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From the Courts to the Code: The Origin and Development of the Law of Louisiana on Mineral Rights

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*Patrick S. Ottinger**

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I. INTRODUCTION

A. Preface

The earliest mineral lease at issue in Louisiana jurisprudence was presented in *Escoubas v. Louisiana Petroleum & Coal Oil Co.*¹ The lease contract there involved a tract of land in Calcasieu Parish and was dated October 5, 1865. Interestingly, the Civil War only ended six months prior, so this was an old lease indeed.

From a very early date, the judiciary expressed significant skepticism about oil and gas operators and the lease contracts under which they operated. For example, the following remarks from the Louisiana Supreme Court in *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Company*² are instructive as to the suspicion—if not outright disdain or hostility—with which early courts viewed contracts for the lease of property for oil and gas purposes:

Whether it proceeds from design of crafty speculators in oil and gas leases to enshroud their contracts with doubtful, ambiguous, inconsistent, and absurd provisions, as a means of promoting their interests, or whether it comes from a custom in the rural districts of employing unskilled draftsmen, it is a notable fact that few subjects of contract contribute to the courts an equal proportion of written agreements for interpretation.

This regrettable observation—written a mere six years after the discovery of oil in Louisiana—set an unfortunate stage for a study of the emergence of both the oil and gas industry, and the concomitant need to establish a set of “ground rules” under which that industry might operate.

B. An Industry is Born

Yandell Boatner, writing for the American Bar Association’s Section of Mineral Law in 1939, reported that “[i]n a well drilled prior to 1899 in connection with the ice factory at Shreveport, natural gas had been found. The gas was used for lighting the office at the factory.”³ While self-evidently not commercial

1. 22 La. Ann. 280 (1870).

2. 119 La. 793, 844–5, 44 So. 481, 499 (1907) (quoting *Ohio Oil Co. v. Detamore*, 73 N.E. 908 (Ind. 1905)).

3. Yandell Boatner, *Legal History of Conservation of Oil and Gas in Louisiana*, 60, in SECTION OF MINERAL LAW, AM. BAR ASS’N, LEGAL HISTORY

production, it establishes the earliest date of gas production in Louisiana as being within the nineteenth century.

The Louisiana Geological Survey published a very informative pamphlet that chronicles the earliest days of the oil and gas industry in Louisiana.⁴ Greater detail of this initial well is provided by the Louisiana Department of Natural Resources where the following is reported, to-wit:

The first oil well in Louisiana was drilled in 1901 in a rice field on the “Mamou Prairie” in the community of Evangeline near Jennings.

The owner of the property, Jules Clement, had noticed bubbles rising from a spot in one of his rice fields when it flooded. With the recent discovery in Spindle Top in mind, he conducted an experiment. He stood on an old stovepipe over the bubbles, lit a match, and threw it into the pipe. Gas from the bubbles ignited.

He told friends about this and word spread to Jennings, reaching the ears of several interested area businessmen. They quietly secured leases on approximately 2000 acres in

OF CONSERVATION OF OIL AND GAS: A SYMPOSIUM CONSISTING OF 11 PAPERS WHICH, AS A WHOLE, GIVE THE LEGAL HISTORY OF THE REGULATION OF THE OIL AND GAS INDUSTRY IN THE PRINCIPLE PRODUCING STATES.... 60 (1938) (citing A. C. Veatch, *Special Report on the Shreveport Area*, in GILBERT D. HARRIS, A. C. VEATCH, HEINRICH RIES, CHARLES ARTHUR HOLLICK & GEORGE FRANCIS ATKINSON, *A PRELIMINARY REPORT ON THE GEOLOGY OF LOUISIANA* 199 (1899)).

4. Therein it is stated:

Louisiana’s oil industry began September 21, 1901, with the discovery of oil at Jennings Field. The Jules Clement No. 1 Well was completed as a spectacular gusher on this day, spraying a fountain of oil into the air at a rate estimated to be 7000 barrels of oil per day. Just 9 months earlier, oil had been discovered near Beaumont, Texas, at Spindletop Field. Together, the Spindletop and Jennings discoveries ignited an “oil rush” of exploration and development activity throughout Texas and Louisiana.

Jennings Field—The Birthplace of Louisiana’s Oil Industry, LOUISIANA GEOLOGICAL SURVEY (September 2001), available at <http://www.lgs.lsu.edu/deploy/uploads/9jennings.pdf>. Numerous additional accounts of the discovery of the Jennings Oil Field can be found in the Carnegie Memorial Library in Jennings, Louisiana. See, e.g., *A COMPREHENSIVE REVIEW OF THE AGRICULTURAL RESOURCES AND FUTURE POSSIBILITIES OF JENNINGS AND CALCASIEU PARISH, LOUISIANA* (Passenger Dept. of the Southern Pacific-Sunset Route, New Orleans, 1910); WALTER D. MORSE, *Jules Clement No. 1 Brings Oil Industry to Life in Louisiana*, in *THE BIRTH OF JENNINGS AND JENNINGS FIRSTS* (1961).

the vicinity of the seepage and formed S. A. Spencer & Company.

They contacted Scott Heywood, a successful wildcatter in Texas, to see if he would be interested in their prospect. Heywood visited the area and noted that the land formations were much the same as those at Spindle Top and conducted his own tests by lighting the bubbles with matches. When it burned with a red flame, showing smoke at the top of the flame, he was convinced that it was petroleum gas.

Heywood contracted to drill two wells to a depth of 1000 feet each for an undivided one-half interest in the acreage. The contract also provided that he could organize a company to be called the Jennings Oil Company.

A drilling rig was moved from Beaumont to drill the well and drilling began on the Jennings Oil Company-Clement No. 1 on June 15, 1901. Scott Heywood was the superintendent and co-owner. Machinery was shipped from Spindle Top. The derrick was 64 feet high and the drill pipe (stem) was just ordinary line pipe.⁵ At about 250 feet there was a very small showing of oil in the mud on the top of a water sand. Around 400 feet they twisted off a string of pipe.

It was necessary to give up the hole, move over a few feet and make a new start. When the specified contract depth of 1000 feet was reached, oil had not been found.

Heywood's contract provided that his second well must be started within 30 days after the Jennings Oil Company well was finished. It seemed foolish to him to drill another well to a depth of 1000 feet to acquire his interest.

Scott Heywood proposed that Heywood Brothers obtain an agreement from Spencer & Company allowing a second well to be drilled at the bottom of the Jennings Oil Company-Clement No. 1 Well.

A joint agreement was reached between Spencer & Company, Scott Heywood, Jennings Oil Company and Heywood Brothers and the contract was signed on August 11, 1901.

5. "Heywood commented that he sometimes wondered how they ever accomplished what they did in those 'old days.' It was 90 days of working in the hot sun, fighting mud and mosquitos [sic]." *First Oil Well in Louisiana*, LA. DEP'T OF NATURAL RES., <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=48> (last visited Oct. 2, 2012) (On that page, it is stated that the article "was adopted [sic] from an article by Shelia Esthay in the *Jennings Daily News*.")

Heywood Brothers was to drill to a depth of 1500 feet. If any favorable indications were found, they were to drill to a greater depth, if it was deemed advisable.

