."[143] The same article goes on to provide: "The landowner has the exclusive

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140. 146 Tex. 575, 210 S.W.2d 558 (1948). See also, Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935 (1935).

141. 146 Tex. at 581, 210 S.W.2d at 561-62.

142. Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296, 299 (1923); County School Trustees of Upshur County v. Free, 154 S.W.2d 935, 937 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.).

143. La. R.S. 31:6 (1989). In connection with solid minerals, such as coal, sulphur and salt, ownership of land does include all minerals that occur in a solid state; however solid minerals cannot be owned apart from the land until reduced to possession. Id. § 5. See also Adams v. Grigsby, 152 So. 2d 619 (La. App. 2d Cir. 1963), concerning subterranean water in which the court decided that a landowner has the right to use an unlimited and unregulated amount of water, considered a fugitive subsurface mineral, on his own land even though such use has the effect of depleting the common reservoir of the neighboring tract; however, such landowner may be liable for damages if he negligently or intentionally depletes his neighbors' water supply. General references on the subject of the nature of mineral ownership are: George W. Hardy, III, A Mineral Code for Louisiana: A Progress Report, Rights of the Landowner, 17 L.S.U. Min. L. Inst. 96, 99-105 (1970); Charles W. Phillips, Damages, 4 L.S.U. Min. L. Inst. 16 (1956); J. Clayton Johnson, Maintenance of Mineral Interests in Louisiana, 26 L.S.U. Min. L. Inst. 85, 85-94 (1979); and L. Linton Morgan, Correlative Rights: Surface Owner vs. Mineral Owner, 26 L.S.U. Min. L. Inst. 141 (1979).

right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership."[144]

While a separate mineral estate cannot be created,[145] the landowner can convey the right to produce minerals to another.[146] This will constitute a servitude upon the land.[147] A mineral servitude is a real right that is alienable and heritable and must be evidenced by a writing and is subject to the law of registry; consequently, it is not effective against third parties until it is filed in accordance with law.[148] A mineral servitude owner has no obligation to use his rights; however, such rights may be protected by the owner of the mineral servitude by all means available to a landowner.[149] As minerals are extracted from the ground, the legal characteristics of the minerals change, and they become separately owned and are classified as movables. The point at which such change occurs is when the minerals are "severed" from the land. In Louisiana, minerals

144. La. R.S. 31:6 (1989). In Gliptis v. Fifteen Oil Co., 204 La. 896, 16 So. 2d 471 (1943), the court identified subsurface trespass as one such limitation, a limitation that is important in connection with directional and horizontal drilling. The *Gliptis* court, the first to consider subsurface trespass, decided that the landowner, while not the owner of fugitive minerals, possesses the exclusive right to explore his land for production of minerals, and, therefore, is entitled to damages for subsurface as well as surface trespass. But see Nunez v. Wainoco Oil & Gas Co., 488 So. 2d 955 (La. 1986) and Raymond v. Union Texas Petroleum Corp., 697 F. Supp. 270 (E.D. La. 1988), concerning the effects of an order of the Commissioner of Conservation on what might otherwise be a subsurface trespass. Compare Railroad Comm'n v. Manziel, 361 S.W.2d 560 (Tex. 1962).

145. Cf. Wemple v. Nabors Oil & Gas Co., 154 La. 483, 97 So. 666 (1923) (attempt to create by agreement separate estates in land is a legal impossibility, in that a purported sale of the subsoil as a corporeal mineral estate, distinct from and independent of the surface, and so called a mineral estate, by what ever term described, or however acquired or reserved, creates mere servitudes, giving only the right to extract the minerals and appropriate them).

146. La. R.S. 31:15 (1989).

147. As a dismemberment of ownership that only may be created by the owner of land and may not be acquired by acquisitive prescription, a mineral servitude is the right to explore for and produce minerals from the land of another. La. R.S. 31:21 (1989): "A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership." It should be observed that when the Louisiana courts first treated the severed right to produce minerals as a servitude, the right did not fit into the current classifications of servitude. The Louisiana Civil Code recognized two types of servitude: personal and predial. The mineral servitude was not a personal servitude because it was intended not to be personal but rather heritable and running with the land. It was not a predial servitude because a predial servitude was a servitude on a servient estate for the benefit of a dominant estate: with the mineral servitude, there was no dominant estate. Thus, it is said that the mineral servitude is a "limited personal servitude" or that it is "in the nature of a predial servitude."

148. La. R.S. 31:15 and 17 (1989).

149. Id. § 23.

are severed or "reduced to possession when they are under physical control that permits delivery to another."[150]

3. *Consequences of Distinction: Liberative Prescription in Louisiana*

The mineral servitude doctrine is what makes Louisiana unique among oil and gas producing states. But the unique factor is not that there is no ownership in place, i.e., that the minerals cannot be owned apart from the land; some other states also follow the doctrine that one does not own minerals as such until they are produced but that one only owns a right to produce the minerals.[151]

Rather, it is the regime of prescription that distinguishes Louisiana from other producing states, the liberative prescription of ten years. The Louisiana Supreme Court was well aware that the consequence of characterizing the right to produce minerals as constituting a servitude was to bring into play the regime of liberative prescription. To quote Justice O'Neil from *Frost-Johnson v. Salling's Heirs*,[152] the case which definitively established the adoption of the non-ownership-in-place theory:

> Except for the question of prescription, the question whether the owner of a tract of land owns the physical or corporeal property in the oil and gas running at large beneath the surface, or owns merely the exclusive right to drill and explore for the oil and gas and to become the owner of such oil and gas as he may find and reduce to possession, is a matter of no importance whatever.

Liberative prescription is a very technical area in Louisiana mineral law. Articles 27-79 of the Mineral Code directly relate to the operation of the prescriptive regime.[153] These fifty-three articles constitute nearly

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150. Id. § 7.

151. California, for example. See Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968).

152. Frost—Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 835, 91 So. 207, 235 (1920). Wadkins v. Atlanta & Shreveport Oil & Gas Co. (not for publication) (La. 1913) was the first case to adopt the non-ownership theory but Wadkins was not published because the parties compromised while waiting for rehearing. Eugene A. Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute, 25 Tul. L. Rev. 30, 32 (1950). The difficulty of arriving at the definitive statement of the nonownership or servitude principle is indicated by the fact that *Frost-Johnston* was the ninth case to take up the point and the court's final opinion was on the second rehearing of the case.

153. La. R.S. 31:27-79 (1989). Compare La. Civ. Code art. 3546 (1870) (in effect prior to the adoption of the Mineral Code—rights of usufruct, use, and habitation and servitudes are lost by nonuse for ten years) with La. Civ. Code art. 3448 (prescription of nonuse is a mode of extinction of a real right other than ownership as a result of failure to exercise the right for a period of time).

one-quarter of the Mineral Code, and liberative prescription involves even more when one considers the fact that articles on mineral royalties also relate to the application of liberative prescription to such royalty.

Before going into the details of prescription we should ask the basic question, why have a prescriptive regime to begin with? One reason is that Article 789 of the Civil Code of 1870 said so: "A right to servitude is extinguished by the non-usage of the same during ten years." That is just the rule; it does not suggest why it is the rule. Article 753 of the Civil Code of 1870 suggested a reason: "Servitudes which tend to effect the free use of property in case of doubt as to their extent or the manner of using them are always interpreted in favor of the owner of the property to be affected." Thus, it has something to do with the free use of the property. The Civil Code tended to favor free use. A perpetual interest ties up the property on which that interest exists. Also, the rule tends to promote the more rapid development of the resources of the land, and it avoids the problems of trying to determine the abandonment of property rights, as well as lessening the problems associated with fractional interests increasingly burdening property over a long period of time.[154]

A full discussion of the rules of prescription is beyond the scope of this paper but brief description is necessary.[155] Unless the parties

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154. See Texaco, Inc. v. Short, 454 U.S. 516, 102 S. Ct. 781 (1982); Patrick J. Garver and Patricia J. Winmill, Medicine for Ailing Mineral Titles: An Assessment of the Impact of Adverse Possession, Statutes of Limitation, and Dormant Minerals Acts, 29 Rocky Mt. Min. L. Inst. 267 (1983); George W. Hardy, III, Ancient Mineral Claims—An Obstacle to Development, 28 Inst. on Oil & Gas L. & Tax'n 137 (1977); Debra Dobray, An Explanation of Louisiana Mineral Law and the Doctrine of Liberative Prescription: Policy Considerations for Common Law Jurisdictions? 6 J. Energy L. & Pol'y 153 (1985).

155. For a useful summary and discussion of the subject, see J. Clayton Johnson, Maintenance of Mineral Interests in Louisiana, 26th L.S.U. Min. L. Inst. 85 (1979). See also Debra Dobray, An Explanation of Louisiana Mineral Law and the Doctrine of Liberative Prescription: Policy Considerations for Common Law Jurisdictions?, 6 J. Energy L. & Pol'y 153, 167-84 (1985). A good summary of Louisiana oil and gas law generally is John M. McCollam, A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code, 50 Tul. L. Rev. 732 (1976). Other general references on the subject of mineral servitudes are John B. Hussey, Conservation Developments of the Year, Co-Owners' Right to Contribution for Well Costs Under Forced Pooling, 3 L.S.U. Min. L. Inst. 118, 124-29 (1955); James J. Davidson, A Resume of the Decisions of the Supreme Court of Louisiana During the Year 1954, Construction of Contracts Relating to Minerals and Mineral Rights, 3 L.S.U. Min. L. Inst. 158, 166-68 (1955); Lawrence F. Donohoe, Jr., Acknowledgements, Joint Leases and Prescription, 11 L.S.U. Min. L. Inst. 82, 82-96 (1964); George W. Hardy, III, A Mineral Code for Louisiana: A Progress Report, Mineral Servitudes, 17 L.S.U. Min. L. Inst. 96, 105-19 (1969); D. Ryan Sartor, Jr., Basic Principles of Liberative Prescription, 18 L.S.U. Min. L. Inst. 186 (1971); L. Linton Morgan, The Impact of Louisiana Mineral Code on Mineral Servitudes and Mineral Royalties, 22 L.S.U. Min. L. Inst. 1, 1-18 (1975); Thomas A. Harrell, The Mineral Code

agree to a definite or ascertainable term limiting the duration of the mineral servitude, it is, in theory, a perpetual right; however, whether a mineral servitude has a term, it prescribes in ten years if it is not used.[156] A servitude is created upon completion of the steps necessary to create juridically the right, and at such time prescription commences.[157] The principal method of interrupting prescription is by good faith operations for the discovery and production of minerals.[158] This is specified by the Mineral Code to mean that the operations must be commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth, continued at the site chosen to that point or depth, and conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.[159] The interruption takes place when drilling actually is commenced even though they may not be completed until after ten years have run.[160] A use continues, and prescription is interrupted, as long as production continues or activities designed to obtain or restore production are being conducted.[161]

There are technical rules as to the interruption of prescription when only a portion of a tract burdened by a servitude is included in a unit. A use by means of a unit well located on the tract covered by the servitude interrupts the effect of prescription as to the entire servitude; however, a use by means of a well located off the servitude tract but on a unit that includes a portion of the servitude tract interrupts pre-

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After a Year. Where Are The Problem Areas?, 23 L.S.U. Min. L. Inst. 93, 93-110 (1976); J. Clayton Johnson, Maintenance of Mineral Interests in Louisiana, The Mineral Servitude, 26 L.S.U. Min. L. Inst. 85, 94-115 (1978); Bernard H. McLaughlin, Jr., Co-Ownership and Partition of Mineral Rights in Louisiana, 27 L.S.U. Min. L. Inst. 135 (1980); and Symeon Symeonides, One Hundred Marginal Notes to the New Law of Possession and Acquisitive Prescription, General Principles of Prescription, 30 L.S.U. Min. L. Inst. 126, 216-43 (1983).

156. La. R.S. 31:27, 74 (1989). Cf. Bodcaw Lumber Co. of Louisiana v. Magnolia Petroleum Co., 167 La. 847, 120 So. 389 (1929) (servitude with fixed term of 15 years prescribes if not used in ten years).

157. La. R.S. 31:28 (1989).

158. Id. § 29.

159. Id.

160. Id. §§ 30-31. Geophysical, seismic or other exploration activities that are not designed to produce minerals if minerals are discovered do not constitute a use. Cf. Goldsmith v. McCoy, 190 La. 320, 182 So. 519 (1938) (geophysical exploration of the premises for the purpose of determining by scientific methods an indication of minerals underlying the surface is not a use). The word "actual" implies that a use begins when the bit penetrates the ground or earth is excavated from the mine. The activities must be conducted in good faith but do not have to be successful; thus, a dry hole may interrupt prescription. The Mineral Code follows the pre-Code law in this respect; see Taylor v. Dunn, 233 La. 617, 97 So. 2d 415 (1957).

161. La. R.S. 30-32 (1989).

scription only as to the portion of the servitude tract within the unit.[162] Parties may vary the rules regarding interruption of prescription by contract to enable unit operations to interrupt prescription as to the entire servitude without regard to the location of the well.[163] Furthermore, an *acknowledgment* of the servitude by the landowner will interrupt prescription; however, to be effective, an acknowledgment must be express, evidence the intention to waive the benefits of accrued prescription, in writing, and clearly identify the person making the acknowledgment and the servitudes acknowledged.[164] Prescription may be interrupted by *adoption* of the operations of a third party.[165] It may be *extended* by the landowner for a period less than the ten years that would result from an acknowledgment. Once prescription accrues, the servitude is extinguished, ownership of the formerly severed mineral rights returns to the then owner of the surface of the land on which the mineral servitude was created, and the extinguished mineral servitude may no longer be acknowledged.[166] To "revive" the servitude requires a new act sufficient to create a new servitude, and such act will be viewed as creating a new and distinct right.[167]

There can be *suspension* of prescription. Under Article 58 prescription of nonuse is not suspended by the minority or other legal disability of the owner of a mineral servitude.[168] However, Article 59 provides that prescription will be suspended by an obstacle which the servitude owner cannot prevent or remove.[169]

An attorney dealing with Louisiana lands should observe that Article 64 provides that an act creating mineral servitudes on non-contiguous tracts of land creates as many mineral servitudes as there are tracts, unless the act provides for more.[170] This must be read in conjunction with Article 73 that says one cannot create a single mineral servitude on two or more non-contiguous tracts.[171] Prescription must be interrupted separately on each separate servitude.

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162. Id. §§ 33, 37. See generally 2 Bruce M. Kramer & Patrick H. Martin, The Law of Pooling and Unitization, § 20.03[6][b] (1991).

163. La. R.S. 31:75 (1989).

164. Id. §§ 54, 55.

165. Id. §§ 44, 53.

166. Wise v. Watkins, 222 La. 493, 62 So. 2d 653 (1952).

167. See comments to La. R.S. 31:55 (1989).

168. La. R.S. 31:58 (1989).

169. Id. § 59. A landowner's efforts to prevent access to and drilling on land burdened by a mineral servitude was held in Corley v. Craft, 501 So. 2d 1049 (La. App. 2d Cir.), writ denied, 503 So. 2d 18 (1987) to have created an obstacle to use of the servitude thereby suspending the accrual of liberative prescription. Such action in creating an obstacle was a tort for which damages were required to be paid. Corley v. Craft, 571 So. 2d 718 (La.App. 2d Cir. 1990).

170. La. R.S. 31:64 (1989).

171. Id. § 73.

Under Article 66, the owners of several contiguous tracts of land may establish a single mineral servitude in favor of one or more of them or a third party.[172] This has the effect of pooling the interests of the parties. Article 67 allows parties to partition land they own in indivision and in so doing to reserve a single mineral servitude in favor of one or more of them.[173] Where this is done, as will be noted below, one needs to be aware that co-owners of land or of mineral rights in Louisiana have a veto power over development by one another.

Prescription of royalty. The nature of the right to a future share of minerals produced from the land without the right to explore for and produce the minerals was decided by the Louisiana Supreme Court in the 1939 case of *Vincent v. Bullock*.[174] In this case the court construed a reservation in a deed of a royalty of a stated percentage of all the oil, gas and other minerals produced from and saved from the premises free of the costs of production, and concluded that the interest was not a servitude because it did not provide its owner with any right to conduct any activities on the premises; it merely entitled him to receive a portion of the minerals if and when they were produced. If the land in question had been subject to a mineral lease, the court may have characterized the transaction simply as an assignment of the royalty (or lessor's rent) payable under the lease; however, such characterization was inappropriate because the royalty owner's rights were intended to exist without regard to whether the land was leased. Relying on the Louisiana Civil Code on the law of sales, the Louisiana Supreme Court held that a mineral royalty, while not a servitude, did constitute a charge upon the land and was a real right.

Cases decided subsequent to *Vincent v. Bullock* held that a mineral royalty was a "lesser" right than a servitude and by analogy was subject to the same limitations applicable to servitudes; thus, it was not deemed appropriate to allow a royalty to exist longer than or with more extensive rights than a servitude.[175] It was, therefore, held that a royalty interest prescribes in ten years, and since the royalty owner has no right to

172. Id. § 66.

173. Id. § 67. See Wall v. Leger, 402 So. 2d 704 (La. App. 1st Cir. 1981) on the consequences of such an arrangement for future conveyances by one of the co-owners of an undivided interest in a mineral servitude.

174. 192 La. 1, 187 So. 35 (1939).

175. Cf. Union Oil and Gas of Louisiana v. Broussard, 237 La. 660, 112 So. 2d 96 (1958) (royalty right is an appendage to a mineral right and cannot have any life of its own, and that when a royalty right prescribes, it ceases to exist, and the parties are in the same position as though no royalty right had ever existed); Arkansas Fuel Oil Co. v. Sanders, 224 La. 448, 69 So. 2d 745 (1953) (where royalty reserved by grantor at time of conveyance prescribed because of nonproduction within ten year period of time, it was extinguished and did not revert either to owner of surface or owners of mineral rights).

conduct operations, it was held that a dry hole or other unsuccessful effort to produce minerals would not prevent its prescription (as is the case with a mineral servitude) and actual production of the minerals at least every ten years is generally required to prevent extinction of the royalty by prescription.[176]

These rules have continued in the Mineral Code. Article 87 of the Mineral Code provides that prescription of nonuse running against a mineral royalty is interrupted by the production of any mineral covered by the act creating the royalty.[177] The drilling sufficient to interrupt prescription on a mineral servitude will not be sufficient to interrupt prescription on the mineral royalty. It should be observed that the royalty that is subject to prescription is the "royalty per se," established under Article 80 of the Mineral Code,[178] not the lessor's royalty or the royalty carved out of the lessee's interest.[179] There are rules on prescription of mineral royalty that are similar to those on interruption of prescription on a mineral servitude dealing with unit production and suspension due to the existence of an obstacle. Prescription can be interrupted through the acknowledgment of the mineral royalty by a mineral servitude owner, even though the royalty was established by the landowner prior to the creation of the mineral servitude.[180]

Texas does not have a theory of liberative prescription. Since the state has adopted an ownership/corporeal interest approach, there should not even be the possibility of abandonment of such an interest in minerals. There are cases that support this theory that there can be no abandonment under the Texas approach, but there is also some indication that the matter is not fully settled.[181]

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176. Cf. Union Sulphur Co. v. Andrau, 217 La. 662, 47 So. 2d 38 (1950) (royalty interest in oil, gas and other minerals to be produced from land is lost by the prescription of ten years, if oil, gas or other minerals are not produced within ten years after creation of such interests); La. R.S. 31:85 and 87 (1989); but see La. R.S. 31:90 and 91 (1989) (although production is normally required to interrupt prescription, completion of a well capable of producing in paying quantities will interrupt prescription of royalty); accord, Union Oil Co. of California v. Touchet, 229 La. 316, 86 So. 2d 50 (1956); Le Blanc v. Haynesville Mercantile Co., 230 La. 299, 88 So. 2d. 377 (1956).