With no favorable results at 1500 feet they ran short of drill pipe Some of the Heywood brothers wanted to call it a day, but Scott Heywood insisted on getting more drill pipe and going deeper on his own. Alba Heywood felt that the brothers should stay with Scott as long as he wanted to drill.

Scott Heywood shipped in more drill pipe, continued to drill, and at 1700 feet struck “a very fine showing of oil in sugar sand.” More pipe was sent in to finish drilling into the sand and when finished there was 110 feet of oil sand.

Casing was set with a gate valve for protection. After running the bailer the second time the well came in, flowing a solid four-inch stream of pipeline oil over 100 feet high.

The well flowed sand and oil for seven hours and covered Clement’s rice field with a lake of oil and sand, ruining several acres of rice.

Oil sand piled up on the derrick floor and for about 100 feet around the derrick to a depth of over one foot.

The well finally gave one big gush of oil and sand and shut itself in, sanding up for a distance of 1000 feet in the casing.

On the evening of September 21, 1901, a farmer rushed into Jennings with the news that oil had been discovered.

Washing, bailing, and flushing continued for about 30 days. If the sand could have been controlled in that well, it would have produced over 7,000 barrels per day.

One day when the 2-inch pipe was being removed from the well after washing the sand out, the well began flowing again.

Before the removal could be completed, however, the well sanded up over 1,000 feet and stuck the pipe. Failing in an attempt to fish the 2-inch pipe out, the well was abandoned.

But, the boom had begun! It brought people, money and ideas into the area, and the town of Jennings flourished.⁶

In *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Company*, the Louisiana Supreme Court made the following observations as to the then emerging industry as it pertained to what would come to be known as the Jennings Field, to-wit:

6. *Id.*

[T]hat at the date of the alleged contract said property was much sought after by the parties interested in the discovery of oil, as the indications upon said property of the existence of oil were very great, and gave great and sudden value to said property by reason of the discovery of oil, shortly before, at Beaumont, Tex.; that the indications which led to the discovery of oil at Beaumont were the same as those upon the property, and that the Beaumont discovery, being the first in this entire section, was the beginning of widespread search for oil, and that property presenting favorable oil indications became valuable beyond all precedent . . .⁷

* * *

Oil was 'brought in' on the 'Spindle Top' field, near Beaumont, Tex. (about 90 or 100 miles from the locus in quo), in January, 1901, and was immediately followed by a speculative excitement in that vicinity, the accounts of which read like those of the 'South Sea Bubble'; but that excitement did not at once, or for several months, extend to, or affect values in, the parish of Acadia. It seems, however, that the indications which led to the discovery at Spindle Top consisted of a seepage of gas in proximity, more or less, to a mound, which is situated in an otherwise flat prairie, and, as gas seepage was known to exist in many places in Acadia, Calcasieu, and other parishes in Louisiana, they attracted some renewed attention, and after a few months began to be seriously considered. It had been known for many years that such a phenomenon existed on section 48 (known as the 'McDaniel Tract'), adjoining section 47 on the north, and it was also known that there was a mound on Latreille's prairie, some 1,000 or more feet distant from the seepage. About the first persons to act upon the idea suggested by those conditions were S. A. Spencer, of Jennings, and C. C. Duson, of Crowley; the places mentioned being small towns near, though in different directions from, the indications referred to. There were, sooner or later, associated with Spencer, Messrs. Williams, Jaenke, Mehaffey, and Wilkins, and they agreed to operate together in the obtention of land and leases (principally the latter, as no one seemed to care to invest much money in the enterprise), as a basis upon which

7. April 19, 1901. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Company, 119 La. 793, 864, 44 So. 481, 506 (1907).

thereafter to find some one with capital, experience, and courage enough to exploit their holdings at his own expense in the search for oil.⁸

C. “Ground Rules”

So a great industry is born in the Pelican State. No industry can flourish without a set of “ground rules” by which land owners, industry participants, and legal practitioners might be guided in their dealings with one another. The important notion of predictability in commercial transactions is promoted only if the controlling principles are well understood by those concerned with such matters.

In the case of the oil and gas industry, those “ground rules” are provided by state law. During the infancy of the industry at the beginning of the twentieth century, the task of determining those “ground rules” in Louisiana was complicated by the fact that Louisiana is a civil law jurisdiction. In contrast to all of the other forty-nine states, whose law is based on the common law of England, the essential private law of Louisiana is contained in a Civil Code based on French and Spanish authorities and precedents. The Louisiana Civil Code was first promulgated in 1803 and later revised in subsequent editions enacted in 1808, 1825, and again in 1870.⁹

Interestingly, the Codes of 1808 and 1825 were originally written in French and accompanied by an English translation. So powerful were the French influences on Louisiana law that the Louisiana Supreme Court has recognized that, “[w]here there is a conflict between the English and French texts of the Code of 1825, the French text prevails.”¹⁰ It was not until 1870 that the Code was promulgated in English only.

The early Codes were heavily influenced by the French texts, which presented problems to the courts. The courts encountered significant challenges in the consideration of early oil and gas issues because the words “oil,” “gas,” or “minerals” did not even appear in the early editions of our Civil Code.¹¹ The closest word

8. *Id.* at 800, 804–07, 44 So. at 484, 486.

9. JOSEPH DAINOW, INTRODUCTORY COMMENTARY TO THE LOUISIANA CIVIL CODE (West 1952).

10. *Sample v. Whitaker*, 172 La. 722, 727–28, 135 So. 38, 40 (1931).

11. *See Harmon v. Whitten*, 390 So. 2d 962 (La. App. 2 Cir. 1980), *writ denied* 396 So. 2d 899 (La. 1981). The words “mineral interest” were first introduced into the Civil Code by amendments to Article 741 dealing with suits for partition, by Act No. 336 of 1940 and later by Act No. 521 of 1950.

to the subject matter was the term “mines and quarries,” to which reference was made in the articles on usufruct.¹²

D. A Civilian’s “Pet Peeve”—Use of Common Law Terms in Louisiana Jurisprudence and Legislation

Any review of the richness of the civil law tradition in Louisiana, and the accompanying rejection of the influence of common law in our state, would not be complete without mention of the most unfortunate predilection of certain judges to employ common law terms which have no basis whatsoever in our Civil Code. The most compelling example is the use of the term “fee simple title” when referring to the ownership of Louisiana immovable property. When your author hears this statement in reference to Louisiana immovable property—amazingly uttered by Louisiana lawyers—the typical response is and should be confusion.

For example, in *Fuselier v. Police Jury of Parish of Iberia*, the court noted:

In the one case, where complete expropriation is had under the articles of the Code, it would seem that *the fee, itself, of the land*, so far as the purpose for which it is wanted is concerned, is taken, while in the other, to-wit: the laying out of a public road under Rev. St. § 3369, *the fee remains altogether in the owner of the soil.*¹³

If this were an isolated example, it could be tolerated—perhaps even forgiven. Regrettably, however, this is but one of a number of decisions in which this inappropriate reference is made to a regime of property that is totally abhorrent to the civil law. For example, the Louisiana Supreme Court has stated that, “[i]t is clear that the reversionary mineral interest of *the owner of the fee simple title* is ‘a certain object,’ which can be legally sold.”¹⁴ Similarly, in *Texas and Pacific Railway Co. v. Ellerbe*, the court noted that “[t]he jurisprudence is well settled that the conveyance of a right of way is to be regarded as a mere servitude and not as a transfer of a *fee-*

12. “The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened.” LA. CIV. CODE ANN. art. 552 (1973) (prior to it by Act No. 50 of the 1974 Louisiana Legislature). *See also* Part II(A), *infra*.

13. 109 La. 551, 556–57, 33 So. 597, 599 (1903) (emphasis added) (citations omitted).

14. *Gailey v. McFarlain*, 194 La. 150, 157, 193 So. 570, 573 (1940) (emphasis added).

simple title of the land unless the deed itself evidences that the parties intended otherwise.”¹⁵ Still again, the court in *French v. Querbes* observed that “[t]he husband and wife, the owners of the *fee simple title to two separate contiguous tracts of land*, instituted this action against R. B. Williams . . .”¹⁶ In *Hicks v. Clark*, it was stated that “[t]he defendants by mesne conveyances are now the *fee simple owners of the property*.”¹⁷ Sadly, numerous other examples abound.¹⁸

More unfortunate is the fact that the Legislature has made the same mistake.¹⁹ For example, Louisiana Revised Statutes section

15. 199 La. 489, 492, 6 So. 2d 556, 557 (1942) (emphasis added).

16. 200 La. 654, 656, 8 So. 2d 631, 632 (1942) (emphasis added).

17. 225 La. 133, 136, 72 So. 2d 322, 323 (1954) (emphasis added).

18. *See, e.g.*, *Sun Oil Company v. Kinder Canal Company*, 231 La. 1039, 1044–45, 93 So. 2d 551, 552 (1957) (“The Court also noted that it was not necessary for [the grantee] to *acquire the strip in fee* because a right-of-way was sufficient for his canal operations.”) (emphasis added); *Sohio Petroleum Company v. Hebert*, 146 So. 2d 530, 535 (La. App. 3 Cir. 1962), *writ denied* 243 La. 1004, 149 So. 2d 763 (1963) (itemizing, as one of the factors to be considered, “whether the party claiming the *fee title* had an actual need for such title.”) (emphasis added); *Meaux v. Southdown Lands, Inc.*, 361 So. 2d 974, 977 (La. App. 3 Cir. 1978) (“The term ‘right of way’ may be used to convey either a servitude of passage or fee title of the land. Whether a servitude or fee title is meant must be determined from an examination of the instrument as a whole.”); *Allied Chemical Corporation v. Dye*, 441 So. 2d 776, 784 (La. App. 2 Cir. 1983), *writ denied* 444 So. 2d 119 (La. 1984) (“Appellants contend that the parties to the partition could only have meant to continue as the owner of the minerals under all the land involved in the same manner as they owned the full fee title to the land.”); *Reaux v. Iberia Parish Police Jury*, 454 So. 2d 227, 231 n. 2 (La. App. 3 Cir.), *writ denied* 458 So. 2d 120 (La. 1984) (“Fee simple title is ownership of an estate with unconditional power of disposition, deviation and descendibility. In Louisiana this is analogous to full ownership, where the elements of ownership (usus, fructus, abusus) are held in common by one person.” (citation omitted)).

19. *See also* LA. REV. STAT. ANN. § 9:2791 (West 2011) (creating conclusive presumption that a transfer of land described as being bounded by a road shall convey all interest under the bed of the road, except:

[W]here the grantor at the time of the transfer or other grant holds as owner the *title to the fee of the land* situated on both sides thereof and makes a transfer or other grant affecting the land situated on only one side thereof, it shall then be conclusively presumed, in the absence of any express provision therein particularly excluding the same therefrom, that the transfer or other such grant thereof shall include the grantor’s interest to the center of such waterway, canal, highway, road, street, alley, railroad, or other right of way.) (emphasis added).

Other statutes contain the same inappropriate reference. *See, e.g.*, LA. REV. STAT. ANN. § 41:14 (West 2011) (“No one shall own *in fee simple* any bottoms of lands covering the bottoms of waters described in this Section”); LA. REV. STAT. ANN. § 19:141 (West 2011) (a port commission can acquire, by expropriation, property in “fee simple title”); LA. REV. STAT. ANN. §

30:210 provides that no state or local governmental agency shall issue a permit to “prospect by means of torsion balance, seismograph explosions, mechanical device, or otherwise, for minerals, or for any other purpose” on any right-of-way held by the State or its agencies for highway purposes, “whether owned . . . *in fee simple*, or otherwise,” unless the person getting the permit demonstrates that he has given the landowners on either side of the right-of-way certain specified written information as to the nature of the exploration.²⁰

To further illustrate the unfortunate propensity of the Legislature to utilize common law terminology, which has absolutely no basis in Louisiana’s organic law, it is noted that, prior to its repeal in 1979,²¹ and its replacement by the Louisiana Condominium Act,²² the Louisiana Horizontal Property Act²³ provided that “[a]ny apartment may be held and owned by more than one person as joint tenants, as tenants in common, as tenants by the entirety, or *in any other real estate tenancy relationship recognized under the laws of this state.*”²⁴ That is a peculiar statement indeed since not a single one of the identified relationships has ever been “recognized under the laws of this state.” It makes one wonder if there were Louisiana-educated lawyers in the Louisiana Legislature in 1962 and if there were, whether they read the bill.

In criticizing the use of such common law language by a recent Louisiana court decision,²⁵ Professor J. R. “Randy” Trahan, the Louis B. Porterie Professor of Law at the Paul M. Hebert Law Center, Louisiana State University, said:

To talk of “fee” is inappropriate—the concept of “fee”, [sic] though a fixture of the common law of property, is completely unknown to the civil law. Consequently, in a discussion of issues arising under Louisiana property law,

48:1255(11) (West 2011) (the Louisiana DOTD may acquire property in “fee simple absolute”).

20. LA. REV. STAT. ANN. § 30:210(A)–(B) (West 2012).

21. 1979 La. Acts 682.

22. LA. REV. STAT. ANN. §§ 9:1121 (West 1979).

23. Originally adopted by Act No. 494 of the 1962 Louisiana Legislature. 1962 La. Acts 494.

24. LA. REV. STAT. ANN. § 9:1125 (repealed 1979).

25. *Capital One v. City of Alexandria*, 439 B.R. 379 (W.D. La. 2010).

which, of course, is part of Louisiana's civil law, any mention of "fee" is altogether out of place.²⁶

As unfortunate as these references are, they are all the more dramatic by virtue of the fact that they are written by judges—even justices of the Louisiana Supreme Court—rather than merely being a reiteration or recitation of arguments made by litigants.

The practice is actually rather curious in view of the fact that the very early courts recognized the impropriety of presuming the application of English common law merely by virtue of the employment of words, terms or concepts inherent in that body of law. For example, in the 1813 decision in *Agnes v. Judice*, the Louisiana Supreme Court said:

The common law names in judicial proceedings have naturally been adopted in a practice which is carried on in the English language, but they ought to be considered rather as a translation of the names formerly used, than as emanations from the English jurisprudence. . . [B]ut their adoption as words can, by no rule of law, or common sense, be considered as having introduced the English practice itself.²⁷

A decade and a half later, in *Abat v. Whitman*,²⁸ the Louisiana Supreme Court refused to apply English precedents merely by virtue of the fact that the Legislature utilized terms from that system, saying: "The use of common law terms is easily accounted for, in the desire of the legislature to use those words which would convey in the most clear and concise manner, to persons acquainted with the English language alone, the remedies defined."²⁹

One court rejected any application of common law regimes of ownership in the following words, to-wit:

26. John Randall Trahan, *The Law of Property, Sales & Leases*, in 2 RECENT DEVELOPMENTS IN LEGISLATION & JURISPRUDENCE 1–72 (2011).