177. La. R.S. 31:87 (1989).

178. Id. § 80.

179. Id. § 126.

180. Id. §§ 94-96.

181. See 1 Howard R. Williams and Charles J. Meyers, Oil and Gas Law § 210.1 (1989); A. W. Walker, Jr., The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 7 Tex. L. Rev. 539 (1929); Hall v. McClesky, 228 S.W. 1004 (Tex. Civ. App.—Ft. Worth 1921); Davis v. Texas Co., 232 S.W. 549 (Tex. Civ. App.—Galveston 1921), rev'd on other grounds, Texas Co. v. Davis, 113 Tex. 321, 254 S.W. 304, 255 S.W. 601 (1923); Shuttle Oil Corp. v. Hamon, 477 S.W.2d 701 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

E. *Adverse Possession—Acquisitive Prescription*

Adverse possession is a method of acquiring title to property by possession for some statutory period. It depends on the intent of the possessor to claim and hold the property in opposition to all the world. Possession must be open, notorious, hostile and continuous for the statutory period.

1. Texas

Statutes of limitation in Texas provide periods within which one who has a right to recover realty from an adverse possessor must bring suit or be forever barred. These periods are for three, five, ten and twenty-five years depending on the degree of merit of the title or color of title.[182]

If there has been no prior severance of the minerals from the surface, possession of the surface will run to and mature title to the mineral estate.[183] However, if minerals have been severed, possession of the land subsequent to the severance will not mature title to the minerals.[184] The execution of an oil and gas lease will have the same effect as the severance of the minerals.[185]

The Texas rules have been summarized in the case of *Watkins v. Certain-Teed Products Corp.*[186] as follows:

> The rule is well established in Texas that an adverse entry upon the surface of land extends downward and includes title to the underlying minerals where at the time of entry there had been no severance of the mineral estate. . . . The rule is equally as well established in Texas that, after the severance of the surface of the land and the mineral estate, the mere possession of the one will not ripen into a limitation title to the other and that, after severance of the oil and gas estate, a mere adverse possession and use of the surface does not constitute adverse possession of the minerals under the surface. Grissom v. Anderson, 125 Tex. 26, 79 S.W.2d 619; Wallace v. Hoyt, Tex.Civ.App., 225 S.W. 425; Henderson v. Chesley, Tex.Civ.App., 229 S.W. 573, writ refused; 31-A Tex.Jur., pages 43, 44, Section 15. The

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182. 55 Tex Jur 3d, Oil and Gas § 27 (1987); Tex. Civ. Prac. & Rem. C. §§ 16.024-.027 (Vernon 1986 & Supp. 1989).

183. Cargill v. Buie, 343 S.W.2d 746, (Tex. Civ. App.—Texarkana 1960, writ ref'd, n.r.e); Broughton v. Humble Oil & Refining Co., 105 S.W.2d 480 (Tex. Civ. App.—El Paso 1937, reh'g denied).

184. See Dixon v. Henderson, 267 S.W.2d 869 (Tex. Civ. App.—Texarkana 1954).

185. Weems v. Hawkins, 278 S.W.2d 439 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.).

186. 231 S.W.2d 981 (Tex. Civ. App.—Amarillo 1950).

last-cited authority says: "After the severance of the surface and the mineral estate, the possession of the one will not ripen into a limitation title of the other. So after severance of the oil and gas estate adverse possession of the surface is not adverse possession of the minerals. When the adverse entry is made after the severance, something more than use of the surface is required. Such dominion must be exercised over the minerals as will be notice to the owner of the mineral estate that the possessor of the surface estate is claiming the minerals also."[187]

2. Louisiana

The rules on adverse possession or acquisitive prescription in Louisiana are different from the rules in common law jurisdictions. This is in large part due to its theory of ownership of the right to produce oil and gas and other minerals. The creation of a mineral servitude is different from a mineral title in other jurisdictions. To take up acquisitive prescription we must first take up the general principles applicable to acquisitive prescription of land under the Civil Code. These rules are found in the Civil Code and are of two types: ten and thirty years.[188]

The elements of ten year prescription include the following: 1) *Possession* during the ten years.[189] 2) *Good Faith.* Good faith is presumed, but it is a rebuttable presumption.[190] 3) A *title* which shall be legal and sufficient to transfer the property. This means "just title," not good title.[191] 4) A thing capable of being prescribed.[192] One cannot prescribe against the state.[193]

The possession of thirty years is governed by Article 3486 of the Louisiana Civil Code. Just title is not required, only possession for thirty years. But this requires actual possession; this is more than is required for ten year possession. If one possesses within boundaries or enclosures, one possesses the whole area.[194]

To apply the concept of acquisitive prescription to minerals one must look at what is possession of mineral rights. The Mineral Code provides: "Mineral rights are possessed by their use or exercise according

187. Id. at 984-85.
188. La. Civ. Code arts. 3473-3488.
189. La. Civ. Code arts. 3474, 3478-3479.
190. La. Civ. Code arts. 3480-3482.
191. La. Civ. Code art. 3483.
192. La. Civ. Code art. 3485.
193. See Dynamic Exploration, Inc. v. LeBlanc, 362 So. 2d 734 (La. 1978) (a levee district is a state agency under 1921 constitution and thus one cannot acquire the mineral rights to land owned by the levee district).
194. See A. N. Yiannopoulos, Civil Law Property, § 212 (2d ed. 1980).

to their nature."[195] In connection with liberative prescription we have already seen that a servitude is possessed by conducting drilling operations or by producing. The Mineral Code further provides that possession of the surface is possession of the minerals. It states:

> One who establishes corporeal possession of land as owner under an act translative of title is in possession of the rights in minerals inherent in perfect ownership of land except to the extent mineral rights are reserved in the act or the act is expressly made subject to outstanding mineral rights. This Articles [sic] does not apply to a mineral lessee of the possessor or any of his ancestors.[196]

Thus, even if there is an outstanding mineral servitude, one who adversely possesses the surface also possesses the minerals adversely, even without drilling or production by that person.

However, one is not possessing adversely if the owner of the servitude interrupts that possession by exercising possession himself. That is provided for in Article 156, which states:

> Possession of mineral rights under Article 154 or 155 is lost by adverse use or exercise of them according to their nature. Loss of possession occurs although the production or operations constituting the adverse use or exercise are not on the land being possessed. It is sufficient that the production or operations constitute a use of the mineral rights according to the title of the owner thereof. In the case of a mineral lease, the use or exercise must be such that it would interrupt the liberative prescription of nonuse if the lessee had been the owner of a mineral servitude.[197]

Articles 29 through 41 specify what will interrupt liberative prescription of a servitude, and those principles are incorporated by Article 156. Basically what those articles provide is that good faith operations for the discovery and production of minerals will interrupt prescription. Drilling a well, for example, even if it does not produce oil or gas, will be sufficient to interrupt liberative prescription. It will also then be sufficient to interrupt acquisitive prescription, and the acquisitive prescription as to the minerals will not commence again until the interruption is ceased. One should note that the interruption need not take place on the land being adversely claimed by the one trying to establish acquisitive prescription.

Acknowledgment of title by the adverse possessor to the minerals in another causes the possession to cease because he is no longer claiming

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195. La. R.S. 31:153 (1989).
196. Id. § 154.
197. Id. § 156.

title against the true owner of the minerals.[198] Article 159 states expressly what is implicit in the foregoing articles: mineral rights may not be established by acquisitive prescription.[199] The only way to acquire minerals by acquisitive prescription is through acquisitive prescription of land itself. That is because one cannot establish a continuous possession of a servitude for the requisite time without also establishing the title to the land.

Thus, the differences between Louisiana and Texas on adverse possession may be summarized as follows: the mere fact of severance of a mineral servitude in Louisiana will not protect the mineral rights from being acquired by an adverse possessor of the land. Still, a person may want to sever, because if there is acquisitive prescription, it may be interrupted as to the minerals if the servitude is exercised even off the possessed area.

F. Co-Ownership—Tenants in Common; Veto Power

1. Texas

In Texas, the owners of undivided interests in oil and gas are deemed tenants in common.[200] Each tenant in common is able to go on the land and develop it.[201] There is no trespass against the other cotenants and no waste committed by producing the commonly owned minerals.[202] There is only a duty to account.[203] The basis for the accounting is the fractional share of production less the same share of costs of development

198. Id. § 157.

199. Id. § 159.

200. See Howard R. Williams, The Effect of Concurrent Interests on Oil and Gas Transactions, 34 Tex. L. Rev. 519 (1956); A. W. Walker, Jr., Fee Simple Ownership of Oil and Gas in Texas, 6 Tex. L. Rev. 125, 144-48 (1928).

201. See Willson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.): "The interest of each co-tenant is coextensive of the property and extends to every part thereof, and while each co-tenant has the right to occupy the property, neither of them has the right to occupy any particular part of it to the exclusion of the other. . . . Each co-tenant may enter upon the premises for the purpose of exploring for oil and gas and may drill and develop the premises."

202. Byrom v. Pendley, 717 S.W.2d 602 (Tex. 1986); Cox v. Davison, 397 S.W.2d 200 (Tex. 1965); Burnham v. Hardy Oil Co., 147 S.W. 330 (Tex. Civ. App.—San Antonio 1912), aff'd, 108 Tex. 555, 195 S.W. 1139 (1917).

203. *Byrom*, 717 S.W.2d 602; *Burnham*, 147 S.W. 330; see also Bullard v. Broadwell, 588 S.W.2d 398 (Tex. Civ. App. 1979, writ ref'd n.r.e.); Cox v. Davison, 397 S.W.2d 200 (Tex. 1965); Rosse v. Northern Pump Co., 353 S.W.2d 287 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.); Stroud v. Guffey, 3 S.W.2d 592 (Tex. Civ. App.—Waco 1927), aff'd, 16 S.W.2d 527 (Tex. Comm'n App. 1929); Texas & Pac. Coal & Oil Co. v. Kirtley, 288 S.W. 619 (Tex. Civ. App.—Eastland 1926, writ ref'd); Lone Acre Oil Co. v. Swayne, 78 S.W. 380 (Tex. Civ. App. 1903), aff'd, 98 Tex. 597, 86 S.W. 740 (1905).

and operation, not a share of royalty.[204] The rationale of the Texas rule allowing each cotenant to develop has been given as follows:

> The right of one cotenant to appropriate the property of another is sanctioned only because the mineral estate is such that necessarily the rights of one cotenant must be interfered with if another cotenant is to be permitted to exercise those rights properly belonging to him. As between the producing cotenant and the non-joining cotenant a balance of equities has been struck.[205]

2. *Louisiana*

a. Co-ownership—Veto Power

The basic approach of Louisiana law is that land or mineral rights subject to co-ownership cannot be developed for minerals without the consent of the co-owners.[206] Article 164 of the Mineral Code provides:

> A co-owner of land may create a mineral servitude out of his undivided interest in the land, and prescription commences from the date of its creation. One who acquires a mineral servitude from a co-owner of land may not exercise his right without the consent of the co-owners owning at least an undivided eighty percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations, except out of his share of production.[207]

Under Article 166, a co-owner of land can grant a lease, but the lessee is unable to exercise the lease without the consent of the other

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204. See Bullard v. Broadwell, 588 S.W.2d 398 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.). In this case the producing cotenant (who had the right to grant leases) claimed the other owner of one-third minerals should be paid a share of royalty (one-third the normal one-eighth royalty) when the producing cotenant himself drilled a well without a lease. The court of appeals followed Cox v. Davison, 397 S.W.2d 200 (Tex. 1965) and ruled that the nonproducing cotenant was entitled to one-third the production less one-third the costs.

205. Cox v. Davison, 397 S.W.2d 200, 203 (Tex. 1965).

206. See generally Thomas A. Harrell, Problems Created by Coownership in Louisiana, 32 L.S.U. Min. L. Inst. 381 (1985); Angela Jeanne Crowder, Comment, Mineral Rights: The Requirement of Consent Among Co-owners, 48 La. L. Rev. 931 (1988).

207. La. R.S. 31:164 (1989). The provision for development with the consent of 80% was added after the initial adoption of the Mineral Code.

co-owners.[208] There are similar provisions for co-owned mineral servitudes.[209]

b. Exception to Veto Power for Mineral Servitude

The rule that co-owners may not develop without consent of the other is subject to the limitation that if waste is threatened any of the co-owners may undertake development. Article 176 provides as follows:

> A co-owner of a mineral servitude may act to prevent waste or the destruction or extinction of the servitude, but he cannot impose upon his co-owner liability for any costs of development or operation or other costs except out of production. He may lease or otherwise contract regarding the full ownership of the servitude but must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership.[210]

This last article was attributed to the case of *United Gas Public Service Co. v. Arkansas-Louisiana Pipeline Co.*[211] by the Comments to the Mineral Code, but doubt has been expressed about whether the case was accurately stated for this proposition.[212] Nonetheless, it is now statute, and it is, of course, something like the common law rule. What is strikingly different from the common law approach is the provision of Article 176 that allows any of the co-owners to lease the entire

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208. Id. § 166. The article provides:

> A co-owner of land may grant a valid mineral lease as to his undivided interest in the land but the lessee may not exercise his rights thereunder without consent of co-owners owning at least an undivided eighty percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations or other costs, except out of his share of production.

209. Article 175 of the Mineral Code, La. R.S. 31:175 (1989), provides:

> A co-owner of a mineral servitude may not conduct operations on the property subject to the servitude without the consent of co-owners owning at least an undivided eighty percent interest in the servitude, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. A co-owner of the servitude who does not consent to such operations has no liability for the costs of development and operations except out of his share of production.

210. La. R.S. 31:176 (1989).

211. 176 La. 1024, 147 So. 66 (1932).

212. See Thomas A. Harrell, Problems Created by Coownership in Louisiana, 32 L.S.U. Min. L. Inst. 381, 405-07 (1985), discussing Ree Corp. v. Shaffer, 261 La. 502, 260 So. 2d 307 (1972).

servitude when drainage or other waste is threatened. That makes it easier to get the land under development than the Texas rule: under the Texas approach a company will be most reluctant to drill if it has to share its production on a fifty/fifty basis with a cotenant. Under the Louisiana rule of Article 176, even an owner of a small interest could lease the entire servitude.

It is interesting to observe that when the Mineral Code was proposed in 1971, the proposal was to change from the veto approach that had characterized Louisiana law so as to follow the majority approach to cotenancy, as represented by the Texas rule. When this washed out in the legislature, Article 176 came into being to avoid the great harshness that can result from the veto power. Also, partition of land or of mineral servitudes is available to allow disagreeing co-owners to go their separate ways.[213]

c. Non-Co-ownership—No Veto Power

It may be important to note that Article 169 of the Mineral Code recognizes that "co-ownership does not exist between the owner of a mineral right and the owner of the land subject to the right or between the owners of separate mineral rights." For example, if *A* owns Blackacre and *A* sells *B* half the minerals in Blackacre, they are not co-owners. What rule does Louisiana follow in this situation or when two parties each have separate rights to develop and produce minerals so that they are not co-owners? E.g., instead of *A* granting a servitude to *B* and *C* in indivision, *A* grants to *B* a servitude as to fifty percent of the minerals, and six months later conveys another servitude to *C* for fifty percent of the minerals. Can *B* and *C* develop independently of one another or must they gain one another's consent before proceeding? What code article covers this situation? None, but it appears that under established jurisprudence, each owner can develop.[214]

Royalty, it may be noted, is passive. Thus, royalty can be created by co-owners of land or of mineral servitudes without securing consent of other co-owners.[215]

G. Successive Interests—Usufruct and Life Estate Compared

1. Texas

The common law rules of waste do apply to successive interests in oil and gas, specifically to life tenant and remainder interests. Neither

213. See La. R.S. 31:172-73 (1989); Bernard H. McLaughlin, Jr., Co-ownership and Partition of Mineral Rights in Louisiana, 27 L.S.U. Min. L. Inst. 135 (1980); Gates, Partition of Land and Mineral Rights, 43 La. L. Rev. 1119 (1983).

214. See Clark v. Tensas Delta Land Co., 172 La. 913, 136 So. 1 (1931) and Star Davis Oil Co. v. Webber, 218 La. 231, 48 So. 2d 906 (1950).

215. La. R.S. 31:165, 170 (1989).

life tenant nor remainder interest can alone exploit oil and gas without joinder by the other.[216] The life tenant is entitled only to the use of the estate, not its corpus. The remainder interest does not have a present right to the corpus. This is true whether it is a legal life estate or a conventional life estate.[217] A life tenant can be granted the power to drill wells by the instrument creating the estate.[218] A Texas statute has also been enacted which allows a receivership to be established to protect the relative interests of successive interest owners.[219] Although a lease signed by either the life tenant or the remainderman will bind the signing party's interest, the recommended practice is to obtain a single lease executed by both the life tenant and the remainderman.[220]

Along with the majority of common law jurisdictions, Texas follows the general rule that royalties and bonus are treated as the corpus or principal which is to be accumulated for the remainderman and invested.[221] Furthermore, the life tenant is entitled to enjoy the interest that accrues from royalty and bonus payments.[222] On the other hand, delay rentals in Texas are characterized as rent or income from the land and are payable to the life tenant.[223]

The rule that the life tenant may not enjoy the benefits of the minerals is subject to the exception of the open mine doctrine.[224] A leading case in Texas is *Moore v. Vines*.[225] It can be used to illustrate the operation of the principles regarding life tenant and remainder interests, as well as the open mine doctrine. In 1931 Troy and Ruby Vines were married. In 1951 they executed lease on two tracts with a ten year primary term. This was followed in 1953 by their divorce. They divided the two tracts so that Ruby got Tract *A* and Troy got Tract *B*. In 1958 the couple remarried one another. The next year they executed a joint will naming the survivor as life tenant. Ruby later died, leaving

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216. Kemp v. Hughes, 557 S.W.2d 139 (Tex. Civ. App.—Eastland 1977).

217. See Davis v. Bond, 141 S.W.2d 979 (Tex. Civ. App.—Texarkana 1940), aff'd, 138 Tex. 206, 158 S.W.2d 297 (Tex. Comm'n App. 1942).