27. 3 Mart. (O.S.) 182, 185–86 (1813).

28. 7 Mart. (N.S.) 162 (1828).

29. So important is the notion that, in Louisiana, the institutions of the common law cannot be incorporated by reference, that the Constitution of 1921 admonished that the "Legislature shall never adopt any system or code of laws by general reference to such system or code of laws; but in all cases shall recite at length the several provisions of the laws it may enact." LA. CONST. art. III, § 18 (1921). It was noted in *LeBlanc v. City of New Orleans* that the predecessor to this constitutional provision was "especially directed . . . against [the adoption of] the 'common-law' and 'equity' systems established in the other states." 138 La. 243, 257, 70 So. 212, 217 (1915). See also LA. CONST. art. III, § 15(B) (1974).

Rules governing the common-law relation of joint tenancy and tenancy in common have no application to a case of this character arising in this state. Ownership of property, real or personal, in this state may arise only in the manners expressly established and recognized by its laws; and divestiture of such ownership may be effectuated only in the manner and form as by them directed.³⁰

If, as Abraham Lincoln once said, “[a] lawyer’s time and advice are his stock in trade,” then, certainly, words or legal terms are the currency by which such trade is conducted. Those who practice their trade in the civil law system are not without appropriate words or terminology with which to transact such business. There simply is no need to use an alien term that has absolutely no meaning in our state.

II. JUDGES MADE THE “GROUND RULES”

A. *The Civil Code Was Silent as to Oil and Gas and Mineral Rights*

Because oil and gas were products unknown to the redactors of the Civil Code, and in the absence of other legislation on the subject matter of oil and gas, it became the task of the courts to “hammer out” the “ground rules” by a process of analogy to the disparate provisions in the Civil Code—a document which, as noted, was totally silent on the important subject matter.

On numerous occasions, the Justices of the Louisiana Supreme Court expressed seeming frustration with the task before them. The Court has made many statements with regard to the absence of legislative guidance in the Civil Code.

In *Rives v. Gulf Refining Co.*, the Louisiana Supreme Court held that:

Gas and oil leases and contracts are a part by themselves. There is scarcely any comparison between them and the ordinary farm or house lease, although there is some resemblance in them to coal or solid mineral leases. The Code is silent as to such contracts; for the reason, doubtless, that minerals under and within the soil of Louisiana were not in the contemplation of the lawmakers at the time that the Code was adopted. The Legislature up to this time has been silent upon the subject of mineral rights and contracts. The law with reference to sales and leases found in the Code cannot be unreservedly applied to

30. *Northcott v. Livingood*, 10 So. 2d 401, 405 (La. App. 2 Cir. 1942).

these contracts. Such contracts partake of the nature of both sale and lease, and they have features that are not applicable to either.³¹

In *Natalie Oil Co. v. Louisiana Railway & Naval Co.*, the Court noted the difficulty with the articles of the Code of Practice because “they were framed at a time when the nature and existence of oil under the soil of this state was not supposed or known, and the laws were not therefore framed to meet such things and the conditions surrounding them.”³²

Again noting the newness of “mining,” the Court stated in *Spence v. Lucas*:

Until the Legislature shall have passed laws specially applicable to the industry of mining, which is a new one in this state, the parties engaged in those pursuits and the courts of the state will adhere to the jurisprudence on the subject, and treat mineral contracts as leases.³³

And later in *Demoss v. Sample*, the Court stated, “There has been little legislation in this state on mining contracts, and there have been few adjudications on the subject.”³⁴

Concerning the interpretation of oil and gas contracts, the Court stated in *Tyson v. Surf Oil Co.*:

This court has consistently applied the codal provisions, whenever applicable, to oil and gas leases for many years. Having declined to enact laws for the regulation of the oil industry and, particularly, having declined to adopt a Mineral Code, the Legislature has placed the stamp of approval upon the system of interpretation of oil and gas contracts which this court has followed for so many years.³⁵

And again, in *St. Martin Land Co. v. Pickney*, the Court stated:

[T]he Civil Code was adopted [when] the oil industry was not in existence. Consequently, the framers of the Code did not contemplate the various questions and problems arising in the course of the industry. The Legislature has not seen fit to adopt statutes sufficient to guide the courts in

31. *Rives v. Gulf Refining Company*, 133 La. 178, 179–82, 62 So. 623, 624–25 (1913).

32. *Natalie Oil Co. v. Louisiana Ry. & Nav. Co.*, 137 La. 706, 708–10, 69 So. 146, 147 (1915).

33. *Spence v. Lucas*, 138 La. 763, 771, 70 So. 796, 798 (1916).

34. *DeMoss v. Sample*, 143 La. 243, 247, 78 So. 482, 483 (1918).

35. *Tyson v. Surf Oil Co.*, 195 La. 248, 268–69, 195 So. 336, 343 (1940).

determining the various controversies arising in this industry. Under such circumstances, the court was compelled to apply the articles of the Civil Code that were most applicable to the nature of the rights asserted It must be borne in mind that we had no exact rule to apply and consequently applied the articles of the Code most applicable to the nature of the right involved.³⁶

Judge John Minor Wisdom, who served with distinction as a Judge of the United States Court of Appeals, Fifth Circuit, for forty-two years, made a similar observation with regard to the development of the rules pertinent to the mineral servitude, as follows:

The juristic accomplishment of fitting oil and gas transactions into the codal law of praedial servitudes is a tour de force illustrative of the theory of the Code as a compilation of principles, not a digest of specific laws. As with many similar tours de force, although the result as a whole is in keeping with civilian concepts, some specific results are far from perfect. We recognize, therefore, that courts should not expect a perfect fit in cloaking a mineral servitude (the right to explore for oil and gas) with ancient laws designed for such servitudes as the right of passage. Louisiana courts have utilized this latitude to make logical extensions of the scope of the servitude doctrine, if such extensions are in keeping with the principle underlying the doctrine.³⁷

More contemporary opinions by the Louisiana Supreme Court also recognize the significant role of the courts in the development of the body of law which is mineral rights, as noted by this passage in *Andrus v. Kahao*, viz.:

The Louisiana Civil Code substantially predates the development of the oil and gas industry in Louisiana. Consequently, the framers of the Code did not contemplate the many and varied legal questions and problems which would arise in the course of development of that industry. With scant Codal or other statutory guidance this Court was called upon to resolve legal questions, and decide cases in which such questions arose.³⁸

36. *St. Martin Land Co. v. Pinckney*, 212 La. 605, 617–18, 33 So. 2d 169, 172–73 (1947).

37. *Elkins v. Townsend*, 296 F.2d 172, 179 (5th Cir. 1961).

38. 414 So. 2d 1199, 1205 (La. 1982).