218. Amarillo Oil Co. v. McBride, 67 S.W.2d 1098, 1100 (Tex. Civ. App.—Amarillo 1934, writ ref'd n.r.e).

219. Texas Civ. Prac. & Rem. C. § 64.091 (Vernon, 1986 & Supp. 1989).

220. MCZ, Inc. v. Smith, 707 S.W.2d 672 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

221. See Stephens v. Stephens, 292 S.W. 290 (Tex. Civ. App.—Amarillo 1927, writ dism'd w.o.j.); Andrews v. Brown, 283 S.W. 288 (Tex. Civ. App. 1926), aff'd, 10 S.W.2d 707 (Tex. Comm'n App. 1928).

222. Davis v. Bond, 138 Tex. 206, 158 S.W.2d 297 (Tex. Comm'n App. 1942).

223. McGarraugh v. McGarraugh, 177 S.W.2d 296 (Tex. Civ. App.—Amarillo 1943, writ dism'd).

224. See generally M. K. Woodward, The Open Mine Doctrine in Oil & Gas Cases, 35 Tex. L. Rev. 538 (1957).

225. 474 S.W.2d 437 (Tex. 1971).

Troy as the life tenant over Tract *A*, the tract at issue. In March 1961 the lease on the tract in dispute expired without production. Shortly thereafter that same year, 1961, Troy and the remainder interests executed a lease on Tract *A* to Pan American. Pan American produced and paid $64,500 in royalties to Troy. The question before the court was whether the open mine doctrine was applicable so that Troy had a right to all of the royalties.

The court said that the open mine doctrine is an exception to the rule that the life tenant cannot commit waste; where mines have opened on the land prior to the creation of a life estate and remainder, the life tenant is entitled to continue to operate the opened mines and retain the proceeds of such operation, the owner of the future interest not being entitled to have such proceeds impounded or to receive an apportioned share thereof. The open mine doctrine is an ancient one, discussed in Blackstone's Commentaries. Its basis is that a life tenant given the beneficial enjoyment of land is entitled to enjoy the land in the same manner as it was enjoyed before the creation of the life estate.

What constitutes the opening of a mine? The Texas court recognized that a producing well clearly would be open mine, and further observed that the drilling of wells under authority of a lease in existence at the death of the creator of the life estate comes within the open mine doctrine. Thus, the mere existence of an oil and gas lease on the land would be sufficient to constitute an open mine. But the question before the court was whether the lease executed after the death came within the rule. The court held that it did not. The lease under which royalty was being paid to Troy was not in existence at the time the life tenancy came into existence so it did not come under the open mine doctrine. One could not attribute an intent to Ruby that the land should continue to be leased by the life tenant. A strong dissent by Justice McGee turned on intent. How could Ruby know whether the existing lease would produce?

2. Louisiana

The analogous rules on successive interests in Louisiana are rather complicated. The legal principles of usufruct and naked ownership are analogues of life tenant and remainder interests at common law. To appreciate the Louisiana rules we should begin by noting that the rules differ if we are considering a usufruct of a mineral right rather than usufruct of land.

If one has the usufruct of a mineral right (and not of land), the usufructuary enjoys all the benefits of production. Under Article 193 of the Mineral Code the usufructuary may lease or develop the land himself.[226]

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226. La. R.S. 31:193 (1989):

As to a usufruct of land, in Louisiana, contrary to the common law rule, the naked owner (remainder) of land can grant a lease and go on the land to recover the oil and gas while he is only a naked owner. This is under Articles 195 and 196 of the Mineral Code.[227] The naked owner need not account to the usufructuary except to pay for use of land and for any surface damages resulting from the developmental operations. As with the common law, the person creating the usufruct can provide that the usufructuary of land can have the right to enjoy the minerals.[228]

Louisiana does have an open mine doctrine that is an exception to the rule that the naked owner of land enjoys the present benefit of the minerals. The open mine doctrine is found in Articles 190 and 191 of the Mineral Code.[229] When originally enacted they provided very strictly that the usufructuary of land could enjoy the minerals only on mines actually worked at the time the usufruct came into existence. This meant that the pool actually had to be penetrated and shown by surface test to be capable of production in paying quantities. In 1986 the legislature modified the operation of the open mine doctrine to provide that the usufruct of the surviving spouse will enjoy the rights to minerals whether or not there is an actual working of a mine at the time the usufruct comes into existence.[230]

When originally enacted, the Mineral Code provided that the usufructuary had to account to the naked owner when the usufruct terminated. Now Articles 193 and 194 provide that a usufructuary of land benefiting under Articles 190 or 191 or a usufructuary of a mineral right is not obligated to account to the naked owner of the land or of the mineral right for production of the value thereof or any other income to which he is entitled.[231]

Usufructuaries of mineral servitudes, or usufructuaries of land who have been granted such power, may grant leases that extend beyond the

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One who has the usufruct of a mineral right, as distinguished from the usufruct of land, is entitled to all of the benefits of use and enjoyment that would accrue to him if he were the owner of the right. He may, therefore, use the right according to its nature for the duration of his usufruct.

227. Id. §§ 195-96.

228. Id. § 189.

229. Id. §§ 190-91. Article 552 of the Civil Code of 1870 provided for an open mine doctrine. This was the one provision of the Civil Code that dealt with mining.

230. As it now reads La. R.S. 31:190B (1989) provides: "If a usufruct of land is that of a surviving spouse, whether legal or conventional, and there is no contrary provision in the instrument creating the usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals, whether or not mines or quarries were actually worked at the time the usufruct was created. However, the rights to which the usufructuary is thus entitled shall not include the right to execute a mineral lease without the consent of the naked owner."

231. La. R.S. 31:193-94 (1989).

term of the usufruct. Usufructuaries who enjoy the benefits of the open mine doctrine cannot grant leases that extend beyond the term of their usufructs.[232]

H. Overconveyance

Under the well-known *Duhig* doctrine,[233] a grantor who, by warranty deed, purports to convey a fractional mineral interest is estopped (though "estoppel" may not be quite the appropriate rationale) from asserting title to a reserved fractional mineral interest in contradiction to the interest purportedly conveyed. This doctrine has enjoyed a considerable amount of very able attention and discussion in recent years. Professors Ellis, Maxwell, and Smith have all written on the subject, and their works have been noted and followed by the courts.[234]

In the paradigm *Duhig*-type case, a grantor owns Blackacre, and fifty percent of the minerals are owned by another. The grantor conveys Blackacre by warranty deed with a reservation to himself of fifty percent of the minerals. The litigation is between the grantor's successors, who claim the reservation was effective for fifty percent of the minerals, and the grantee's successors, who claim that the fifty percent passed from the grantor under the warranty deed and that the reservation was ineffective.

Under the *Duhig* rule where there is a grant and a reservation, each of which is clear and unmistakable and both of which cannot be fulfilled, the grant will be given effect and the reservation will not. A conveyance of Blackacre conveys all of the rights in Blackacre (which includes minerals) except for those rights that it expressly does not convey. A

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232. La. R.S. 31:118 (1989) provides:

> A usufructuary of land may grant a mineral lease on the estate of which he has the usufruct if his usufruct includes mineral rights susceptible to leasing, but any such lease is extinguished with the termination of the usufruct. A usufructuary of a mineral servitude or other executive interest may grant a mineral lease that extends beyond the term of the usufruct and binds the naked owner of the servitude.

Cochran v. Gulf Refining Co., 139 La. 1010, 72 So. 718 (1916) involved an extension of a lease on land by a usufructuary and the lease was attacked on this ground, but the case was decided on other points.

233. Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 144 S.W.2d 878 (1940).

234. Willis H. Ellis, Rethinking the *Duhig* Doctrine, 28 Rocky Mtn. Min. L. Inst. 947 (1983); Richard C. Maxwell, Some Comments on North Dakota Oil and Gas Law—Three Cases From the Eighties, 58 N.D. L. Rev. 431 (1982); Richard C. Maxwell, Colorado Oil and Gas Conveyancing in Context, 56 U. Colo. L. Rev. 495, 513 (1985); Ernest E. Smith, The "Subject To" Clause, 30 Rocky Mtn. Min. L. Inst. 15-1, 15-20 (1984); see also the excellent student note, Lisa B. Plumly, Note, Conveyances of Fractional Mineral Interests: North Dakota Supreme Court Repudiates the *Duhig* Rule, *Gilbertson v. Charlson*, 17 Tulsa L.J. 117 (1981).

reservation both limits what is purported to be conveyed (or warranted) and creates a right. The reservation "reserves" in the sense that it holds back from conveyance. It creates in the sense that a fractional interest arises which theretofore had been an inherent aspect of the ownership of the land; i.e. there is a right created which exists apart from the land. Logically, the reservation purports to create out of that which is not conveyed. Thus, the conveyance to A is given effect, the limitation of the reservation is given effect, and the creation of the reservation is given effect to the extent that there is anything left after outstanding mineral interests are taken into account. From this it follows that the *Duhig* rule should apply even if no warranty is given, for the deed still purports to convey all rights for which there is no limitation. Thus, too, the *Duhig* rule would not apply in a quitclaim: there the fact of quitclaim limits what the deed purports to convey and the reservation serves only the function of creation of a right in the grantor. Recent cases in Texas have reaffirmed the *Duhig* approach.[235]

Louisiana follows the same approach and principles as the Texas courts in the *Duhig*-type cases. The case of *Dillon v. Morgan*[236] is the Louisiana decision which follows the same approach as *Duhig*. In *Dillon* an owner of land (Dean) sold the land to the defendant Morgan reserving to himself one-half the minerals, thus creating a servitude as to one half the minerals. Morgan later sold the same land to the plaintiff Dillon by warranty deed but reserving to himself one-half the minerals. Dispute then arose when plaintiff buyer learned of the existing servitude owned by Dean and sued claiming breach of warranty. It was the plaintiff's contention that he was acquiring the land subject only to a mineral servitude as to one-half the minerals; the defendant contended that he was reserving the one-half the minerals that had not already been reserved by his seller, Dean. The trial court held that Dean owned one-half the minerals, and that Dillon and Morgan each had one-fourth the minerals, apparently reasoning that Dean's interest clearly was valid and that the deed should be construed as Morgan reserving one-half the remaining minerals, thus leaving one-fourth to be conveyed to Dillon. The court of appeal reversed, holding that the deed warranted ownership of one-half the minerals of the land and that the effect of the reservation of a servitude as to one-half the minerals was simply to reserve that which had already been reserved by the seller's vendor, Dean.

The court explained its result in terms of an estoppel.[237] It stated: "By whatever name, the principle is sound that a seller should not be

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235. Blanton v. Bruce, 688 S.W.2d 908 (Tex. App.—Eastland 1985, writ ref'd n.r.e.); Averyt v. Grande, Inc., 686 S.W.2d 632 (Tex. App.—Texarkana 1985), aff'd, 717 S.W.2d 891 (1986); Tiller v. Tiller, 685 S.W.2d 456 (Tex. App.—Austin 1985).

236. 362 So. 2d 1130 (La. App. 2d Cir. 1978).

237. The court relied on the cases of Hodges v. Long-Bell Petroleum Co., 240 La. 198, 121 So. 2d 831 (1960), and Gaines v. Crichton, 187 La. 345, 174 So. 666 (1937).

allowed to obligate himself to deliver and to warrant title and peaceable possession to a buyer of a thing and then by his own act or claim to derogate from, or to assert rights to the thing contrary to, his obligations."[238] The court further rejected the defendant-seller's contention that if the Dean servitude should expire the reservation of one-half the minerals in his own favor should then become effective. The court quite properly held that the after-acquired title doctrine could not operate in a party's own favor. A more recent case along the same lines as *Dillon v. Morgan* is *Texaco, Inc. v. Newton and Rosa Smith Charitable Trust*.[239]

IV. Mineral Leases

A. *Nature of the Lease*

What is the character of a mineral lease? Is it an estate or an incorporeal right? Is it a servitude or a mere contract? Both Louisiana and Texas have struggled with these questions. The courts of the two states have dealt with them differently but in the end, thanks in part to legislation in Louisiana, the results are not dissimilar. This is as it should be. Both states adhere to the basic premise of freedom of contract, and leases are similar in both states. The intentions of lessors and lessees are not terribly different in Louisiana and in Texas. Lessors and lessees in both states are attempting to establish the same type of on-going relationship between them.

1. Texas—Estate

Texas has gone through several stages in achieving its current view of the nature of a mineral lease. A 1902 case, *National Oil & Pipe Line Co. v. Teel*,[240] held that a no-term lease providing for deferment of drilling by payment of a periodic rental did not pass an interest in land but was only a contract for an option by which the lessee might acquire such an interest. In 1915 the case of *Texas Co. v. Daugherty*[241] said that a lessee acquired a defeasible fee title to the minerals, but there was some uncertainty over whether this depended on the particular wording of the granting clause. Doubt was removed in 1923 by *Stephens County v. Mid-Kansas Oil & Gas Co.*[242] which held that a lease was a conveyance of minerals to the lessee; the estate conveyed was a determinable or base fee. The rule is now well settled that in Texas a mineral lease operates as a deed or conveyance of a determinable fee simple

238. 362 So. 2d at 1132.

239. 471 So. 2d 877 (La. App. 2d Cir.), writ denied, 475 So. 2d 1104 (1985). See also Callon Royalty Fund—1980 v. Walker, 461 So. 2d 621 (La. App. 1st Cir. 1984).

240. 95 Tex. 586, 68 S.W. 979 (1902).

241. 107 Tex. 226, 176 S.W. 717 (1915).

242. 113 Tex. 160, 254 S.W. 290 (1923).

estate, with the lessor retaining a reversionary interest, a possibility of reverter. The possibility of reverter is an estate in land that vests an interest in the lessor upon execution of the mineral lease which may be assigned or devised.[243] During the term of the lease, the possibility of reverter furnishes the lessor with no possessory rights; all of such rights pass to and vest in the lessee.[244] The lessee's estate could last forever, but it is terminable on a special limitation, a contingent event. The event must be one that could happen, but it must not be one that is certain to happen. Otherwise, the estate cannot be properly characterized as one that is capable of enduring forever. An oil and gas lease is ordinarily subject to various events of special limitation, for example, failure to timely commence operations, failure to properly pay delay rentals, and cessation of production.[245]

2. *Louisiana—Hybrid Institution*

Louisiana has had problems with the characterization of the mineral lease.[246] As early as 1913 Justice Sommerville, in the case of *Rives v.*

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243. Caruthers v. Leonard, 254 S.W. 779 (Tex. Comm'n App. 1923); Bagby v. Bredthauer, 627 S.W.2d 190 (Tex. Civ. App.—Austin 1981).

244. 88 Texas Oil & Gas Corp. v. Ostrum, 638 S.W.2d 231, 234 (Tex. App.—Tyler 1982, writ ref'd n.r.e.).

245. See A.W. Walker, Jr., The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 7 Tex. L. Rev. 539, 543-48 (1929).

246. The subject is well covered in William M. Hall, Jr., The Juridical Nature of the Louisiana Mineral Lease, 11 L.S.U. Min. L. Inst. 106 (1964). General references on the subject of mineral leases are Jack P. Brook, Lease Cancellation as a Remedy for Breach of Prudent Operator Duties, 27 L.S.U. Min. L. Inst. 25 (1980); Jerry A. Brown, Right, Capacity, and Authority to Enter into Mineral Transactions, 13 L.S.U. Min. L. Inst. 33 (1966); Robert E. Brumby, Lease Negotiations From the Viewpoint of the Lessor, 7 L.S.U. Min. L. Inst. 45 (1960); Jack C. Caldwell, Remedies for Breach of Mineral Leases in Louisiana, 14 L.S.U. Min. L. Inst. 123 (1967); John E. Coleman, Jr., Representing the Lessor—Selected Problems, 31 L.S.U. Min. L. Inst. 60 (1984); Randall S. Davidson, The Overriding Royalty, 27 L.S.U. Min. L. Inst., 38 (1980); Andrew Gates, Problems of Delay Rentals and Shut-In Payments, 27 L.S.U. Min. L. Inst. 110, 110-117 (1980); Richard E. Gerard, Some Miscellaneous Lease Clauses of Interest to Louisiana Lawyers and Landmen, Reasonable Development Clause, 18 L.S.U. Min. L. Inst. 194, 196-97 (1971); C. Manly Horton, Jr., The Public Records Doctrine and Louisiana Mineral Interests, 11 L.S.U. Min. L. Inst. 16 (1964); John M. McCollam, Impact of Louisiana Mineral Code on Oil, Gas and Mineral Leases, 22 L.S.U. Min. L. Inst. 37 (1975); Charles J. Meyers, The Effect of Express Provisions in an Oil and Gas Lease on Implied Obligations, 14 L.S.U. Min. L. Inst. 90 (1967); S. W. Plauche, III, The Impact of the Louisiana Mineral Code on Oil, Gas and Mineral Leases Part II—Sublease and Assignment, 22 L.S.U. Min. L. Inst. 107 (1975); William V. Redmann, Basic Louisiana Law of Recordation, 23 L.S.U. Min. L. Inst. 1 (1976); Clyde W. Thurmon, Basic Procedures for Examination of Title to Real Property in Louisiana, 8 L.S.U. Min. L. Inst. 72 (1961); J. Hugh Willey, Jr., The Lessee's Implied Obligations Under the Mineral Code, 23 L.S.U. Min. L. Inst. 155 (1976) [hereinafter "Willey"].

Gulf Refining Co.,[247] said the oil and gas lease was in a class by itself which partook of the nature both of sale and of lease. The case of *Arent v. Hunter*[248] ruled that a mineral lease conveys a servitude on the land, thus a lease on four noncontiguous nonproducing tracts lapsed for nonuse of ten years despite the fact that on the fifth tract of the original lease a producing well was in existence.[249] But then the 1936 case of *Gulf Refining Co. v. Glassell*[250] treated the lease as a lease thereby not allowing the lessee to protect its interest through a claim of trespass, a real action. Thus, mineral leases were made subject to the same general principles as were leases for agricultural or commercial purposes. Act 205 of 1938 was passed to overcome the result in *Glassell*. It was made retroactive. Confusion continued in the courts because Act 205 was treated as applying only to procedure and not as to substance in treating mineral leases as real rights.[251]

The Mineral Code resolves the matter by saying that the mineral lease is a contract[252] but it is a real right.[253] The comments to Article 16 refer to the mineral lease as a "hybrid institution." The effect of these two articles is to continue the rule that a mineral lease is not subject to liberative prescription as it is not a servitude, but gives to the lessee the capacity to assert and defend title through use of the real actions. As stated by the Comments, "All things considered, the lease has the major characteristics of a real right: the mineral lessee may follow the land, regardless of transfers of ownership; the mineral lessee may assert his rights against the world just as the proprietor of any other real right; he may enjoy directly and draw from the land a part of its economic advantages by appropriating a wasting asset; he has certain rights of preference; and he holds a right that is in reality susceptible of a type of possession through exercise."

Unlike a mineral servitude, a lease is not subject to prescription of nonuse; however, a critical requirement of a lease that was jurisprudentially developed prior to the Mineral Code and continued in the Mineral Code is that it must have a term.[254] A lease may not continue

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247. 133 La. 178, 62 So. 623 (1913).

248. 171 La. 1059, 133 So. 157 (1930).

249. See also White v. Ouachita Natural Gas Co., 177 La. 1052, 150 So. 15 (1933).

250. 186 La. 190, 171 So. 846 (1936). See also Tyson v. Spearman, 190 La. 871, 183 So. 201 (1938).

251. See Arnold v. Sun Oil Co., 218 La. 50, 48 So. 2d 369 (1949). See La. R.S. 9:1105, repealed by 1974 La. Acts No. 50, § 3, which amended 1950 La. Acts No. 6, § 1, which classified mineral leases as real rights under both procedural and substantive rules.

252. La. R.S. 31:114 (1989).

253. Id. § 116.

254. Id. § 115A; cf. Reagan v. Murphy, 235 La. 529, 105 So. 2d 210 (1958) (prescription

for a period of more than ten years without drilling, mining operations or production.[255] Any attempts by agreement of the parties to the lease to permit a continuation of such term for a period greater than ten years will result in a reduction of the term to ten years by operation of law.[256] Special exceptions to the limitation on the term of a mineral lease exist to permit a longer term for leases covering solid minerals.[257] Beyond the primary term, if the lease provides that its term will be continued as long as production from the premises continues, such production must be in "paying quantities."[258] A single lease may cover separate, non-contiguous tracts. Furthermore, if the terms of the lease do not provide to the contrary, operations on one tract will continue the entire lease as to all tracts.[259]

B. Lease/Deed Distinction

Both Texas and Louisiana have gone through the problem of distinguishing lease from deed. In the Texas case of *Danciger Oil & Refining Co. v. Powell*[260] the issue related to whether there was an implied obligation of the party with a seven-eighths interest in the minerals to develop the oil and gas in order that the plaintiff could enjoy the one-eighth cost-free share of production that the plaintiff owned. The court ruled that the intent had been to establish a mineral interest, not a mineral lease, and there was no implied obligation to develop for the interest of the grantor.

In *Logan v. State Gravel Co.*,[261] a gravel case, Louisiana recognized the distinction between lease and deed, and the court specifically discussed the applicability of the distinction for oil and gas law. The purpose for distinguishing the two was that the plaintiff was seeking to enforce a lessor's privilege or lien for unpaid royalty. The defendant said that such a lien could not apply because the instrument had to be treated as a sale of minerals, not a lease. The defendant relied on the Civil Code article 2678, which provided that "all corporeal things are susceptible of being let out, movable as well as immovable, excepting those which cannot be used without being destroyed by that very use

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of ten years non-use is inapplicable to a mineral lease); Bristo v. Christine Oil & Gas Co., 139 La. 312, 71 So. 521 (1916) (under the public policy of the State of Louisiana, a lease for an indefinite term is a nudum pactum).

255. La. R.S. 31:115A (1989).

256. Id.

257. Id. § 115A and B.

258. Id. § 124.

259. Id. § 114.

260. 137 Tex. 484, 154 S.W.2d 632 (1941). See also Loomis v. Gulf Oil Corp., 123 S.W.2d 501 (Tex. Civ. App.—Eastland 1938, error ref'd.).

261. 158 La. 105, 103 So. 526 (1925).

. . . ." Since a mineral would be destroyed or consumed by use, the defendant argued, it could not be the subject of a lease. The court simply rejected the argument. The court said that the essential difference between a sale and a lease is this:

> That in a sale the property, or ownership, of the thing sold passes at once out of the vendor and to the purchaser, his heirs and assigns, forever; whilst in a lease the property, or ownership, of the thing leased remains in the lessor (landlord) and the lessee (tenant) acquires only the use or enjoyment of the thing leased, and must restore it at the end of the term. Hence it is of the nature (R. C. C. art. 1764, subd. 2) of a lease that the leased property should be restored at the end of the term, in the same condition in which it was received. But this is not of the essence of a lease; for the parties are clearly at liberty to agree otherwise, to wit, that the tenant may remove, or add to, the improvements on the leased immovables.[262]

The contractual nature of the mineral lease is the essential difference between a mineral lease and a mineral servitude. The mineral lessee is bound to the lessor by a contract that contemplates that the lessee will develop the premises for their mutual benefit.[263] Conversely, the mineral servitude owner has no continuing contractual obligations to the landowner. He is viewed as owning a property right; he is not bound to utilize his rights, and if he does so the landowner does not necessarily benefit from his actions.[264]

C. *Implied Covenants*

There are implied covenants in all mineral leases. These arise from the nature of the lease relationship. Lessor and lessee cannot put into every lease terms that will cover all of the eventualities that may arise in the course of the long term relationship between the parties. There are several basic areas of implied covenants that have been taken up in cases in Louisiana and Texas: (a) protection against drainage, or the obligation to protect the leased premises against drainage by wells located on adjacent property as a reasonable, prudent operator; (b) reasonable development, or the obligation to develop known mineral producing formations as a reasonable, prudent operator; (c) further exploration, or the obligation to explore and test all portions of the leased premises after discovery of minerals in paying quantities as a reasonable, prudent

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262. Id. at 107, 103 So. at 526-27. See also Spence v. Lucas, 138 La. 763, 70 So. 796 (1915).

263. La. R.S. 31:122 (1989).

264. Id. §§ 21 and 22.

operator; and (d) diligence in marketing, or the obligation to produce and market minerals discovered and capable of production in paying quantities as a reasonable, prudent operator. Now these implied covenants can be fulfilled in more than one way, and some would include as an additional implied covenant the recognition of a duty to represent the lessor in administrative proceedings. Furthermore, the obligation of the lessee to restore the surface of the leased premises upon completion of operations is sometimes considered to be part of the general standard of prudent operator conduct.

There is nothing peculiar to the origins of the legal systems of Texas and Louisiana that would lead to differing approaches by the courts of the two states in regard to implied rights and obligations of lessors and lessees.[265] The court decisions of both states are generally similar on such implied rights and obligations, with the caveat that Louisiana does seem to impose a greater obligation on development of the lease than do the courts of Texas. Louisiana seems to be more receptive to the idea that the lessee is under a duty of exploration as opposed to a duty of reasonable development.

1. Protection Against Drainage

Texas: In connection with protecting the leased premises against drainage, the Texas courts have imposed an implied obligation on lessees to drill offset or additional wells, if, considering the cost of such wells and the profit to accrue from them, the lessee would have been doing what an ordinarily prudent person would have done under the same circumstances.[266] Under Texas law to establish a cause of action for breach of the drainage covenants one must establish essentially the same elements of proof as in Louisiana; however, in Texas, the lessor must prove that substantial, rather than minor, drainage is occuring to the leased premise.[267] In *Amoco Production Co. v. Alexander*,[268] the Texas court held that the lessee was obligated to seek administrative relief for

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265. Under Article 2710 of the Louisiana Civil Code, a lessee is bound "to enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease." Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701, 64 So. 684 (1913); Carter v. Arkansas Louisiana Gas Co., 213 La. 1028, 36 So. 2d 26 (1948). This general standard is translated into Louisiana mineral law as the "reasonably prudent operator" standard found in La. R.S. 31:122 that has been consistently applied by Louisiana courts to mineral leases.

266. Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928).

267. Compare Good v. TXO Prod. Corp., 763 S.W.2d 59 (Tex. App.—Amarillo 1988, writ ref'd) with Breaux v. Pan American Petroleum Corp., 163 So. 2d 406 (La. App. 3d Cir.), writ denied, 246 La. 581, 165 So. 2d 481 (1964); see Willey, supra note 246, at 176.

268. 622 S.W.2d 563 (Tex. 1981).

permits for Rule 37 exception wells to protect against drainage or even to seek voluntary fieldwide unitization. Contrary to the requirements in Louisiana, in Texas, no statutory requirement exists requiring that a lessor give notice and demand prior to bringing a cause of action for breach of the implied covenant to protect against drainage; however, the requirements of notice and demand may be elements of the cause of action if the lessor seeks partial or complete lease termination.[269]

Louisiana: In Louisiana, the amount of minerals that must be drained to establish that a substantial amount has been drained has not been defined; however, under the prudent operator standard, it would appear to be the amount of drainage that would cause a reasonably prudent operator to offset the drainage, if, of course, the offset well would be profitable.[270] Although the lessee, by payment of delay rentals during the primary term of the lease, may not defer the obligation to protect the leased premises against drainage, if after the breach of the obligation to protect against drainage occurs, the lessor subsequently accepts payment of delay rentals, the lessor may be barred from an action for cancellation of the lease or damages based on such breach.[271] Under Mineral Code article 136, the lessor must put the lessee in default as "a prerequisite to a demand for damages arising from drainage on the property leased." To sustain an action for breach of the duty to protect against drainage, under the guidelines established by the court in *Breaux v. Pan American Petroleum Corp.*, the lessor must establish: (i) the existence of drainage; (ii) the quantity of minerals that would have been produced from an offset well if drilled at the proper time; (iii) the profitability of an offset well (that it would meet operating costs and repay investment costs); and (iv) the lessor's share of the minerals that would have been produced from an offset well had it been drilled at the proper time. If a substantial amount of minerals are being drained from the leased premises, but to undertake to drill an offset well on the leased premises would not be profitable to the lessee, as an alternative to drilling an offset well, the lessee may have a duty to seek the creation

269. Shell Oil Co. v. Stansbury, 401 S.W.2d 623 (Tex. Civ. App.—Beaumont 1966), writ ref'd n.r.e. per curiam, 410 S.W.2d 187 (Tex. 1967).

270. See generally Coyle v. North Am. Oil Consol., 201 La. 99, 9 So. 2d 473 (1942); Louisiana Gas Lands v. Burrow, 197 La. 275, 1 So. 2d 518 (1941); McCoy v. State Line Oil & Gas Co., 175 La. 231, 143 So. 58 (1932); Swope v. Holmes, 169 La. 17, 124 So. 131 (1929); Breaux v. Magnolia Petroleum Co., 121 So. 2d 280 (La. App. 1st Cir. 1960); Breaux v. Pan Am. Petroleum Corp., 163 So. 2d 406 (La. App. 3d Cir.), writ denied, 246 La. 581, 165 So. 2d 481 (1964); see also Williams v. Humble Oil & Refining Co., 432 F.2d 165 (5th Cir. 1970); Billeud Planters, Inc. v. Union Oil Co. of California, 245 F.2d 14 (5th Cir. 1957).

271. *McCoy*, 175 La. 231, 143 So. 58; Hood v. Southern Production Co., 206 La. 642, 19 So. 2d 336 (1944).

of a unit.[272] Where the lessee does seek and establish such a unit, then it has fulfilled the implied covenant.[273]

2. Reasonable Development and Further Exploration

Under the implied covenant of reasonable development, the prudent operator lessee will drill to all known productive formations and produce where it can be shown that a well would produce in paying quantities.[274] Some writers and courts would recognize the existence of an implied covenant of further exploration.[275] It posits that a lessor should be able to show that a prudent operator would undertake to drill an exploratory well (one to a formation not proven to be productive in paying quantities) in some circumstances, even though the lease is being held by production from another formation or by some other lease provision, and if the lessee cannot then show a good reason for not drilling the lease will be cancelled. The existence of producing units on the leased tract or on adjacent acreage may well play a role in the court or jury's evaluation the conduct of a prudent operator, as well as in the question of the implied covenant of reasonable development.

Texas: In Texas, under older forms of leases that were granted for fixed terms, if the lease did not contain an express drilling covenant or option to pay a delay rental in lieu of drilling, courts have imposed a

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272. See *Breaux*, 163 So. 2d 280; cf. Williams v. Humble Oil & Refining Co., 234 F. Supp. 985 (E.D. La. 1964); *Williams*, 432 F.2d 165 (express offset clause in lease construed in manner that did not displace duty of lessee to drill offset wells or seek creation of unit to protect against drainage).

273. Pierce v. Goldking Properties, Inc., 396 So. 2d 528, writ denied, 400 So. 2d 904 (1981).

274. See generally, Patrick H. Martin, A Modern Look at Implied Covenants to Explore, Develop, and Market under Mineral Leases, 27 Inst. on Oil & Gas L. & Tax'n 177, 180-86 (1976), and 5 Howard R. Williams and Charles J. Meyers, Oil and Gas Law §§ 831-835 (1987). See also Claude L. Vander Ploeg, The Implied Covenant of Reasonable Development—A Delicate Balance, 3 E. Min. L. Found. 18-1 (1982); Stephen F. Williams, Implied Covenants in Oil and Gas Leases: Some General Principles, 29 Kan. L. Rev. 153 (1981); Robert L. Ver Schure, Another Look at the Implied Covenants, 26 Rocky Mtn. Min. L. Inst. 887 (1980); Gary D. Allison, Explorvelopment: A Theoretical Hybrid Searching for Fertile Legal Soil in an Unfertile Economy, 39 Inst. on Oil & Gas L. & Tax'n 9-1 (1988); Jerry L. Pickerill, Is There a New Implied Covenant of Explorvelopment?, 31 Inst. on Oil & Gas L. & Tax'n 245 (1980).

275. Sinclair Oil & Gas Co. v. Masterson, 271 F.2d 310 (5th Cir. 1959), cert. denied, 362 U.S. 952, 80 S. Ct. 864 (1960); North York Land Associates v. Byron Oil Indus., Inc., 695 P.2d 1188, cert. denied (Colo. Ct. App. 1984); Gillette v. Pepper Tank Co., 694 P.2d 369 (Colo. Ct. App. 1984); cf. Humble Oil & Refining Co. v. Romero, 194 F. 2d 383 (5th Cir. 1952). Charles J. Meyers and Steven M. Crafton, The Covenant of Further Exploration—Thirty Years Later, 32 Rocky Mtn. Min. L. Inst. 1-1, 1-1 to 1-24 (1986); Charles J. Meyers, The Covenant of Further Exploration: A Comment, 37 Tex. L. Rev. 179 (1958).

duty upon lessees to drill an initial well.[276] When production of oil or gas from the leased premises or land pooled therewith has been achieved, the Texas courts have imposed a duty of reasonable development that requires the lessee to drill such additional wells as a reasonably prudent operator would drill; however, this implied covenant does not obligate a lessee to drill additional wells unless profit to the lessee may be reasonably expected.[277]

Texas has rejected the implied covenant of further exploration rather definitively. This was in the rehearing in the case of *Sun Exploration and Production Co. v. Jackson*.[278] The issue in this case was whether there exists in Texas oil and gas leases an implied covenant to explore, independent of the implied covenant of reasonable development. The court declared: "The law of Texas does not impose a separate implied duty upon a lessee to further explore the leasehold premises; the law recognizes only an implied obligation to reasonably develop the leasehold. Because the jury determined that Sun has not failed to reasonably develop the Jackson lease, the court of appeals should have rendered judgment for Sun. In failing to do this, the court erred."[279]

Louisiana: The implied covenant obligations of the oil and gas lease in Louisiana are now found in the statutory duty of the lessee to act as a prudent operator. Article 122 of the Mineral Code provides: "A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor." The Comment to this article states that the implied covenant of further exploration can be viewed as an evolutionary offshoot of the obligation of reasonable development.[280]

The Comment seems somewhat ambivalent about the existence of the obligation of further exploration. On the one hand they refer to the "test every part" language of the Louisiana court in *Carter v.*

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276. See, e.g., Magnolia Petroleum Co. v. Page, 141 S.W.2d 691 (Tex. Civ. App.—San Antonio 1940, writ ref'd); Van Every v. Peterson, 24 F.2d 26 (5th Cir. 1928).

277. Clifton v. Koontz, 160 Tex. 82, 325 S.W.2d 684 (1959); Rhoads Drilling Co. v. Allred, 123 Tex. 229, 70 S.W.2d 576 (1934); Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 433, 6 S.W.2d 1031, 1036 (1938); Felmont Oil Corp. v. Pan American Petroleum Corp., 334 S.W.2d 449, 455 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.).

278. 783 S.W.2d 202 (Tex. 1989).

279. Id. at 204. See also *Clifton*, 160 Tex. at 98, 325 S.W.2d at 696-97; *Felmont*, 334 S.W.2d at 457.

280. La. R.S. 31:122 (1989), Comment, citing Carter v. Arkansas Louisiana Gas Co., 213 La. 1028, 36 So. 2d 26 (1948). For a discussion of the implications of the concept of "freedom of contract" on the last sentence of La. R.S. 31:122, see Charles J. Meyers, The Effect of Express Provisions in an Oil and Gas Lease on Implied Obligations, 14 L.S.U. Min. L. Inst. 90 (1967).

Arkansas-Louisiana Gas Co., and state: "The jurisprudence since the *Carter* decision has recognized that the obligation of further exploration is embodied in our law."[281] The Comment then goes on to say that in both the obligation of reasonable development and the obligation to further explore there must be discovery in paying quantities to make the obligations operative. The Comment observes that some Louisiana cases have been rather liberal in holding that the lessor has borne the burden of proving that a reasonable, prudent operator would further explore the lease premises. The cases since the adoption of the Mineral Code are not inconsistent with these comments.[282]

Some commentary suggests that Mineral Code article 122 is a rejection of the concept that, after the discovery of minerals in paying quantities on the leased premises, the lessee is under an absolute duty to "test" every part of the premises.[283] However, the pre-Mineral Code cases concerning the development obligations of the lessee should be carefully considered.[284] The issue of whether the lessee is in violation

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281. La. R.S. 31:122 (1989), Comment, citing Middleton v. California Co., 237 La. 1039, 112 So. 2d 704 (1959); Sohio Petroleum Co. v. Miller, 237 La. 1015, 112 So. 2d 695 (1959); Reagan v. Murphy, 235 La. 529, 105 So. 2d 210 (1958); Wier v. Grubb, 228 La. 254, 82 So. 2d 1 (1955); Eota Realty Co. v. Carter Oil Co., 225 La. 790, 74 So. 2d 30 (1954); Nunley v. Shell Oil Co., 76 So. 2d 111 (La. App. 2d Cir. 1954), aff'd, 229 La. 349, 86 So. 2d 62 (1956); Cutrer v. Humble Oil & Refining Co., 202 F. Supp. 568 (E.D. La.), aff'd, 309 F.2d 752 (5th Cir. 1962), cert. denied, 372 U.S. 937, 83 S. Ct. 883 (1963); Romero v. Humble Oil & Refining Co., 93 F. Supp. 117 (E.D. La. 1950), modified, 194 F.2d 383 (5th Cir. 1952). See George Conger, The Evolution of the Further Development Requirement Under Mineral Leases, 7 L.S.U. Min. L. Inst. 149 (1960).