B. The Role of the Judiciary in Formulating the “Ground Rules”

In view of the foregoing, it is both necessary and appropriate to acknowledge the role which the Louisiana judiciary has played in the origin and development of the “ground rules” pertinent to mineral rights. As noted above, with very few exceptions, the entire body of the law pertinent to mineral rights in general has evolved through the rendition of court decisions.

In Professor Harriet Spiller Daggett’s seminal treatise *Mineral Rights in Louisiana*, she noted that the first Louisiana oil and gas case was decided in 1870³⁹ and described the “law of oil and gas” as “new and without precedent,”⁴⁰ “[t]he vocabulary dealing with it” as “new,”⁴¹ and the decisions of other states of “small value because Louisiana is a civil-law state with an old civil code.”⁴²

Professor Daggett stated:

The Louisiana courts deserve unstinting praise for the formulations of the governing principles regarding mineral law. The meshing of the old articles of the code for traction in a modern and peculiar industry was not an easy task.

* * *

The decisions of other states were of small value [to the process of developing the mineral law of Louisiana] 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. The evolution in the hands of judges of the present body of law dealing with one of the most valuable property rights known in the state should restore the

39. *Escoubas v. Louisiana Petroleum & Coal Oil Co.*, 22 La. Ann. 280 (1870); HARRIET SPILLER DAGGETT, *MINERAL RIGHTS IN LOUISIANA* xxix (1949).

40. DAGGETT, *supra* note 39, at xxiv (1939).

41. *Id.*

42. *Id.*

confidence of every citizen in the democratic judicial process, if such confidence has ever wavered.⁴³

Another treatise of the early days makes the following commentary on this point:

The result has been that much has been left to interpretation and court-made law, because, as shown further on, the statutory enactments have been few and far between, with a consequent loss on the part of the State and the land owners and independent operators, who are the ones who have had cause to complain about this inactivity.

* * *

So far as the statutory law of the State is concerned, the lawmakers have been rather lax in dealing with these great natural resources and the industries engaged in their development.

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 Code 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.⁴⁴

Judge Albert A. Tate, Senior, in a dissenting opinion in *Reagan v. Murphy*, noted:

But it must be remembered that the development of the mineral law in Louisiana has, in the absence of comprehensive legislative enactment, been left to the judiciary. Case by case the Louisiana Supreme Court has been forced to develop from the ancient concepts of our civil code the rules and principles to apply to the infinitely variegated problems of a complex and ever changing industry. Without legislative guidance in the main, and utilizing codal articles devised when the existence of modern oil development was unimagined, the court has properly taken into account the general public interest of the commonwealth when resolving by civilian principles the competing interests of the landowners and of the oil-producers and their financiers. The jurisprudence thus

43. *Id.* at xxiv-xxxv.

44. GEO. G. DIMICK, LOUISIANA LAW OF OIL AND GAS 3-4 (1922).

evolved has received well nigh universal approbation and has been ratified by legislative acceptance without fundamental change as to the regulation of mineral property rights evolving through this enlightened judicial interpretation.⁴⁵

Finally, Professor J. Denson Smith, Director of the Louisiana State Law Institute, made the following observation on this point:

The production, refining, transportation and distribution of oil and gas probably constitute the most valuable industry in Louisiana. Nevertheless Louisiana's basic mineral law has been established largely by analogy to provisions of the Civil Code, and because these analogies have not been always precise, its logical development and extension have presented many difficulties.⁴⁶

C. Methodology Employed by the Courts in Developing the "Ground Rules"

1. Judicial Improvisation

For the most part, by reason of the total absence of direct, controlling principles in the Civil Code, the courts had to utilize methods of analogy in order to construct the "ground rules" to regulate the ownership and production of oil and gas. As will be seen, one court aptly referred to this process as "judicial improvisation." Generally, these analogies were made to the articles of the Civil Code regulating predial servitudes as it related to the mineral servitude, to the articles on "rent" when it concerned the mineral royalty, and to the codal articles on lease as it pertained to the mineral lease.

2. Frost-Johnson Lumber Co. v. Salling's Heirs

This process of judicial improvisation is perhaps best illustrated by the Louisiana Supreme Court's analysis in the influential case proposing that, in Louisiana, there is no such thing as a "mineral estate." Thus, in *Frost-Johnson Lumber Co. v. Salling's Heirs*,⁴⁷ the court was called upon to decide the *nature* of a grant or reservation of minerals.

45. 235 La. 529, 548, 105 So.2d 210, 216-17 (1958).

46. J. Denson Smith, *The Basic Mineral Law of Louisiana: A Study for the Louisiana State Law Institute*, 25 TUL. L.REV. 29 (1950-1951).

47. 150 La. 756, 91 So. 207 (1922).

It is doubtful that there has been a more comprehensively briefed case in the Louisiana Supreme Court. The case was pending before the Court for more than two years, during which the composition of the Court changed several times.⁴⁸

There was much interest in the case as the industry needed an answer to these questions:

1. Can a landowner dispose of his rights to oil and gas?
2. If so, what is the nature and effect of such disposition?

Although several prior cases had answered the threshold question in the affirmative, no case considered the *nature* of such a disposal or reservation with regard to the prescription of non-user.⁴⁹

At this early developmental, almost “pioneering,” stage of the industry, most conveyances of mineral rights were accomplished on forms that came with the industry from other producing states. By and large, these forms generally sounded as though the oil and gas was being sold in place.

Why is *Frost-Johnson* important, both as a matter of substantive oil and gas law and as an example of civilian analysis? The decisional process embodied in this opinion is a classic example of civilian analysis. The Louisiana Supreme Court, in Justice Provosty’s concurring opinion on first rehearing, observed that “[o]il and gas were unknown as subjects of ownership at the time of the adoption of our Code. How far, therefore, that kind of property would be subject to a strict application of the provisions of our Code may be a question.”⁵⁰

If, in this process of reaching a decision based upon the provisions of the Civil Code, the objective is to find codal authority (either direct or through the process of analogy), it might be said that the case could have gone either way.

There was support for the proposition that minerals were susceptible of ownership in place because Article 505 of the Civil Code provided, as follows:

The ownership of the soil carries with it the ownership of all that is directly above and under it.

48. Original decision was rendered on January 5, 1920, rehearing decision was rendered on May 2, 1921, and final decision on second rehearing was issued on February 17, 1922.

49. For cases that had answered the threshold question in the affirmative, see *Rives v. Gulf Refining Company*, 133 La. 178, 62 So. 623 (1913); *Cooke v. Gulf Refining Co.*, 135 La. 609, 65 So. 758 (1914); *DeMoss v. Sample*, 143 La. 243, 78 So. 482 (1918).

50. *Id.* at 231.

* * *

[The owner] may construct below the soil all manner of works, digging as deep as he deems convenient, and draw from them all the benefits which may accrue, under such modifications as may result from the laws and regulations concerning mines and the laws and regulations of the police.⁵¹

Further support was to be found in the language of the contract in question. Certainly as to solid minerals, the language was more suggestive of a sale in place—the so-called “mineral estate.”⁵²

On the other hand, there was also support for the contrary view. Article 519 of the Civil Code provided, “[p]igeons, bees, fish, which go from one pigeon house, hive or fish pond, into another pigeon house, hive or fish pond, belong to the owner of those things; *provided*, such pigeons, bees or fish have not been attracted thither by fraud or artifice.”⁵³

Looking to the deed in question, speaking in terms of “the exclusive right and privilege,” the reservation in *Frost-Johnson* could easily be interpreted as being in the nature of a servitude, or at least some regime less than full ownership, as to oil and gas.⁵⁴

Such being the case, the decision was driven by considerations of public policy. Some of the policy considerations on which the Court relied were the following:

First, the development of the natural resources of the State was a prominent feature of the decision and was the focus of briefs filed by the several *amicus curiae*.