282. Goodrich v. Exxon Corp., 642 F. Supp. 150 (W. D. La. 1986); Morrison v. D & L Partnership, 499 So. 2d 988 (La. App. 3d Cir. 1986); Dawes v. Hale, 421 So. 2d 1208 (La. App. 2d Cir. 1982); Frazier v. Justiss Mears Oil Co., 391 So. 2d 485 (La. App. 2d Cir.), writ denied, 395 So. 2d 340 (1980); Waseco Chem. & Supply Co. v. Bayou State Oil Corp., 371 So. 2d 305 (La. App. 2d Cir.), writ denied, 374 So. 2d 656 (1979); Vetter v. Morrow, 361 So. 2d 898 (La. App. 2d Cir. 1978); Dupree v. Relco Exploration Co., 354 So. 2d 1083 (La. App. 2d Cir. 1978).

283. See Willey, supra note 246, at 169.

284. Id. Some commentary suggests that the obligation of the lessee, established by jurisprudence post-*Carter* and prior to the adoption of the Mineral Code, to "test every part" of the leased premises after the discovery of minerals in paying quantities imposes the additional implied obligation on the lessee of further exploration. See 5 Howard R. Williams and Charles J. Meyers, Oil and Gas Law § 845 (1991); La. R.S. 31:122 (1989), Comment. Other commentary suggests that decisions in the *Carter* case and Middleton v. California Co., 237 La. 1039, 112 So. 2d 704 (1959); Sohio Petroleum Co. v. Miller, 237 La. 1015, 112 So. 2d 695 (1959); Weir v. Grubb, 228 La. 254, 82 So. 2d 1 (1955); Eota Realty Co. v. Carter Oil Co., 225 La. 790, 74 So. 2d 30 (1954); LeJeune v. Superior Oil Co., 315 So. 2d 415 (La. App. 3d Cir. 1975); Saulters v. Sklar, 158 So. 2d 460 (La. App. 2d Cir. 1963), writ denied, 245 La. 638, 160 So. 2d 227 (1964); and Nunley v. Shell Oil Co., 76 So. 2d 111 (La. App. 2d Cir. 1954), aff'd, 229 La. 349, 86 So. 2d (1956), combine together to yield the result that if the obligation of further exploration

of his duty to drill an exploratory well should be a question of fact resting upon a predicate to be established by the lessor that a reasonably prudent operator would have drilled such exploratory well and if such well were drilled, it would have been profitable for the lessee, and if such question is answered in the affirmative, the remedy of partial cancellation of the lease, as to the sand or formation that should have been explored, would seem to be appropriate.[285]

3. *Implied Covenant to Market*

Texas: Another generally recognized implied convenant of the lessee is the covenant to diligently market, sometimes referred to as the covenant to manage and administer the lease.[286] Under Texas law, the duty of the lessee to market oil is treated differently from the duty of the lessee to market gas because mineral leases often provide that gas production is owned entirely by the lessee while oil royalty is payable in kind. Under such arrangements, the lessor is dependent upon the lessee's diligence, skill and good faith in marketing gas; therefore, Texas courts have required lessees to act in good faith when selling the gas of its royalty owners.[287]

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obligates the lessee to drill wells to "the known producing horizon from surface locations throughout the property leased after some portion of the property leased has become productive of oil or gas in that horizon," then the obligation of further exploration has been recognized, "but as such it is indistinguishable from the implied covenant of reasonable development" under Louisiana law; however, if the obligation of further exploration means that the lessee is obligated to drill a well from a location on the leased premises to a depth sufficient to "test" a sand or formation that previously has not been encountered by a well on the leased premises, "it cannot be said that in Louisiana the obligation of further exploration, as clearly distinguished from the obligation of reasonable development, has been recognized." Willey, supra note 246, at 172. See *Sohio Petroleum*, 237 La. at 1026, 112 So. 2d at 699.

285. Cf. Fontenot v. Austral Oil Exploration Co., 168 F. Supp 36, 40 (W.D. La. 1958), modified, 266 F.2d 956 (5th Cir. 1959) (analogous facts considered in a reasonble development case were (a) geological data, (b) the number and location of wells drilled both on the leased premises and adjoining lands, (c) the productive capacity of the producing wells, (d) the cost of drilling operations, (e) the time interval between the completion of the last well and the demand for additional operations, and (f) the acreage involved in the disputed lease). See Willey, supra note 246, at 174; La. R.S. 31:134 and 142 (1989).

286. See Sun Exploration and Prod. Co. v. Jackson, 783 S.W.2d 202, 204 (Tex. 1989).

287. See Amoco Prod. Co. v. First Baptist Church of Pyote, 579 S.W.2d 280 (Tex. Civ. App.—El Paso 1979), writ ref'd n.r.e. per curiam, 611 S.W.2d 610 (Tex. 1980) (court held the lessee liable because it obtained for itself a benefit which it did not fully share with its lessors under an arrangement in which the lessee (i) dedicated the lessor's gas to a long-term contract which provided for a price approximately one-half of the amount at which gas was then being sold to other purchasers from the same well and with no right to future price redetermination based on market increases, and (ii) by doing so, the lessee obtained increased prices for production from certain of its other properties in which the lessors had no interest).

Louisiana: As early as 1921, Louisiana courts recognized the implied obligation of the lessee to use reasonable diligence in marketing the minerals discovered on the leased premises. In one of the earliest Louisiana oil and gas cases, *Hutchinson v. Atlas Oil Co.*,[288] the Supreme Court of Louisiana noted that after the lessee drilled a gas well and produced gas from the well for two months, it was "shut off from the pipe line" and concluded that there was "no question but that there was an ample market for the gas which might have been produced upon plaintiffs' property if reasonable development had been made. . . ."[289]

4. Restoration of Premises

Texas: Under Texas law, the mineral owner or lessee is entitled to utilize as much of the surface as may be reasonably necessary for the enjoyment of the mineral rights.[290] Although not recognized as an implied covenant under a lease in Texas, not infrequently, as an obligation expressed in the lease, a lessor will provide for restoration of the surface of the leased premises following the termination of operations and adandonment of the premises; however, without an express covenant for restoration of the surface, a lessee has no duty in Texas to restore the surface of the leased premises to the condition in which it was found prior to commencement of operations.[291]

Louisiana: Whether, as suggested by the comments to the Mineral Code, the duty of restoration of surface is properly characterized as an implied duty, in decisions rendered before the enactment of the Mineral Code and in express provisions in lease forms in circulation in Louisiana, the duty to restore the surface of the leased premises upon completion of operations has been recognized in Louisiana.[292] Provisions that are not uncommon in forms of mineral lease agreements in use in Louisiana

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288. 148 La. 540, 87 So. 265 (1921).

289. Id. at 546, 87 So. at 267. Cf. Nordan-Lawton Oil and Gas Corp. of Tex. v. Miller, 272 F. Supp. 125 (W.D. La. 1967), aff'd, 403 F.2d 946 (5th Cir. 1968) (operators are not held to an all-knowing standard only revealed by *ex post facto* judgments; thus, the general rule is that in connection with shortcomings in the conduct of the lessee that may only be revealed by hindsight, a covenant is not breached if, under the circumstances, an ordinary prudent operator might have followed the same course); Lelong v. Richardson, 126 So. 2d 819 (La. App. 2d Cir. 1961) (extensive discussion of the relative interests and expectations of the lessor and the lessee concerning marketing of gas production). See generally on both Texas and Louisiana on the marketing covenant Bruce M. Kramer and Chris Pearson, The Implied Marketing Covenant in Oil and Gas Leases: Some Needed Changes for the 80's, 46 La. L. Rev. 787 (1986).

290. Humble Oil and Refining Co. v. Wood, 294 S.W. 197 (Tex. Comm'n. App. 1927, judgm't adopted).

291. Ottis v. Haas, 569 S.W.2d 508 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

292. See William O. Bonin, Comment, 26 Tul. L. Rev. 522 (1952).

are provisions that obligate the lessee to be responsible for damages to timber and growing crops and to restore the surface of the leased premises after the conclusion of operations on such premises.[293] Prior to the enactment of the Mineral Code, the duty of the mineral lessee to reasonably restore the surface of the leased premises after the conclusion of operations was recognized by Louisiana courts even in the absence of express obligations to restore the surface under the lease agreement.[294] Louisiana courts have limited the duty of the lessee to restore the premises by an economic balancing process. In *Rohner v. Austral Oil Exploration Co.*,[295] the lessor sued his mineral lessee to recover for crop and other property damages resulting from drilling operations. Although the lessor recovered for damage (1) to his cornfield that resulted from actions by the lessee in (a) assembling its derrick in the cornfield and (b) driving his trucks through the cornfield instead of the constructed runway for ingress and egress, (2) to his entire watermelon crop that resulted from actions by the lessee and his employees in (a) driving through the watermelon field and (b) eating and hauling away the watermelons, and (3) to the entirety of his fence, caused by the removal of one section of fence by the lessee, the court denied the claim by the lessor for damage to acreage on which actual drilling took place. The lessor asserted that the drillsite acreage was rendered useless for agricultural purposes by the operations of the lessee; however, the court reasoned that "the condition or infertility of the land actually used for the pits and clay and drilling operation was due to the ordinary, customary and necessary acts which must be done by drilling company in order to put down a well" and emphasized that the damage to the drillsite acreage was not attributable to any negligence of the lessee. According to the redactors of the Mineral Code, the general standard of Louisiana Civil Code article 2710 that the lessee is bound "[t]o enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease," as it is imported into the Mineral Code by Article 122, is intended to elevate the jurisprudentially developed duty to restore the surface of the leased premises to an implied covenant of the lessee.[296]

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293. See, e.g., Bath Form 42 CPM—New South Louisiana Revised Eight, Paragraph 8.

294. Cf. Smith v. Schuster, 66 So. 2d 430 (La. App. 2d Cir. 1953) (lessee should maintain and restore the premises in the condition he found them subject to his rightful use, and where he has damaged the land it is his duty to appropriately remedy the condition brought on by his use of the lease).

295. 104 So. 2d 253 (La. App. 1st Cir. 1958).

296. La. R.S. 31:122 (1989), Comment.

D. Lease Royalty Actions

Texas: Accrued royalty payments under Texas law are characterized as personal property and are subject to a four year statute of limitations.[297] Actions to enforce such payments must be taken within four years of the date on which the cause of action accrues; for royalty payments the operative date will be "at or about the time of the production or purchase of the oil or gas in question."

Louisiana: An action to recover underpayments or overpayments of royalties from the production of minerals, except for payments, rents, or royalties derived from state-owned properties, is subject to the liberative prescription of three years.[298] In *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*,[299] the court applied the three year prescription to royalties claimed but not paid because of a mistake in a survey of the land under lease. In *Hankamer v. Texaco, Inc.*,[300] the court of appeal applied the three year prescription, relying on the *Pure Oil* case, but there was no discussion by the court of a claim of concealment or misrepresentation by the defendant. Likewise, in *Parker v. Ohio Oil Co.*,[301] the court applied the three year prescription, citing *Pure Oil*, but the defendant had paid the proper royalty to the father of the plaintiffs and had made no misrepresentations or concealments to those plaintiffs. In *Frey v. Amoco Production Co.*,[302] the United States Fifth Circuit Court of Appeals held that under the Louisiana doctrine of *contra non valentem agere non currit praescripto* (no prescription runs against a person unable to bring an action), the three-year prescriptive period did not begin to run on a royalty miscalculation claim until the royalty owners could have known, through the exercise of reasonable diligence, that they had such a cause of action against lessee.

Louisiana for a time was the only state that cancelled leases for failure to pay royalty without even a requirement of a putting in default. It was a rather harsh remedy, and when the Mineral Code was adopted, it pointedly specified that the lessor had to put the lessee in default. The Mineral Code states that the provisions of the Civil Code that

297. Tex. Civ. Prac. & Rem. Code § 16.004 (Vernon 1986). See Shell Oil Co. v. State, 442 S.W.2d 457 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

298. La. Civ. Code art. 3494(5). Cf. Hankamer v. Texaco, Inc., 387 So. 2d 1251 (La. App. 1st Cir.), writ granted, 392 So. 2d 669 (1980), appeal dismissed, 403 So. 2d 651 (1981) (claims for unpaid royalties accruing more than three years prior to the filing of suit are prescribed).

299. 167 La. 801, 120 So. 373 (1929).

300. 387 So. 2d at 1254.

301. 191 La. 896, 186 So. 604 (1939).

302. 943 F.2d 578 (5th Cir. 1991), opinion withdrawn in part on other grounds, No. 90-3553, 1992 WL 1743, 1992 LEXIS 205 (5th Cir. 1992).

establish a distinction between an active and a passive breach are applicable to mineral leases.[303] It was this distinction that gave rise to lease cancellation by the courts. But the Mineral Code further provides it is subject to modifications.

If a mineral lessor seeks relief for the failure of his lessee to make timely or proper payment of royalties, he must give his lessee written notice of such failure as a prerequisite to a judicial demand for damages or dissolution of the lease.[304] The lessee has thirty days after receipt of the notice to pay or respond in writing as to why payment is not being made.[305] If the lessee's original failure to pay was due to fraud or from a willful and unreasonable refusal to pay, then the court may give double the royalties due plus interest plus attorneys' fees.[306] Otherwise, the lessee is liable only for the amount owed plus interest and, if payment is not made within thirty days, attorneys' fees.[307] Failure to pay within the thirty days or inform the lessor of a reasonable cause for failure can lead to double the royalties due plus interest plus attorneys' fees, and the court may cancel the lease.[308] Lease cancellation is available only when the remedy of damages is inadequate to do justice.[309]

What about interest owners, such as overriding royalty owners who are not lessors? The Mineral Code was amended in 1982 to provide similar notice and demand with doubled damages for them, though without lease cancellation since that would virtually never be in the interest of such an interest owner.[310]

Thirty-Day Rule Concerning Extinguished Rights. Another important requirement of Louisiana mineral law, one that can entitle the person

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303. La. R.S. 31:135 (1989).

304. Id. § 137. The comment here explains well the development of the Louisiana law with respect to nonpayment of royalty and the considerations in enacting this article. In Rivers v. Sun Exploration & Prod., 559 So. 2d 963, 969 (La. App. 2d Cir. 1990) the court held that the notice must be of a sufficiently specific nature "so as to reasonably alert the lessee and to allow for an appropriate investigation of the problem by the lessee."

305. La. R.S. 31:138 (1989). See Arceneaux v. Hawkins, 376 So. 2d 362 (La. App. 3d Cir. 1979), discussed in Patrick H. Martin, Mineral Rights, Developments in the Law, 1979-1980, 41 La. L. Rev. 344, 350-51 (1981); Fuller v. Franks Petroleum, Inc., 501 So. 2d 1024 (La. App. 2d Cir. 1987).

306. La. R.S. 31:139 (1989).

307. Bailey v. Franks Petroleum, Inc., 479 So. 2d 563 (La. App. 1st Cir. 1985) (negligent nonpayment is not willful nonpayment, and the damages limited to the amount due with interest from the date due and attorney fees.)

308. La. R.S. 31:140 (1989).

309. Id. § 141. For a case in which lease cancellation was found to be appropriate, see Wegman v. Central Transmission, Inc., 499 So. 2d 436 (La. App. 2d Cir.), writ denied, 503 So. 2d 478 (1987).

310. La. R.S. 31:212.21-212.23 (1989 & Supp. 1991), added by 1982 La. Acts No. 249.

demanding cancellation of a previously outstanding right from the public records to damages and attorneys' fees, is the obligation imposed on the former owner of a mineral right that is extinguished by the accrual of liberative prescription, upon the expiration of its term, within thirty days after written demand by the person in whose favor the right has been extinguished or terminated, to furnish such person with a recordable act evidencing the extinction or expiration of the right.[311]

Ninety-Day Rule Concerning Extinguished Leases. In the instance of a mineral lease that is extinguished prior to the expiration of its primary term, within ninety days after the lease is extinguished, the former lessee *shall record* an act evidencing the extinction or expiration of the lease in the official records of all parishes in which the lease is recorded.[312] In the case of all mineral rights other than mineral leases, the party demanding cancellation is not entitled to damages or attorneys' fees if a good faith dispute exists concerning whether the right at issue has expired.[313]

Unclaimed Property Act. In Louisiana, if for more than two years after becoming payable, unpaid "rents and royalties" remain unclaimed, they are presumed abandoned under the Louisiana Uniform Disposition of Unclaimed Property Statute.[314] This statute is not an escheat statute, a common law term that is not applicable; however, despite differences in terminology, Louisiana provides for the patrimony of a deceased to pass to the state in circumstances of "in default of blood, adopted relations, or a spouse not judicially separated."[315] Although not defined in the Unclaimed Property Act, the terms "rents and royalties" appear to contemplate lessor's royalties, mineral royalty interests, overriding royalty interests and delay rentals (including "Pugh clause" rentals and "shut-in gas well rentals"); however, such terms do not appear to encompass operating interests, whether owned by a mineral lessee or unleased owner. On the other hand, unpaid amounts due to operating interest owners (including unleased owners) should be subject to the general abandonment period of five years set forth in the Unclaimed Property Act, which provides that, except as otherwise provided in the statute, all intangible personal property (including any income), less any lawful charges, is presumed abandoned if such property remains unclaimed by the owner for more than five years after becoming payable or distributable.[316] Without any attempt to provide a comprehensive

311. Id. §§ 206(A) and 207.
312. Id. § 206(B).
313. Id. § 206, Comment.
314. La. R.S. 9:151-188 (1991), by 1986 La. Acts No. 829, § 1, effective July 10, 1986 (the "Unclaimed Property Act").
315. La. Civ. Code art. 902. See also La. R.S. 9:1611-15 (1991).
316. La. R.S. 9:153(A) (1991).

treatment herein of the Unclaimed Property Act, in connection with prescription, oil and gas operators and practitioners should be aware that, although "rents and royalties" become abandoned (and, thus, reportable and payable to the State of Louisiana) after two years from the date on which they are payable, the prescriptive period (statute of limitation) applicable to an action by a landowner to recover these monies is three years; thus, in the third year a gap in the law exists since under the Unclaimed Property Act, the monies attributable to such "rents and royalties" are payable to the State of Louisiana, but the operator or lessee appears to remain liable to the owner, should the owner re-appear prior to the expiration of the third year. Section 171(A) of the Unclaimed Property Act may afford adequate protection to a person paying or delivering abandoned property to the State against claims from the owner who appears after payment or delivery to the State.[317]

E. Breach of Express Duty to Drill

One other difference between Louisiana and Texas to be noted is the measure of damages for breach of an express obligation to drill a well. One can look at the lessor's or farmoutor's loss in several different ways. It is possible to say that the nonbreaching party has lost the royalty that would have been earned had the well been drilled, or that he has lost the cost that it would take to drill the well, or that he has lost the value of the retained interest (e.g. the market value of the royalty interest), or that he has lost the value of the information that the well would have yielded.[318]

1. Louisiana—Cost-of-Drilling

Louisiana has adopted the cost-of-drilling rule.[319] The rationale of the court in *Fite v. Miller*, the leading case on the cost-of-drilling rule, was as follows:

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317. Cf. id. § 171(E) (providing for defense and indemnity of holder of unclaimed property if, in good faith, holder delivers property to secretary of the Department of Revenue and Taxation for the State of Louisiana, the state administrator).

318. 5 Howard R. Williams and Charles J. Meyers, Oil and Gas Law § 885 (1991); Richard C. Maxwell, Appropriate Damages for Breach of Implied Covenants in Oil and Gas Leases, 42 Inst. on Oil & Gas L. & Tax'n, §§ 7.01, 7.02 (1991). See also Louis Emanual, Remedies for Breaches of Implied Covenants and Express Obligations to Drill in Oil and Gas Agreements, 7 E. Min. L. Inst. 16-1 (1986); Richard C. Maxwell, Damages for Breach of Express and Implied Drilling Covenants, 5 Rocky Mt. Min. L. Inst. 435 (1960); William R. Scott, The Measure of Damages for Breach of a Covenant to Drill a Test Well for Oil and Gas, 9 Kan. L. Rev. 281 (1961); Annotation, Right and Measure of Recovery for Breach of Obligation to Drill Exploratory Oil or Gas Wells, 4 A.L.R.3d 284 (1965).

319. Fite v. Miller, 196 La. 876, 200 So. 285 (1940), prior appeal, 192 La. 229, 187

> It is no defense to the claim of loss of the right to have the well drilled by the defendant, i. e., the act of performance, that subsequent happenings showed that the prospects for discovering oil and gas at the time of performance were practically nil or at most equivalent to "wildcat" chances, for this contention fails when the fact is taken into consideration that at the time the contract was entered into the plaintiff transferred to the defendant valuable mineral rights and the defendant, in return therefor, unconditionally bound himself to perform his part of the agreement. If the plaintiff had furnished the defendant with $6,400 cash for the purpose of drilling the well instead of valuable mineral rights, and the defendant refused and failed to drill the well, it is clear that the plaintiff could have recovered the $6,400 in a suit for damages for the breach of the agreement. The only difference between the instant case and the hypothetical one is that here the plaintiff parted with valuable mineral rights and in the hypothetical case the obligee paid $6,400 in cash. To carry the defendant's argument to its logical conclusion with reference to the above assumed case, if the value of the dollar had been depreciated due to subsequent economic conditions and the plaintiff had sued the defendant for damages for breach of the contract, he could plead as a defense that the value of the dollar at the time for the performance of the contract was only worth seventy-five cents and, therefore, the plaintiff could only recover from the defendant, in damages, three-fourths of the $6,400.
>
> The plaintiff lost the right to have the well drilled by the defendant through his breach of the contract. The value of this right or the act of performance is the amount of money that it would have cost the defendant to drill the well when he should have done so. Therefore, it is our conclusion that the amount that it would have cost to drill the well at the time of performance furnishes a measure for determining the value of the loss or damage which the plaintiff sustained as a result of the defendant's unjustifiable nonperformance or breach of the contract, which deprived the plaintiff of his right to have the well drilled by the defendant.[320]

So. 650 (1939); Jones v. Whittington, 171 So. 2d 764 (La. App. 2d Cir.), writ refused, 247 La. 624, 172 So. 2d 703 (1965).

320. *Fite*, 196 La. at 885-86, 200 So. at 288.

2. Texas—Lost Royalty

Texas originally followed a cost-of-drilling approach[321] but then adopted the lost royalty rule as a measure of damages.[322] Williams and Meyers describe *Guardian Trust Co. v. Brothers* as the leading case on the lost-royalty rule.[323] The lessee breached a promise to drill, and the lessor sought $8,000 in damages, the cost to drill. The court held that the plaintiff's damages were to be measured by the royalty he would have received had the well been drilled. The court said:

> No other value to appellants than the value of the royalty was contemplated. The land was situated in an oil field and three wells had been drilled on this very tract a few years before this lease was executed. The royalty was one-eighth of the oil and a like proportion of the proceeds of the sale of gas. Its value might have been substantially more than $8,000 and it might have been substantially less. The only way to put appellants in the position they would have been put by performance would be to award them damages measured by the value of their royalty. The burden was upon them to establish that value, but they offered no evidence thereof. There is no more reason to fix that value at $8,000 than to fix it at $10,000 or $2,000. To do so would be to hold that the measure of damages for the breach of a contract is not the value of performance to the obligee, but is the cost of performance to the obligor.[324]

F. Executive Rights In Louisiana and Texas

Louisiana and Texas do have some apparent differences in their respective approaches to executive rights, that is the power to grant oil and gas leases.

1. Louisiana

Prior to the effective date of the Mineral Code, early jurisprudence recognized another right as a separate, valid charge on land, that carried

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321. Texas Pac. Coal & Oil Co. v. Stuard, 7 S.W.2d 878 (Tex. Civ. App.—Eastland 1928, writ ref'd).

322. Fain-McGaha Oil Corp. v. Owens, 132 Tex. 109, 121 S.W.2d 982 (1938); Hardwick v. Jackson, 315 S.W.2d 440 (Tex. Civ. App.—Dallas 1958); Guardian Trust Co. v. Brothers, 59 S.W.2d 343 (Tex. Civ. App.—Eastland 1933, writ ref'd).

323. 5 Howard R. Williams and Charles J. Meyers, Oil and Gas Law § 885.2 (1991).

324. *Guardian*, 59 S.W.2d at 345.

with it the "perpetual and exclusive right to make and execute mineral leases."[325] Due to the limited number of pre-Mineral Code cases addressing the juridical nature of the executive right, the exact nature of the charge, whether it was a form of agency coupled with an interest or an independent property right, was not clearly articulated before the adoption of the Mineral Code.[326]

Under the Mineral Code, an executive right is classified as a mineral right and a real right that may exist independently or "as a part of another form of mineral right."[327] An executive right is defined as the exclusive right to grant mineral leases on specified lands or mineral rights.[328] Unless restricted by contrary agreement, the executive right owner is entitled to receive bonuses and rentals incidental to leasing. The executive right owner may exercise his power to lease the land or mineral rights to the same extent as if he were the owner of a mineral servitude.[329] If the executive right exists independently, its prescription is regulated by the same rules that apply to mineral servitudes.[330] If the executive right is part of or appended to another right, its life is dependent upon the right to which it is appended.[331] Considering Mineral Code articles 105 and 117 together, the Mineral Code seems to indicate that a lease granted by an executive right owner will terminate when the executive right itself prescribes rather than when the term of the interest leased has expired.

Nonexecutive Interest. The Mineral Code also distinguishes between executive and nonexecutive interests.[332] An executive interest is a "mineral right that includes an executive right," that is, the right to lease.[333] A nonexecutive interest is one that does not include the right to lease, for example a mineral royalty or a mineral servitude with respect to which

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325. Mt. Forest Fur Farms of Am. v. Cockrell, 179 La. 795, 155 So. 228 (1934); cf. Ledoux v. Voorhies, 222 La. 200, 62 So. 2d 273 (1952) (transfer of exclusive right to grant leases, in effect, transferred "all that the lease might bring," including sources of income or profit which leases might involve (i.e., bonus and delay rentals)); Cormier v. Ferguson, 92 So. 2d 507 (La. App. 1st Cir. 1957) (reservation of right to execute leases does not reduce the mineral right to a royalty); see Dart v. Breitung, 136 So. 2d 501 (La. App. 1st Cir. 1961).

326. Extensive treatment of the jurisprudential development of executive rights before the adoption of the Mineral Code can be found in two articles by Marlin Risinger, Jr. See Marlin Risinger, Jr., Executive Rights in Louisiana, 16 L.S.U. Min. L. Inst. 3 (1968), and, on the impact of the Mineral Code, Marlin Risinger, Jr., Executive Rights, Chapter 6, Louisiana Mineral Code, 22 L.S.U. Min. L. Inst. 23 (1974).

327. La. R.S. 31:16, 106 and 113 (1989).

328. Id. § 105.

329. Id.

330. Id. § 107.

331. Id. § 113.

332. See id. §§ 108-110.

333. Id. § 108.

the right to lease has been granted to another. The purpose of this distinction is to define the duties of the holder and owner of the right to lease, the executive right, to the owner of a nonexecutive interest.

Standard of Care. The executive interest owner is not bound to grant a mineral lease; however, if he does lease, he must "act in good faith and in the same manner as a reasonably prudent landowner or mineral servitude owner whose interest is not burdened by a nonexecutive interest."[334] If this standard of care is violated, the lease is not invalidated due to violation of such standard of conduct; however, the owner of the executive interest is liable for damages suffered by the nonexecutive interest owner.[335] A prescriptive period of one year applies to an action by the nonexecutive interest owner against the executive interest owner commencing from the time that the lease is filed for registry.

Power to Pool. In *LeBlanc v. Haynesville Mercantile Co.*,[336] the Louisiana court reached a result opposed to that of Texas regarding the executive's power to pool a non-executive's interest. The issue was whether a non-participating royalty interest that had been previously severed from the mineral servitude had prescribed for non-use after ten years. After the sale of the non-participating royalty, the remaining interests had been leased with a pooling clause. Shortly before the end of the ten-year prescriptive period, the lessee pooled the acreage covered by the non-participating royalty with outside acreage. That acreage had a productive gas well located thereon at the time of the pooling, but it had been shut-in due to the lack of a market. Shut-in royalties were being paid pursuant to the lease.[337] The court found that the executive owner possessing the power to lease must, as a necessary corollary, have the power to pool or to authorize the lessee to pool all interests covered by the lease.[338] Therefore, the payment of shut-in royalties on the pooled

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334. Id. § 109. This article is intended to reverse the decisions in Whitehall Oil Co. v. Eckart, 252 La. 30, 209 So. 2d 11 (1968) and Uzee v. Bollinger, 178 So. 2d 508 (La. App. 1st Cir. 1965) insofar as they hold that the executive owes no duty whatsoever to the nonexecutive. In these cases the executive took as bonus amounts that were claimed should have been shared with the non-executive owners.

335. La. R.S. 31:110 (1989).

336. 230 La. 299, 88 So. 2d 377 (1956).

337. Id. at 302-04, 88 So. 2d at 378-79.

338. The court said: "[T]he landowners having full power to enter into any lease contract they saw fit affecting the property—and that would include the power to grant a lessee the authority to pool and combine the leased acreage or any portion thereof with any lands or leases and mineral interests in the immediate vicinity—subject only to the right of the royalty owner to receive its 1/64th of the oil, gas, or other minerals allocated to the acreage included in the unit." Id. at 308, 88 So. 2d at 380. Louisiana at this time did not impose on the executive any duty of care regarding the non-executive interest. See, e.g., Lee Jones, Jr., Exercise of Executive Rights in Connection with Non-Participating Royalty and Non-Executive Mineral Interests, 15 Inst. on Oil & Gas L. Tax'n 35, 90 (1964).

acreage was sufficient to interrupt prescription of the non-participating royalty interest.[339]

2. Texas

In the recent case of *Day & Co. v. Texland Petroleum*,[340] the Texas Supreme Court was called on to determine the nature of the executive right. The court held that the executive right is an interest in property rather than a contractual power. It is an incident and part of the mineral estate like other attributes such as bonus, royalty and delay rentals. The issue in *Day* was whether a conveyance of land by warranty deed carried with it an executive right, unmentioned in the deed, which had been previously severed as to one-half undivided interest in the minerals. It was held that the executive right passed.[341]

Standard of Care. The standard of care in exercise of the executive right has been discussed in several cases. In *Manges v. Guerra*,[342] actual and exemplary damages were allowed against the holder of one-half of the minerals and the executive rights who leased to himself for a nominal bonus in a situation where the non-executive owners were entitled to participate as to their one-half interest "in all bonuses, rentals, royalties, overriding royalties and payments out of production."[343] Although the *Manges* case speaks of "utmost good faith" it also uses the term "fiduciary," noting that the "duty arises from the relationship of the parties and not from the contract," specifically placing its approval of the exemplary damages award on the status of the executive as a "breaching fiduciary" rather than a mere contract breacher. Does such language represent a tightening of the protection for nonexecutive interests? Would a standard of dealing for the executive phrased in terms of a "fiduciary" obligation reach a different result than a standard of "utmost fair dealing" in a situation where the executive entered into a joint venture

339. For other cases supporting this general proposition, see Crown Central Petroleum Corp. v. Barousse, 238 La. 1013, 117 So. 2d 575 (1960), and Montie v. Sabine Royalty Co., 161 So. 2d 118 (La. App. 3d Cir.), writ ref'd, 246 La. 84, 163 So. 2d 359 (1964). Both of these cases again involve issues relating to the interruption of prescription. For a view that suggests that they do not support the *LeBlanc* holding, see Raymond M. Myers, Stare Decisis and the Pooling of Nonexecutive Interests in Oil and Gas: A Reply, 47 Tex. L. Rev. 1379, 1381-84 (1969).

340. 786 S.W.2d 667 (Tex. 1990).

341. To the extent that it was inconsistent, Pan American Petroleum Corp. v. Cain, 163 Tex. 323, 355 S.W.2d 506 (1962) was overruled. See Comment, Power to Execute Mineral Leases Over a Severed Mineral Interest is a Real Property Interest, 32 S. Tex. L.J. 337 (1991).

342. 673 S.W.2d 180 (Tex. 1984). See Ernest E. Smith, Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right, 64 Tex. L. Rev. 371 (1985).

343. *Manges*, 673 S.W.2d at 181.

agreement "worded so as to preclude any royalty payment" rather than a lease?[344]

In *Shelton v. Exxon Corp.*,[345] the instrument which created the executive right under consideration included language giving the executive the "exclusive right to enforce the obligations of . . . leases and to contract and negotiate with the lessee . . . with respect to each such obligation." The executive settled a dispute with a lessee over royalties by accepting an increase in "royalty fractions" from 1/6 to 9/48 thus avoiding "adverse tax consequences" to itself. One holder of a non-executive interest preferred a cash settlement. The court held that the "executive fulfilled its duty because it obtained for all mineral and royalty interest holders the same consideration for release of the claim, a prospective increase in royalties." This is not a case where the executive "manipulated settlement terms so that benefits usually shared by all mineral owners inure solely to the benefit of the executive." Further, Texas law does not require that the interests of the executive rights holder and those of the mineral and royalty-interest holders be one. No trust relationship existed. Are there other situations where the application of a "fiduciary" standard might make a difference? The Natural Resources Code of Texas was amended in 1985 to state that the surface owner leasing Relinquishment Act lands is under a fiduciary duty to the state. Such an owner may not lease to corporations or partnerships in which he is a principal stockholder or partner.[346]

Power to Pool. The Texas position on the ability of the executive to authorize a lessee to pool or unitize a previously created non-executive interest was set forth in 1943 in *Brown v. Smith*.[347] A Ms. Lee had reserved a 1/32nd royalty interest in a twenty-acre tract that she had otherwise conveyed to the Smiths. The Smiths, who had the executive rights to the minerals, prepared a community lease that purported to pool Lee's interests with other interests. Brown had signed a contract to lease the acreage in question subject to title approval, but upon learning that Lee's royalty interest was not provided for in the lease Brown refused to execute the lease.[348] The court found that specific performance of the contract to lease would not be an appropriate remedy, for in essence, the lessee would be getting two leases: one for Lee's royalty interest in the twenty-acre tract and the other for the remaining communitized interests. Lee's failure to join in the lease meant that the lease could not divest her of any interest in her reserved royalty, nor

344. See Comanche Land and Cattle Co. v. Adams, 688 S.W.2d 914 (Tex. App.—Eastland 1985).

345. 921 F.2d. 595 (5th Cir. 1991).

346. Tex. Nat. Res. Code Ann. § 52:188-189 (Vernon Supp. 1992).

347. 141 Tex. 425, 174 S.W.2d 43 (1943).

348. Id. at 426-29, 174 S.W.2d at 44-45.

could it vest her with any share of the interest from the other tract that was communitized.[349] While concluding that the grantees of Lee could lease the interest in which she reserved a royalty, the court concluded: "But it does not follow that Mrs. Lee's deed invested her grantee with the right or authority to pool her royalties with royalties from other land that might thereafter be included with it in a lease."[350] In *Minchen v. Fields*,[351] the *Brown* rationale was applied, and further justification was given for the result. Minchen was a non-executive owner of a defeasible-term interest on one of three tracts that was included in a 802-acre lease executed by Fields, the lessor. The lease contained an oil payment provision that the court treated as a bonus payment. Production was obtained from the lease but not from the tract that was burdened by Minchen's defeasible-term interest. Fields was the owner of the future interest in the event that production was not obtained from the acreage covered by the Minchen interest.[352] The court followed the basic *Brown* doctrine, emphasizing the Texas rule that a pooling constitutes a cross-conveyance of the respective interests. The *Minchen* court affirmed the lower court decisions that the execution of a communitized lease by Fields did not by itself act as a pooling of Minchen's defeasible term non-executive interest. The court additionally held that Minchen was entitled to his proportional share of the bonus for the period in which his defeasible term interest was still alive.[353] Finally, the supreme court concluded that the facts did not show that Minchen

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349. The court said: "Since Mrs. Lee did not join in the lease, the execution and delivery of it by Floyd and Ector Smith would neither divest her of any part of her royalty interest in the 20-acre tract nor vest in her any interest in the royalty in the [other tract]." Id. at 431, 174 S.W.2d at 46.

350. Id., 174 S.W.2d at 46. While the lessees were free to lease the 20-acre tract burdened by the non-participating royalty, they were not free either to include a pooling clause in the lease or enter into a communitized lease that would in effect force-pool or unitize the royalty interest with other mineral or royalty interests. The effect of the communitized lease would be to have the reserved interest's share in royalties be diminished by the amount of acreage the 20-acre parcel contributed to the tract covered by the communitized lease. In addition, under the cross-conveyancing theory adopted for communitized leases in Texas, the executive would in effect be conveying a fractional share of the reserved royalty to the other mineral and royalty owners. See Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472 (1942).

351. 162 Tex. 73, 345 S.W.2d 282 (1961). For two divergent views of the *Minchen* case, compare Howard R. Williams, Stare Decisis and the Pooling of Nonexecutive Interests in Oil and Gas, 46 Tex. L. Rev. 1013, 1020-22 (1968), with Raymond M. Myers, Stare Decisis and the Pooling of Nonexecutive Interests in Oil and Gas: A Reply, 47 Tex. L. Rev. 1379, 1387-88 (1969).

352. *Minchen*, 162 Tex. at 74-75, 345 S.W.2d at 284.

353. Since there was no production from the Minchen acreage and no effective pooling of the acreage by the lease, there was no production sufficient to keep the defeasible-term interest alive. Id. at 77, 345 S.W.2d at 285.

had ratified the communitized lease so as to receive the benefits of a pooling of his interest.