51. See LA. CIV. CODE ANN. art 490 (West 2011) (“Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it. The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.”).

52. “Excepting and reserving . . . all minerals, coal, fossils and precious stones, in, upon or underneath the lands . . .” *Frost-Johnson*, 150 La. at 762, 91 So. at 208.

53. See LA. CIV. CODE ANN. art. 3415 (West 2011) (“Wild animals or birds within enclosures, and fish or shellfish in an aquarium or other private waters, are privately owned. Pigeons, bees, fish, and shellfish that migrate into the pigeon house, hive, or pond of another belong to him unless the migration has been caused by inducement or artifice.”).

54. “. . . also excepting and reserving . . . the exclusive right . . . to enter upon the lands . . . and bore, explore for gas and oil, and to utilize and sell gas and oil that may be found . . .” *Frost-Johnson*, 150 La. at 762, 91 So. at 208.

The Court was also motivated to prohibit the practice of speculation⁵⁵ in minerals which might result if an estate in minerals had been embraced. Indeed, this policy consideration was an underpinning of the decision by Justice O’Niell in his dissenting opinion on first rehearing, as observed:

I cannot see how it imposes any hardship upon the owner of a right to extract the mineral oil or gas from the land of another to require that he shall exercise his right within 10 years or allow it to go back into commerce. That has been the law of this state from the beginning of her history.⁵⁶

Another important consideration pertained to the economic utilization of land. In that regard, the ruling prevents old, stale claims to land from destroying the surface owner’s development.

Honoring the uncomplicated regimes of civil law property, the Court fostered simplicity of titles in that it disapproves of the dismemberment of the so-called mineral estate from the so-called surface estate. The impermissibility of creating separate estates under the civil law was recognized in the ruling in *Wemple v. Nabors Oil & Gas Co.*⁵⁷

Finally, an important consequence of the Court’s decision results in the eventual return of wealth to the landowner. The “fundamental reasons of public policy which have dictated [the] application of this rule” were stated in one case, as follows:

A recognition that prolonged divorce of the ownership of the land from the undeveloped mineral interest thereunder is detrimental to the welfare of the State, both as tending to inhibit development of our mineral resources (without the spur of a time limit and of a financially interested landowner), and as tending to divert in the event of production the royalty rentals therefrom away from the local landowner and the local community often into the

55. In this context, “speculation” has reference to an action that takes minerals out of commerce, while the holder thereof “speculates” that the value will increase at a future date.

56. *Frost-Johnson Lumber Co. v. Salling’s Heirs*, 150 La. 756, 91 So. 207, 239 (1922).

57. 154 La. 483, 97 So. 666 (1923).

And we therefore conclude that there is in this state no such estate in lands as a corporeal “mineral estate,” distinct from and independent of the surface estate; that the so-called “mineral estate” by whatever term described, or however acquired or reserved, is a mere servitude upon the land in which the minerals lie, giving only the right to extract such minerals and appropriate them.

Id. at 490, 97 So. at 668–69.

hands of such absentee financial interests as for long range investment acquire mineral interests at a time when virtually valueless on the open market.⁵⁸

Professor Daggett commented on the mineral servitude as ordained by *Frost-Johnson* as follows:

It is a new variety of personal servitude like unto (sic) a railroad right of way—indivisible and heritable. It is *sui generis* in servitudes and does not fall *precisely* into any predetermined groove; hence, it cannot always be governed by the letter of the articles of the Code. The court might well have taken the attitude that they maintained in insurance law and declared the right *sui generis in toto* and not governed by the articles of the Code just as they declared that the articles on donations would not apply to insurance. They took a less arbitrary course, much more troublesome to themselves, and fitted the applicable articles of the Code, discarding those in which the letter would have been against public policy and inimical to the protection of private rights. The failure to apply the fundamental principles of the law of donation to insurance has resulted in a method of partially circumventing the most sacred doctrines of the law of successions, i.e., the doctrine of forced heirship, substitutions, and *fidei commissa*. No such violence to the ideals of tenure and use of property in this state is found in the law of oil and gas.⁵⁹

In the humble view of the author, *Frost-Johnson* is the single most important mineral law decision ever rendered by the Louisiana Supreme Court. Although its current relevance as jurisprudential authority is arguably minimized since the enactment of the Louisiana Mineral Code, the fact remains that the policy announced by the decision has resulted in the eventual return of mineral wealth to the landowner.⁶⁰

The wisdom of this approach is demonstrated by the experience of other oil and gas states—such as Texas, Oklahoma, and Mississippi—where distant or ancient owners of minerals cannot be found, resulting in wells which were not drilled. The experience of these sister states demonstrates that minerals were

58. *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210, 217 (1958) (Tate, J., dissenting).

59. DAGGETT, *supra* note 39, at 27–28.

60. See LA. REV. STAT. ANN. § 31:21 (West 2011) (“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.”).

often bought and resold on a widespread, speculative basis such that today, many of the original owners, or their heirs, cannot be found. Since these heirs cannot be found, the land in question cannot be leased; and, since the land cannot be leased, the well cannot be drilled. There is no way to tell how many otherwise geologically meritorious exploratory wells have not been drilled for this reason.

3. Other Cases Employing the Same Methodology

The courts have, by analogy, ascertained the controlling rules applied to mineral servitudes in other cases.

For example, in *Ohio Oil Co. v. Ferguson*, the Louisiana Supreme Court noted that the Court has “been called upon to decide and from our efforts to apply consistently, by analogy, the articles of the Code relating to predial servitudes in the development of the mineral law of this state.”⁶¹

In *Mire v. Hawkins*, the Court stated this proposition, as follows:

In the absence of a mineral code, it long ago became the lot of this Court to adjudge the nature of mineral rights, and the obligations and advantages flowing from contracts affecting such rights, within the framework of our civil law. In performance of this task, the Court has consistently held that the sale or reservation of minerals creates a real right in the nature of a servitude and during the years has developed and extended the doctrine, by analogy, to those provisions of the Civil Code which relate to real or predial servitudes.⁶²

To the same effect, the Court in *Trunkline Gas Co. v. Steen* stated the following:

In the evolution of the mineral law in the State, it was recognized that the sale or reservation of a mineral right, having been classed as a servitude, was subject to the applicable articles of the Civil Code in the resolution of conflicting claims; and in deciding the early and landmark case of *Ohio Oil Co. v. Ferguson*, *supra*, the precedent upon which succeeding decisions, including *Childs v. Washington*, *supra*, and *Jumonville Pipe and Machinery Co. v. Federal Land Bank*, *supra*, were predicated, we

61. 213 La. 183, 261, 34 So. 2d 746, 772 (1947).