V. LIEN ACTS

A. *Louisiana Oil, Gas and Water Wells Lien Act*

The Louisiana Oil, Gas and Water Wells Lien Act,[354] expresses the public policy of Louisiana to protect those who supply labor, services and/or materials to the oil and gas industry. The lien and privilege provided by the Louisiana Oil and Gas Lien creates a security interest against property as an in rem right without regard to ownership.[355] While under the Mineral Code, Louisiana law grants secured rights to lessors against their lessees for payment of royalties and "other obligations of the lease,"[356] the Louisiana Oil and Gas Lien applies to all enumerated property, regardless of ownership or contractual relationship, as follows:

> a. The oil, gas or water well or wells for or in connection with which services or materials are supplied;
> b. Lease whereon same are located;
> c. All drilling rigs, standard rigs, machinery, pipelines, flow lines, gathering lines and other related equipment;
> d. Gathering line, flow line or other producer, operator or contract operator-owned pipeline rights-of-way; and
> e. All oil or gas produced from the well or wells, and the proceeds thereof inuring to the working interest therein.[357]

Although liens and privileges are ordinarily accorded strict construction, Louisiana courts have extended the Louisiana Oil and Gas Lien to benefit an operator for unpaid sums due from a non-operator.[358] The Louisiana Oil and Gas Lien affords protection for companies supplying

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354. La. R.S. 9:4861 et seq. (1991) [hereinafter the Louisiana Oil and Gas Lien].

355. Lor, Inc. v. Martin Exploration Co., 489 So. 2d 1326 (La. App. 1st Cir.), writ denied, 493 So. 2d 1217 (1986), appeal dismissed sub nom. Chevron U.S.A., Inc. v. Lor, Inc., 480 U.S. 912, 107 S. Ct. 1363 (1987); Ogden Oil Co. v. Venture Oil Corp., 490 So. 2d 725 (La. App. 3d Cir.), writ denied, 494 So. 2d 328 (1986); cf. La. R.S. 9:4861.2(C) (1991) (certain property moved onto a lease for purpose of plugging and abandonment and closing pits not covered by lien); see generally, J. Lanier Yeates, The Louisiana Privilege—A Lien Securing Certain Obligations, Chapter H, Oil & Gas Law: Texas & Louisiana Style (South Texas College of Law, 1988).

356. La. R.S. 31:146 (1989). This extends the lessor's privilege to "all equipment, machinery and other property of the lessee on or attached to the property leased" and to the property of others on or attached to the property leased by their express or implied consent in connection with operations on the lease or land unitized with the lease.

357. See La. R.S. 9:4861 (1991); *Ogden*, 490 So. 2d at 730; *Lor*, 489 So. 2d at 1330.

358. La. Civ. Code art. 3185; but see Kenmore Oil Co. v. Delacroix, 316 So. 2d 468 (La. App. 1st Cir. 1975); Blasingame v. Anderson, 236 La. 505, 108 So. 2d 105 (1959); Compadres, Inc. v. Johnson Oil and Gas Corp., 547 So. 2d 382 (La. App. 3d Cir. 1989).

labor and services as well as individuals.[359] However, peripheral services not directly related to drilling or operation of a well are not covered; for example, a lessor of equipment leased to a person who performed tests on a well;[360] a supplier and installer of buoys used offshore;[361] an insurer providing insurance required by operating agreement;[362] or a title abstractor.[363] For the Louisiana Oil and Gas Lien to apply, the activity need not result in a producing well, and the particular materials, machinery, equipment, services or supplies furnished need not be incorporated in or become a part of the completed well.[364]

The lien claimant's rights are preserved by filing an affidavit, or notice of claim, in the mortgage records of the parish in which the property is located within 180 days after last day of performance of labor or services or furnishing of material.[365] The Louisiana Oil and Gas Lien provides a "continuous operations" exception to the 180 day rule for drilling or operation of several wells in same field.[366] The affidavit must contain the nature and amount of the claim and a reasonable description of the property sufficient to identify it to third persons.[367]

A timely filed affidavit must be followed by a suit to enforce the Louisiana Oil and Gas Lien. The privilege is extinguished unless suit is filed within one year of the date of recordation of the notice of privilege.[368]

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359. Continental Casualty Co. v. Associated Pipe & Supply Co., 447 F.2d 1041 (5th Cir. 1971). Its reach extends to the offshore. See Genina Marine Services, Inc. v. Mark Producing Co., 490 So. 2d 1158 (La. App. 3d Cir.), writ denied, 494 So. 2d 541 (1986); St. Mary Iron Works, Inc. v. McMoran Exploration Co., 802 F.2d 809 (5th Cir. 1986), withdrawn, 809 F.2d 1130 (5th Cir. 1987); Louisiana Materials Co. v. Atlantic Richfield Co., 493 So. 2d 1141 (La. 1986); Brown & Root U.S.A, v. Prosper Energy Corp., Civ. No. 87-0343 (E.D. La. 1987) (unreported case); cf. Union Texas Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043 (5th Cir.), cert. denied, 111 S. Ct. 136 (1990) (1984 amendments to Louisiana Oil, Gas and Water Wells Lien Act construed to establish that lien attaches to (1) flow lines or gathering lines connected to a well, and (2) *only* pipelines owned by a well owner).

360. P. & A. Well Serv., Inc. v. Blackies Power Swivels, Inc., 507 So. 2d 280 (La. App. 3d Cir.), writ denied, 513 So. 2d 288 (1987).

361. Melyn Indus., Inc. v. Sofec, Inc., 392 So. 2d 733 (La. App. 3d. Cir. 1980).

362. Sandoz v. A.M.F. Tuboscope, Inc., 61 B.R. 1020 (Bankr. W.D. La. 1986).

363. Herbert Abstract Co. v. Touchstone Properties, Ltd., 914 F.2d 74 (5th Cir. 1990).

364. La. R.S. 9:4861 (1991); see generally La. Civ. Code arts. 482 and 493.1.

365. La. R.S. 9:4862(A)(1) (1991).

366. Id. § 4862(B).

367. Id. § 4861(A) and (C); Shamsie v. Pyramid Petroleum, Inc., 577 So. 2d 835 (La. App. 3d Cir. 1991) (company's oil well lien for equipment, materials, supplies, and labor sold and delivered to petroleum company limited to the amount claimed in the lien filed in the public records.

368. La. R.S. 9:4865(2) (1991).

The order or time of rendition of the services is irrelevant.[369] A timely filing of affidavit, or notice of claim, makes the privilege granted by the Louisiana Oil and Gas Lien superior to other privileges, mortgages and security interests except those granted for (i) non-payment of taxes, (ii) vendor's privileges under certain conditions, or (iii) security interests under Chapter 9 of the Louisiana Commercial Laws as to which financing statements were filed prior to the dates on which the first labor, service, materials or supplies covered by the Louisiana Oil and Gas Wells Lien Act is furnished.[370] Enforcement of the Louisiana Oil and Gas Lien may be by writ of sequestration without the necessity of a bond.[371] Matters of venue for the suit are governed by the Louisiana Code of Civil Procedure.[372] The judgment in such suit is restricted to an *in rem* action.[373] With a producing well, a garnishment action may be more attractive to a seizing creditor than proceeding by writ of sequestration. Insofar as the Louisiana Oil and Gas Lien extends to oil or gas or the proceeds of the sale of oil or gas, the lien claimed is not effective against the purchaser of such oil or gas until written notice of the claim has been delivered to the purchaser.[374] The owner of the property on which the a claim secured by the Louisiana Oil and Gas Lien is asserted may post a bond to secure any such claim.[375]

B. Texas Oil and Gas Liens

Texas law provides certain protected classes of lien claimants with both constitutional and statutory liens.

Constitutional Liens. Under the classification of "secret liens" or "self-executing liens," not unlike the civilian functional equivalent of "privileges," the Texas Constitution identifies a class of lien claimants, "mechanics, artisans and material men, of every class," and as security for the specified obligations owed to them, "the value of their labor done" or "material furnished," provides to such protected class of claimants "a lien upon the buildings and articles made or repaired by them" without any requirement of filing a lien affidavit or statement

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369. Republic Supply Co. v. Carthay Land Co., 244 So. 2d 241 (La. App. 4th Cir. 1971).

370. La. R.S. 9:4862(A)(2) (1991).

371. Id. § 4866.

372. La. Code Civ. P. art. 72.

373. Ogden Oil Co. v. Venture Oil Corp., 490 So. 2d 725 (La. App. 3d Cir.), writ denied, 494 So. 2d 328 (1986); see La. R.S. 9:4861.2(C) (1991); Lor, Inc. v. Martin Exploration Co., 489 So. 2d 1326 (La. App. 1st Cir.), writ denied, 493 So. 2d 1217 (1986), appeal dismissed sub nom. Chevron U.S.A., Inc. v. Lor, Inc., 480 U.S. 912, 107 S. Ct. 1363 (1987).

374. La. R.S. 9:4861.1 (1991).

375. Id. § 4867.

within a prescribed period of time.[376] An initial consideration for persons providing labor and materials to an oil and gas operation is that only limited protection is provided by the constitutional lien. Although recordation of a lien statement within a prescribed period of time is not required to support the validity of the constitutional lien as between the party supplying the labor or materials and the obligor, the constitutional lien is unenforceable against third parties without actual or constructive notice.[377] Under the same rationale, the constitutional lien presumably would be unenforceable against a trustee in bankruptcy.[378] Of more significance to persons providing labor or materials in connection with oil and gas operations is that the Texas Supreme Court has held that a constitutional lien was unavailable to a mineral contractor who attempted to impose a lien on an oil well, related personal property, or the leasehold estate on which the well was situated; the court would not construe the meaning of "building" or "article" within the language of Article XVI, Section 37 to include an oil well.[379] On the other hand, a field repairman is entitled to a constitutional lien for repair work on machinery or structures associated with drilling of or production from an oil well.[380]

Statutory Lien. In view of the current state of Texas law concerning liens available to energy industry laborers and suppliers, the statutory oil and gas lien found in Chapter 56 of the Property Code will be the principal form of security device and assurance of payment for their services and materials furnished to the industry.[381] In 1983, the Texas legislature repealed the existing statutes concerning mechanic's and materialmen's liens on mineral property and replaced them with Chapter

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376. Tex. Const. art. XVI, § 37 [hereinafter, "Article XVI, Section 37"]; see generally R. D. McPherson, Comment, The Constitutional Mechanic's Lien in Texas, 11 S. Tex. L.J. 101 (1969).

377. Black, Sivalls & Bryson v. Operators' Oil & Gas Co., 37 S.W.2d 313 (Tex. Civ. App.—Eastland 1931, writ dism'd).

378. 11 U.S.C. § 544 (1988). For an excellent discussion of bankruptcy implications for the energy industry, see James E. Babcock and Robert O. Thomas, Some Common Issues Involved in Oil and Gas Bankruptcies: A Primer for the Non-Bankruptcy Practioner, 46 La. L. Rev. 763 (1986).

379. Cf. Oil Field Salvage Co. v. Simon, 140 Tex. 456, 168 S.W.2d 848, 851 (1943) (Article XVI, Section 37 lien not available to supplier of materials utilized in drilling of oil well); Ball v. Davis, 118 Tex. 534, 543-44, 18 S.W.2d 1063, 1066-67 (1929) (drilling of oil well is not erection or repair of building within the ambit of Article XVI, Section 37 and casing set by driller is not article made within such context); accord Mulloy v. Humble Oil & Refining Co., 250 S.W. 792 (Tex. Civ. App.—El Paso 1923, no writ).

380. *Ball*, 118 Tex. at 544, 18 S.W.2d at 1067.

381. For an in-depth discussion of oil and gas liens in Texas, see Pearson, Oil and Gas Liens: Filing, Perfecting, and Foreclosing in Texas, Chapter G, Oil & Gas Law: Texas & Louisiana Style (South Texas College of Law, 1988).

56 of the Property Code.[382] This Chapter grants to a "mineral contractor" or "mineral subcontractor" a lien to secure payment for labor or services related to "mineral activities."[383] The Texas Oil and Gas Lien is available both to mineral contractors and mineral sub-contractors.[384] A mineral property owner is defined as "an owner of land, an oil, gas, or other mineral leasehold, an oil and gas pipeline, or an oil and gas pipeline right-of-way."[385] Subject to the Texas Oil and Gas Lien are:

> 1) the material, machinery and supplies furnished or hauled by the lien claimant;
> (2) the land, leasehold, oil or gas well, water well, oil or gas pipeline and its right-of-way, and lease for oil and gas purposes for which the labor was performed or material, machinery, or supplies were furnished or hauled, and the buildings and appurtenances on this property;
> (3) other material, machinery, and supplies used for mineral activities and owned by the owner of the property . . . and
> (4) other wells and pipeline operations related to oil, gas, and minerals and located on [the] property.[386]

The Texas Oil and Gas Lien attaches *only* to the property that is specifically identified in the Texas Lien Act.[387] The Texas Oil and Gas Lien does not attach to the fee title to the property.[388] Unlike the Louisiana Oil and Gas Lien, the Texas Oil and Gas Lien attaches only to the undivided interest of the owner who contracts with the lien claimant, unless the lien claimant can establish among the owners of the leasehold estate in the mineral property the existence of (i) a mining partnership or joint venture or (ii) that the mineral property owner/operator and the non-operators are affiliated by means of an agency relationship, parent-subsidiary corporate status or as the corporate "alter

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382. See Tex. Rev. Civ. Stat. Ann. arts. 5473-5479 (Vernon 1958), repealed by Texas Acts 1983, 68th Leg., p. 3475, Ch. 576, 1; cf. Tex. Prop. Code Ann. § 1.001 (Vernon 1984) (purpose of codification is to pursue topic-by-topic revision of Texas' existing statutory law "without substantive change").

383. Tex. Prop. Code Ann. § 56.002 (Vernon 1984) (herein, such lien is called the "Texas Oil and Gas Lien" and Chapter 56 of the Property Code is called the the "Texas Lien Act").

384. Id. § 56.001(2) and (4).

385. Id. § 56.001.

386. Id. § 56.003(a).

387. Wilkins v. Fecht, 356 S.W.2d 855 (Tex. Civ. App.—San Antonio 1962, writ ref'd); Denny v. White House Lumber Co., 150 S.W.2d 296 (Tex. Civ. App.—Amarillo 1941, writ dism'd judgmt cor.).

388. Tex. Prop. Code. Ann. § 56.003(b) (Vernon 1984).

ego" of an individual.[389] Under certain circumstances a lien claimant who files its affidavits as a sub-contractor may reach the interests of non-operating co-owners if such co-owners are not current in their payment of joint interest billings to the operator at the time such co-owners receive the sub-contractor affidavits.[390] In contrast with the Louisiana Oil and Gas Lien, the Texas Oil and Gas Lien does not attach to severed oil and gas production or the proceeds from production.[391] The Texas approach to providing security to its protected class of lien claimants results in an appreciably disadvantaged bargaining position for the lien claimant under the Texas Lien Act as compared to the rights of the lien claimant in Louisiana because the Texas Oil and Gas Lien claim must be enforced judicially and, during the period preceding any enforcement action and until a judgment is rendered, the mineral owner is entitled to receive and retain the proceeds of production.[392] Both Texas and Louisiana follow a substantial compliance rule in connection with the respective lien act requirements for preparing and filing a lien claimant's affidavit.[393] However, if the lien affidavit is deficient in any material respect, the claimant may not create a valid lien.[394]

Advantages of Lien Acts Compared. A comparison of the Texas Lien Act with the Louisiana Oil and Gas Lien Act reveals that, among other similiarities, under both statutes the lien claims of protected classes

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389. Ayco Dev. Corp. v. G.E.T. Serv. Co., 616 S.W.2d 184 (Tex. 1981); Bethlehem Supply Corp. v. Wotola Royalty Corp., 140 Tex. 9, 165 S.W.2d 443 (1942); Youngstown Sheet and Tube Co. v. Penn, 355 S.W.2d 239 (Tex. Civ. App.—Austin), writ granted, modified on appeal, 363 S.W.2d 230 (Tex. 1962); see Stinnett, Filing, Handling, Perfecting and Foreclosing Oil and Gas Liens, Oil And Gas Law: For Legal Assistants And Attorneys (State Bar of Texas 1984).

390. Tex. Prop. Code Ann. § 56.043 (Vernon 1984); Energy-Agri Prod., Inc. v. Eisenman Chem. Co., 717 S.W.2d 651 (Tex. App.—Amarillo 1986, no writ); see Energy Fund of Am. v. G.E.T. Serv. Co., 610 S.W.2d 833 (Tex. Civ. App.—Eastland 1980), aff'd in part, rev'd in part on other grounds, 616 S.W.2d 184 (Tex. 1981).

391. Tex. Prop. Code Ann. § 56.003 (Vernon 1984); Wilkins v. Fecht, 356 S.W.2d 855 (Tex. Civ. App.—San Antonio 1962, writ ref'd); Crowley v. Adams Bros. & Prince, 262 S.W. 883 (Tex. Civ. App.—Amarillo 1924, no writ).

392. Tex. Prop. Code Ann. §§ 53.154, 56.041 (Vernon 1984).

393. James Mechanical Contractors, Inc. v. Tate, 647 S.W.2d 347 (Tex. App.—Corpus Christi 1982, no writ). Cf. Texcalco, Inc. v. McMillan, 524 S.W.2d 405 (Tex. Civ. App.—Eastland 1975, no writ) (lien claimant must "substantially comply" with the steps required by the Texas Lien Act).

394. Cf. Upham v. Boaz Well Serv., Inc., 357 S.W.2d 411 (Tex. Civ. App.—Fort Worth 1962, no writ) (in connection with Property Code § 56.022 requirement of stating the dates of performance or work or furnishing materials, a lien affidavit was found to be inadequate to create a lien because it failed to state the days of alleged performance); Continental Supply Co. v. Gillespie, 269 S.W. 859, 860 (Tex. Civ. App.—Galveston 1925, no writ) (lien affidavit that referred only to the field and the county in which the wells were located and contained a statement that a legal description of the land or leasehold was unavailable was held to be ineffective).

of lien claimants are perfected by filing a notice of lien claim in the form of an affidavit or statement of lien as prescribed by the relevant statute, the protected classes are similar, and the property covered by the lien includes certain common types of property; however, the Louisiana Oil, Gas and Water Wells Lien Act generally provides more effective remedies for its protected class of lien claimants than are provided to mineral contractors and mineral subcontractors under the Texas Lien Act in two major respects. First, the Louisiana Oil, Gas and Water Wells Lien Act provides the lien claimant with a lien or privilege on all oil or gas produced from the wells located on the lease covered by the lien and the proceeds thereof. Second, a lien claimant in privity of contract only with an operator in Louisiana may reach the interests of non-operators in such lease, wells and proceeds of production.