62. 249 La. 278, 297, 186 So. 2d 591, 598 (1966) (McCaleb, J., dissenting).

concluded the articles of the Civil Code in Title IV, entitled, 'Of Predial Servitudes or Servitudes of Land', whenever applicable were controlling.⁶³

Finally, in *Williams v. Humble Oil & Refining Co.*, this process was explained in the following words:

By judicial improvisation, relying largely upon the analogy to principles of lease and servitude, Louisiana's courts have evolved a body of rules applicable to an industry unknown when the Civil Code was adopted. The shaping of the basic precepts began almost 50 years ago. In 1922, Louisiana's Supreme Court held that a landowner does not own the oil and gas beneath his property.⁶⁴

While not being critical, it would be an understatement to say that the results of this methodology were, on occasion, haphazard. Whenever one leaves to the "whim of man" the development, in a legal vacuum, of "ground rules" of this type, it necessarily and understandably leads to inconsistencies that result in a system lacking in predictability.

Perhaps this is best illustrated by a candid admission by Justice Fournet, the opinion author of the important mineral royalty case *Vincent v. Bullock*.⁶⁵ It has been reported that the *Vincent* decision was the result of a pre-opinion judicial conference that decided the result to be reached, but left to Justice Fournet the construction of a theory to follow in order to reach the result. Justice Fournet later admitted this, in saying:

In accordance with our system of assigning cases by rotation, it fell to me. The court, without determining how the conclusion was to be reached, instructed me, in terms amounting to an ultimatum, to find a way to cut off this new right by the same prescription applicable to the mineral servitude, of which it was an appendage as it were.⁶⁶

Thus, unlike the mineral servitude, there was no sound, valid conceptual theory to support the mineral royalty.

63. 249 La. 520, 535, 187 So. 2d 720, 725 (1966).

64. 290 F.Supp. 408, later reported at 432 F.2d 165, *reh'g denied* 435 F.2d 772 (5th Cir. 1970), *cert. denied sub nom* Humble Oil & Refining Co. v. Price, 402 U.S. 934, 91 S.Ct. 1526, 28 L.Ed.2d 868 (1971).

65. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

66. Institute Dinner Address, 2 ANN. INST. ON MIN. LAW 89, 93 (1954).

D. "Pioneering"

As has been noted by both judges⁶⁷ and commentators,⁶⁸ the process of eking out the "ground rules" by a process of analogy based upon Civil Code articles regulating predial servitudes, is far from perfect. Given the myriad of issues presented by the creation, ownership, administration, maintenance, and transfer of mineral rights, the process of judicial improvisation to which the judiciary had resorted is all the more worthy of respect.

At the same time, the other side of that coin gave wide latitude to litigants to advance arguments which, working in a void, cannot be said to be expressly contrary to any positive law since such did not exist. Thus, it might be said that a litigant—testing as it were the outer limits of this imperfect process—was a sort of "pioneer" in terms of advancing arguments in favor of the client's position.⁶⁹

Thus, by reason of the *absence* of express authority to the contrary (or, indeed, of any positive law one way or the other), good faith arguments were made—albeit in each case unsuccessfully—by such "pioneers," as follows:

- That the *Frost-Johnson* decision was unsound as being based on an incorrect premise, viz., that, because oil and gas are migratory or fugitive, they are insusceptible of ownership separate from the soil;⁷⁰
- That a regime of co-ownership exists between the surface owner and the owner of a mineral servitude burdening that land, sufficient to authorize partition between such parties;⁷¹
- That the granting of a mineral lease by a landowner before the expiration for non-use of a mineral servitude burdening the land constituted an obstacle which suspended the

67. See *supra* note 37 and accompanying text ("[C]ourts should not expect a perfect fit . . .").

68. See *supra* note 46 and accompanying text ("these analogies have not been always precise . . .").

69. Such a litigant meets one of the definitions of a "pioneer," which is "one who is first or among the earliest in any field of inquiry, enterprise, or progress," such as the development of the law of mineral rights. *Pioneer*, DICTIONARY.COM, LLC, <http://dictionary.reference.com/browse/pioneer?s=t> (last visited Oct. 2, 2012).

70. *Wetherbee v. Railroad Lands Co., Limited*, 153 La. 1059, 1067–68, 97 So. 40, 43 (1923) (rejecting such argument, the Court said that even if accepted, such testimony would only serve to "modify in a limited degree the theory upon which the impossibility of exclusive ownership rests in those decisions.")

71. *Clark v. Tensas Delta Land Co.*, 172 La. 913, 915, 136 So. 1, 2 (1931) (holding that what the defendant "owned was not half of the right to the minerals, but the right to half of the minerals, in Clark's land.").

prescription accruing against the pre-existing mineral servitude;⁷²

- That prescription accruing against a mineral servitude was suspended by reason of the existence of a pre-existing mineral lease;⁷³
- That a mineral servitude is not heritable, and, hence, necessarily terminates at the death of its owner;⁷⁴
- That the release by the lessee of a mineral lease covering a mineral servitude effected a division of the underlying mineral servitude;⁷⁵
- That a vendor of an interest in an existing mineral servitude warrants the effectiveness or continuation of the servitude;⁷⁶
- That prescription does not accrue against a mineral servitude subject to a pre-existing mineral servitude as the latter constitutes an obstacle;⁷⁷
- That public policy imposed a limit on the maximum size of a mineral servitude;⁷⁸

72. *Gayoso Co., Inc. v. Arkansas Natural Gas Corp.*, 176 La. 333, 340, 145 So. 677, 680 (1933) (“The granting of the lease did not constitute a placing of an obstacle in the way.”).

73. *Coyle v. North Central Texas Oil Co.*, 187 La. 238, 243–45, 174 So. 274, 276–77 (1937) (“We see no merit to defendants’ contention that the purchase of mineral rights subject to a previous exclusive lease is the purchase of a suspended servitude, the prescription of which is also suspended . . . Therefore the contention of the defendants that the lease is an obstacle which interferes with the exercise of their rights is unfounded.”).

74. *Ford v. Williams*, 189 La. 229, 239, 179 So. 298, 301 (1938) (“A right acquired under a mineral servitude is property, and all property which a person leaves at his death is transmitted by mere operation of law to his nearest heir, if there is no testament or institution of heir.”).

75. *Levy v. Crawford, Jenkins & Booth*, 194 La. 757, 761, 194 So. 772, 773 (1940) (“The servitude has been used continuously since the completion of the first well on February 9, 1919, and is still being used. Such being the case, the entire servitude is still in force and effect.”).

76. *Deas v. Lane*, 202 La. 933, 943–44, 13 So. 2d 270, 274 (1943) (“We know of no law, and we have not been referred to any, that obligates the seller of an incorporeal right to warrant that the right will not become lost subsequently by prescription.”).

77. *McDonald v. Richard*, 203 La. 155, 164–65, 13 So. 2d 712, 715 (1943) (former Article 792 of the Civil Code “has reference only to obstacles which the owner of the servitude has not consented to, either expressly or tacitly.”).

78. *Lenard v. Shell Oil Company*, 211 La. 265, 29 So.2d 844 (1947) (“[A]s everyone knows, the production of mineral oil or gas is such an expensive operation that it cannot be done profitably on a small scale. No one would undertake to drill for oil or gas in unproven territory—what is called a wildcat well—without owning or controlling the mineral rights on a vast area surrounding the prospective well.”).