VI. ANTI-INDEMNITY STATUTES

A. Texas Anti-Indemnity Statute

In 1973, the Texas legislature concluded that some contractors, working for oil and gas well owners, due to disparate economic bargaining power, were being unfairly coerced into indemnifying the well owners against the owners' liability for their own negligent acts and memorialized that conclusion in law.[395] The Texas legislature declared void agreements pertaining to oil and gas wells in which one party agreed to indemnify another party against losses or damages resulting from the sole or concurrent negligence of the indemnitee, if the liability arose from personal injury, death, or property damage. Several significant legal developments have occurred since the Texas Act was reenacted as part of the practice and remedies code. The Texas Supreme Court has adopted an "express negligence" doctrine for determining the enforceability of indemnity agreements generally, and the Texas legislature made several important changes in 1989 to the statute.[396]

The 1989 amendments have not changed the basic purpose of the statute but have significantly broadened its scope and added new ex-

395. Act effective August 27, 1973, 63d Leg., ch. 646, §§ 3, 4(a), 1973 Tex. Gen. Laws 1767, amended by Act of May 7, 1979, 66th Leg., ch. 237, § 1, 1979 Tex. Gen. Laws 511. Effective September 1, 1985, the Texas Anti-Indemnity Statute [hereinafter the "Texas Act"] became Chapter 127 of Title VI of the Civil Practice and Remedies Code, repealing Article 2212b of the Texas Revised Civil Statutes, which was effective on August 27, 1973. Tex. Civ. Prac. & Rem. Code Ann. § 127.001-.008 (Vernon 1986 & Supp. 1992).

396. Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987). For a discussion of the Texas Act before the 1989 amendments, see J. Lanier Yeates, Indemnification and Anti-Indemnity Statutes as They Relate to Mineral Rights and Contracts, 33 L.S.U. Min. L. Inst. 109, 131 (1986).

ceptions and exclusions.[397] The 1989 Texas legislature expanded the scope of the Texas Act by broadening the definition of "well or mine service."[398] The definition of "well or mine service" is important in that the definition of an "agreement pertaining to a well for oil, gas, or water" depends upon this term, and in turn, agreements pertaining to a well for oil, gas, or water are declared void if they purport to indemnify a person against liability for his own negligent acts.[399] In addition to the activities normally performed at the well site that were listed in the previous version, the Texas Act now includes "downstream" activities that may take place a considerable distance away from the well, including purchasing, gathering, storing, or transporting produced fluids and petroleum products.[400] The precise extent of the coverage of the Texas Act, as amended in 1989, will likely be a subject of litigation, because the new general terms could conceivably cover agreements of and transactions involving petroleum refineries and natural gas liquids plants.[401] At the well site, it has become difficult to conceive of any activity or contract that a lessee or operator could enter into that would not be covered by the Texas Act.

Another significant change in the Texas Act made by the 1989 amendments was a broadening of the statutory exclusions section of the act.[402] A frequently overlooked feature of the Texas Act is that, although it is based upon a finding of unfair extraction by owners of indemnity agreements from contractors, the language of the act refers generically to agreements between indemnitors and indemnitees.[403] Therefore, the Texas anti-indemnity statute may benefit and protect the owner (as an indemnitor) from indemnity obligations demanded by a contractor (as an indemnitee) in a superior bargaining position. Possibly with such benefits in mind, the legislature created certain exclusions from the oilfield anti-indemnity statute for indemnity agreements that were traditionally granted by well owners in favor of contractors performing certain hazardous activities.[404] The exclusions were expanded as a result of the 1989 amendments to include property damage resulting from cleanup and control of pollution.[405] The exclusions also cover certain types of catastrophic damage liability.[406] Traditionally, contractors have

397. Tex. Civ. Prac. & Rem. Code Ann. § 127.001 (definitions), § 127.004 (exclusions) and § 127.005 (insurance coverage) (Vernon Supp. 1992).

398. Id. § 127.001(4)(A).

399. Id. § 127.003 (Vernon 1986).

400. Id. § 127.001(4)(A) (Vernon Supp. 1992).

401. Cf. Champlin Petroleum Co. v. Goldston Corp., 797 S.W.2d 165 (Tex. App.—Corpus Christi 1990, writ denied) (indemnitor claimed that maintenance work at petrochemical plant was within the scope of the Texas Act).

402. Tex. Civ. Prac. & Rem. Code Ann. § 127.004 (Vernon Supp. 1992).

403. See, e.g., id. § 127.003 (Vernon 1986).

404. Id. § 127.004 (Vernon Supp. 1992).

405. Id. § 127.004(2).

406. Id. § 127.004(3) and (4).

been able to obtain these types of indemnities from owners in instances in which the cost of the service to be performed is minor in relationship to the potential damages that could accrue if the contractor's negligence were to cause a blowout. The disparity in economic bargaining power that frequently exists between contractors and owners suggests that it would be unreasonable to hold an enterprising, but financially insubstantial contractor, performing a simple task on a well, responsible for the potentially enormous sums of money damages that could result from a blowout. A well owner is likely to indemnify a contractor against such a loss even if caused by the contractor's negligence and the exclusions section of the anti-indemnity statute would permit enforcement of such an indemnity agreement. Significantly, the language of the Texas Act does not make it clear that these exceptions are to be for the benefit of contractors only. Due to the two-way nature of the Texas Act, this exclusion section, if applied literally, could render unenforceable a contractor's ill-advised general indemnity in favor of a well owner, in the event of a blowout at a well site or an accidental release of radiation during the performance of a testing service. The Texas legislature, while expanding this section of the statute with the 1989 amendments, did not take the opportunity to clarify that the exclusions in the Texas Act should inure only to the benefit of contractors.

Prior to 1989, the Texas Act treated all oilfield related indemnification agreements equally, generally prohibiting those that purported to indemnify an indemnitee for its own negligent acts, but with the exception of allowing such agreements if the indemnitor agreed in writing that its obligation would be supported by insurance, the amount required not to exceed a sum that equalled $300,000.[407] With the 1989 amendments, the Texas legislature made its most extensive additions to the Texas Act that resulted in separating indemnity agreements into two categories, and creating different treatments for insurance coverage for each newly created classification.[408] The two categories are "mutual indemnity obligations" and "unilateral indemnity obligations"; no previous such distinction had existed.[409] "Unilateral indemnity obligations" are defined in the amended Texas Act as agreements "in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee."[410] "Mutual indemnity obligations" are defined as contracts between parties in which they "agree to indemnify each other and each other's contractors and their employees."[411] The insurance limitations subsections

407. Id. §§ 127.001(1) and 127.005(c).
408. Id. §§ 127.001(2),(4) and 127.005(b),(c).
409. Id. §§ 127.001(2) and 127.001(5).
410. Id. § 127.001(5).
411. Id. § 127.001(2).

of the statute are the principal places where the classifications as "mutual" or "unilateral" indemnity obligations have legal significance. The two categories of agreements are treated differently in the manner in which insurance coverage for indemnity obligations exempts them from application of the general anti-indemnification provisions of the Texas Act. Parties to "unilateral indemnity" agreements are allowed to create otherwise prohibited indemnity obligations so long as the indemnitor agrees in writing that its obligation is supported by insurance not required to exceed $500,000.[412] On the other hand, parties to "mutual indemnity" agreements are exempted from the general prohibition in the statute against certain oilfield indemnity agreements to the extent that the parties agree to provide equal amounts of insurance to cover their obligations.[413] In other words, parties to "mutual indemnity" agreements are allowed to indemnify each other, even for each one's own negligent acts, so long as the agreement is mutual and they provide equal contractual liability insurance coverage.

Although the Texas Act limits the amount of insurance coverage that one party may require another party to provide in support of the latter's indemnity obligations, the Texas Act expressly states that it does not affect the validity of insurance contracts.[414] This insurance contract exclusion was included by the Texas legislature when it enacted the original version of the Texas Act in 1973,[415] and has not been altered by the legislature despite four separate and distinct opportunities that have arisen in the interim.[416] Under this exclusion from the Texas Act, an agreement between two parties, otherwise within the scope of the Texas Act, by which one party agrees to name the other as an additional insured to a general liability insurance policy and obtain a waiver of subrogation is not voided by the Texas Act.[417] In contrast, in an oilfield indemnity agreement, any requirement to name the indemnitee as an additional insured is void under Louisiana law.[418]

Suggested Improvements. These newly defined categories are deficient in several ways. First, although the Texas Act specifically mentions contractors, subcontractors are not mentioned at all. One reason for this omission may be that the legislature intended to include subcon-

412. Id. § 127.005(c).

413. Id. § 127.005(b).

414. Id. § 127.006.

415. Act approved June 16, 1973, 63d Leg., R.S., ch. 646, 1973 Tex. Gen. Laws 1767.

416. (1) Act of May 7, 1979, 66th Leg., R.S., ch. 237, 1979 Tex. Gen. Laws 511; (2) Act of May 17, 1985, 69th Leg., R.S., ch. 959, 1985 Tex. Gen. Laws 3242; (3) Act approved June 16, 1989, 71st Leg., R.S., ch. 1102, 1989 Tex. Gen. Laws 4557; (4) Act approved April 19, 1991, 72d Leg., R.S., ch. 36, 1991 Tex. Gen. Laws 430.

417. Tex. Civ. Prac. & Rem. Code Ann. § 127.006 (Vernon Supp. 1992).

418. Compare id. with La. R.S. 9:2790(G) discussed infra at note 434.

tractors in the term "contractor" since a subcontractor may be considered as a contractor's contractor.[419] Another possibility is that the Texas legislature intentionally excluded subcontractors from the definitions so that they would not be covered by the insurance limitations subsections of the statute, discussed above. Since the 1989 amendments, some energy industry companies, who perform contractor and subcontractor roles, have expressed interest in amending the statute to include the word "subcontractor" in the definitions of "mutual" and "unilateral" indemnity obligations to clarify the status of subcontractors. Others suggest more pervasive changes so that "mutual" indemnity obligations are defined as agreements in which the parties agree to indemnify each other on substantially the same terms and conditions and dropping all references to contractors. This approach would leave the scope of the mutual coverage up to the contracting parties. Similarly, some would suggest elimination in the definition of "unilateral" indemnity agreements all references to the persons or classes of persons covered, leaving it up to the contracting parties to decide the scope. Leaving the decision of who is to be covered by an indemnity provision up to the contracting parties may be the best solution if the legislature intends to encourage mutual indemnity agreements. In the typical oilfield mutual indemnity situation, the owner usually is prepared to indemnify none other than the contractor and its employees from claims made by the owner's employees, and the contractor typically is agreeable to indemnify the owner, solely, in a reciprocal manner. Numerous other contractors and subcontractors may be involved in a drilling or workover operation. Usually, neither party is willing to indemnify all participants. The statute, as now written, discourages owners and contractors from entering into mutual indemnity agreements, as defined, because of the broad scope of coverage required. A change in the statute, to define mutual indemnity obligations as those in which the parties agree to indemnify each other on substantially the same terms and conditions, would greatly enhance the appeal of such agreements to owners and contractors.

Another criticism of the statute, as amended in 1989, is the wording of the type of damage which may be covered under mutual indemnity agreements. The definition of "mutual indemnity obligation" covers agreements to indemnify against liability arising "in connection with bodily injury, death, and damage to property of the respective employees, contractors or their employees, and invitees of each party."[420] Apparently omitted from this list is liability connected to damage to the parties' own property. This may just be an overlooked grammatical error, but

419. See Owen L. Anderson, Recent State Legislation Affecting Oil and Gas Law, 41 Inst. on Oil & Gas L. & Tax'n 2-1, 2-60 (1990).

420. Tex. Civ. Prac. & Rem. Code Ann. § 127.001(2) (Vernon Supp. 1992).

could become important if a court must interpret the literal meaning of the statute in the future.

Another omission, which may be a legislative oversight, occurs in the definition of "unilateral indemnity obligation." The amended Texas Act defines such obligations as those covering "claims for personal injury or death to the indemnitor's employees" but does not discuss property damage claims.[421] Again, this omission may be inadvertent; however, the absence of coverage of property damage in this section of the Texas Act could be important in a case in which the result depends on a strict interpretation of the literal language of the statute.[422]

The Texas legislature again amended the Texas Act in 1991, eliminating joint operating agreements and certain marketing, transporting, storing, and pipeline construction activities from the scope of the Act. The definition of agreements covered by the Texas Act now specifically excludes joint operating agreements.[423] Prior to the amendment, prohibited indemnity agreements in joint operating agreements were void since such agreements were presumably within the broad definition of agreements covered by the act (i.e. "a written or oral agreement or understanding concerning the rendering of well or mine services"). The Louisiana Act contains an essentially similar exclusion from its coverage.[424] The Texas legislature found that the sharing of costs of joint operations, even losses due to one party's negligent acts, is desired by parties to joint operating agreements and not against public policy of the State of Texas. Under the 1991 amendments, the activities of "purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by pipeline or fixed associated facilities" are no longer subject to the Texas Act. Additionally, the activities of "construction, maintenance, or repair of oil, natural gas liquids, or gas pipelines or fixed associated facilities" are now excluded from the coverage of the Texas Act. These amendments do not affect prohibited indemnity clauses contained in agreements to transport oil, water, condensate, petroleum products, or other liquid commodities, in connection with a well, by means other than through a pipeline; such indemnities continue to be void under the Texas Act.

B. Louisiana Anti-Indemnity Statute

Louisiana law governing oilfield indemnification agreements is similar in many respects to the law of Texas.[425] Under Louisiana law, indem-

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421. Id. § 127.001(5).

422. For a discussion of the Texas Act after the 1989 amendments, including developments in jurisprudence and a full text of the statute marked to indicate changes made in 1989, see J. Lanier Yeates, Indemnification and Anti-Indemnity Statutes—Part II, 38 L.S.U. Min. L. Inst. ____(1991).

423. Tex. Civ. Prac. & Rem. Code Ann. § 127.001(1)(B) (Vernon Supp. 1992).

424. See infra note 434 and accompanying text.

425. See generally Yeates, supra note 396.

nification of an indemnitee for its own negligent acts is permitted, so long as the agreement between the parties expresses that intent in clear and unequivocal terms.[426] The general rule in Louisiana is that it is not against public policy to provide for indemnification against one's own negligence or strict liability.[427] A statutory exception to the general rule is imposed by the Louisiana Oilfield Indemnity Act of 1981 (the "Louisiana Act").[428] The Louisiana Act is based upon a legislative finding that oilfield contractors were being inequitably treated by the death and personal injury indemnity provisions in agreements to which they were parties pertaining to oil, gas or water wells.[429] The Louisiana Act declares void and unenforceable those parts of oilfield-related agreements which purport to indemnify an indemnitee against certain types of liability caused by the indemnitee's own negligence or fault.[430] Essentially, it prohibits enforcement of any indemnity covering the fault, negligence or strict liability of the indemnitee, his agents, employees or independent contractors who are directly responsible to the indemnitee.[431] To the extent that provisions are contained in, collateral to, or affect agreements pertaining to wells or drilling for minerals, which purport to or do provide for defense or indemnity or either, to an indemnitee against loss or liability for damage arising out of or resulting from death or bodily injury that is caused by or results from the negligence, fault or strict liability of the indemnitee, his agents, employees or independent contractors who are directly responsible to the indemnitee, the Louisiana Act makes these provisions unenforceable.[432] Unlike the Texas Oilfield Anti-Indemnity Act, the Louisiana Act does not mention mines.[433] Provisions in agreements concerning drilling a well for minerals that require waivers of subrogation, additional named insured endorsements or any other form of insurance protection that would frustrate or circumvent the prohibitions of the Louisiana Act are not permitted under the statute.[434] Although the Louisiana Act prohibits agreements requiring a waiver of subrogation or an additional insured endorsement, the statute does not preclude them if voluntarily provided. The Louisiana Act does

426. See, e.g., Amoco Prod. Co. v. Forest Oil Corp., 844 F.2d 251 (5th Cir. 1988); Soverign Ins. Co. v. Texas Pipe Line Co., 488 So. 2d 982 (La. 1986); Polozola v. Garlock, Inc., 343 So. 2d 1000 (La. 1977). See Yeates, supra note 396, at 119-22.

427. Jennings v. Ralston Purina Co., 201 So. 2d 168 (La. App. 2d Cir.), writ denied, 251 La. 215, 203 So. 2d 554 (1967); Hyde v. Chevron U.S.A., Inc., 697 F.2d 614 (5th Cir. 1983).

428. La. R.S. 9:2780 et seq. (1991).

429. Id. § 2780(A).

430. Id. § 2780(B).

431. Id. § 2780(A).

432. Id. § 2780(B); see Yeates, supra note 396, at 127 and 151-52.

433. Compare Tex. Civ. Prac. & Rem. Code Ann. 127.002 (Vernon Supp. 1992) with La. R. S. 9:2780(A) (1991); but see La. R.S. 9:2780(c) (referring to mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral).

434. La. R.S. 9:2780(G) (1991).

not prohibit operating agreements and farmout agreements that contain indemnity provisions; however, this exception to the general prohibitions contained in the statute does not extend to any party who physically performs any activities pursuant to an agreement pertaining to a well or drilling for minerals.[435] Exempted from the Louisiana Act are public utilities, the forest industry, and certain companies who drill with the Frasch process.[436] Furthermore, the Louisiana Act exempts agreements that were executed before its effective date if such agreements provide indemnity for a specific, terminable performance or a specific job.[437]

The Louisiana Act was last amended in 1983. Subsequent to its amendment in 1983, a number of federal and state courts have issued opinions interpreting the scope of the statute. The Supreme Court of Louisiana answered a certified question concerning the duty of an indemnitor to pay the indemnitee's attorney fees in the defense of meritless negligence suits.[438] Other courts have determined whether the Louisiana Act applied to lease agreements between parties of equal bargaining power, whether the claims of workers injured while engaged in various activities were within the scope of the act, whether maritime law or the Louisiana Act applied to various accidents and injuries occurring offshore, and various other issues.[439]

V. CONCLUSION

This paper has barely penetrated the surface of the topic it has sought to begin to explore. Certainly there are significant differences in basic principles and in terminology between Louisiana and Texas in oil and gas law. Yet, the similarities in approach and typical results between the two systems are far more important than the differences. After reviewing a number of cases and statutes in both states, we conclude that the two states have probably benefitted by having one another for comparison. The relative merits of the differing approaches of the two legal systems are debatable in relation to oil and gas. It seems that a greater contrast can be made between the approaches the two states have taken on pooling and unitization, particularly in the public law area. But that is an area of discussion that will be left to another occasion.

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435. Id. § 2780(D)(2)(a) and (b).

436. Id. § 2780(E).

437. Id. § 2780(I).

438. Meloy v. Conoco, Inc., 504 So. 2d 833 (La. 1987), answer to certified question conformed to, 817 F.2d 275 (5th Cir. 1987).

439. St. Amant v. Glesby-Marks Corp., 532 So. 2d 963 (La. App. 5th Cir. 1988); see, e.g., Copous v. Odeco Oil & Gas Co., 835 F.2d 115 (5th Cir. 1988); Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514 (5th Cir. 1988). These opinions and other developments concerning the Louisiana Act are discussed in Yeates, supra note 422.