- That, by reserving the so-called “reversionary right,” parties could contractually provide that a mineral servitude, upon its extinction by prescription, should return to a third party other than the surface owner;⁷⁹
- That a servitude owner commits “an alleged trespass to [the burdened] property by the construction [by the lessee of the mineral servitude owner] of a roadway;” and⁸⁰
- That parties may contractually alter the rules of use so as to keep a mineral servitude alive beyond ten years without a use.⁸¹

While, as noted, each of these arguments advanced by the “pioneers” was rejected by the courts, the fact that they could be advanced, consistent with ethical limitations on litigants, is further demonstration of the prudence of the development and enactment of a codification of the law pertinent to oil and gas.

E. A Lawyer’s Dilemma

The several pronouncements noted above and the opportunities for “pioneering” are quite instructive as to the state of affairs which prevailed prior to the enactment of the Mineral Code. This dilemma aptly highlights the uncertainty in the law and the concomitant difficulty confronting a practicing lawyer who is called upon to give advice to a client desiring to expend considerable amounts of money in the drilling of a well.

As has been demonstrated, for the most part, the pre-Code, judge-made body of Louisiana jurisprudence on mineral rights was formed through a process of “bending and molding” disparate articles or principles in the Civil Code to address this emerging, and later developing, industry. Hence, one can best appreciate the

79. *Hicks v. Clark*, 225 La. 133, 141, 72 So. 2d 322, 325 (1954) (The Louisiana Supreme Court rejected this institution as being “an effort to circumvent the public policy of this state, and . . . therefore refuse[d] to recognize or give effect to it.”).

80. *Grayson v. Lyons, Prentiss & McCord*, 226 La. 462, 469, 76 So. 2d 531, 533 (1954) (lessee of a mineral servitude owner “had a right of passage over plaintiff’s land and were within their rights in constructing the road”).

81. In *LeBleu v. LeBleu*, the Court held that an agreement which purported to obligate the defendants to convey the servitude was unenforceable:

constitute[d] a scheme or a device to circumvent or avoid the law and public policy of this state that a mineral servitude will be subject to the prescription of ten years, that contracts which purport to extend such a servitude for a longer period of time without use will not be enforced, and that a party cannot waive or renounce the prescription applicable to a mineral servitude before it has accrued.

206 So. 2d 551 (La. App. 3 Cir. 1967).

consequences of the absence of a codified set of laws when one gives consideration to the predicament of the practitioner who, prior to the Code's adoption in 1975 (and certainly, in the pioneering decades of the 1920s through the 1950s), might be called upon by a client for advice as to how to be absolutely certain that a proposed activity would constitute a "use" sufficient to avoid prescription accruing against a mineral servitude. In essence, the only thing that the Louisiana Supreme Court in *Frost-Johnson Lumber Co. v. Salling's Heirs*⁸² did was to characterize the (conveyed or reserved) mineral interest as being in the nature of a servitude subject to the prescription of nonuse. Beyond that, the court in *Frost-Johnson* did not provide the essential "ground rules" as to the myriad of activities that would constitute a "use" of the servitude.

Thus, particularly heightened was the lawyer's challenge to advise an oil and gas lessee who desired to drill a well on the lands covered by a mineral lease granted by the owner of a mineral servitude that was approaching a prescriptive date. Without the benefit of the guidance and clarity now provided by the Mineral Code, one can imagine the challenge of explaining to such a client the types of activities on the servitude that would constitute a "use" sufficient to interrupt prescription. Without the benefit of a prior court case, and until the courts had ruled on the matter, would not such advice necessarily be in the category of the lawyer's "best guess"? The client was prepared to spend significant amounts of capital to drill a well without the benefit of the "ground rules" previously mentioned. This thought, if no other, illustrates the benefit to the practitioner of a written set of laws now found in the Mineral Code.

III. WRITING IT DOWN—THE LOUISIANA MINERAL CODE

A. A Move Towards a Codification

The confluence of the emerging industry with the absence of a consistent, predictable set of "ground rules" to govern such industry gave rise to a movement toward codification of the law of Louisiana pertinent to mineral rights, including oil and gas. Indeed, the need for a codification of the law of oil and gas was observed by Justice Hamiter who, in a concurrence, noted that the developed jurisprudence on the mineral servitude (with which he disagreed) had nonetheless "established a rule of property, and I shall recognize and respect it until changed by the Legislature, either

82. 150 La. 756, 91 So. 207 (1922).

through the adoption of a mineral code, *which is very much needed in this state*, or otherwise.”⁸³

By Joint Resolution of the Louisiana Legislature adopted as Act No. 170 of 1936, it was determined that:

It shall be the duty of the Governor...to appoint a Commission composed of five (5) citizens of the State of Louisiana, three of whom shall be lawyers who have been practicing law in the State not less than ten (10) years and who are learned in the laws relating to oil, gas and minerals, and two of whom shall be citizens of the State who have had not less than five (5) years practical experience in the buying, selling, leasing or operating oil, gas or mineral rights within the State, whose duty it shall be to prepare a draft of a Code to be known as “A Code of the Oil, Gas and Mineral Laws of the State of Louisiana,” which code shall codify all the laws of the State relative to the private ownership, leasing, selling, mortgaging of oil, gas and other minerals, or otherwise dealing therein, and rights relating thereto or connected therewith.⁸⁴

In compliance, Richard W. Leche, Governor of Louisiana, took steps to form a Commission to study the subject matter of mineral law and charged that commission with the task of making a recommendation as to whether a mineral code should be adopted. Sidney L. Herold, Esq., of Shreveport, Louisiana, was appointed as the Chair of the Commission which was comprised of the leaders of the bar and judiciary in this state as well as individuals having “practical experience in the buying, selling, leasing or operating oil, gas or mineral rights within the State.”⁸⁵

As reported by the late W. Lee Hargrave, Professor of Law at the Paul M. Hebert Law Center, in his authoritative history of LSU Law School:

Distinguished Louisiana lawyers also lectured during Spring 1938. Sidney L. Herold, a prominent Shreveport attorney, delivered a lecture titled “Some Problems Involved in Drafting a Mineral Code for Louisiana.” Ironically, the top story in the *Reveille* on the day that Herold’s lecture was announced featured photographs of a gushing oil well, Duplantier No. 1, located in the

83. *Ohio Oil Company v. Ferguson*, 213 La. 183, 217, 34 So. 2d 746, 757 (1947).

84. 1936 La. Act. 170.

85. Reports of the work of the commission were published in Volumes XXV and XXVI of the *Tulane Law Review*. 25–26 TUL. L. REV. (1950–1952).

University Field south of the Campus. The University had leased its 2,100 acres for mineral production in 1936, and it started earning substantial oil and gas revenues, adding to its prosperity.⁸⁶

Mr. Herold, to whom reference was above made, offered the following interesting comments on April 22, 1938 at a Symposium on the Proposed Louisiana Mineral Code:

I believe a fair reading of the Code will convince the members of the bar that there is nothing in the Proposed Mineral Code except principles which have been a part of the civil law since there has been a civil law jurisprudence; that there is nothing in the Proposed Code that departs from a proper interpretation of the Civil Code of the State; that it seeks to bring into Louisiana no new or foreign jurisprudence. It endeavors simply to apply to actual conditions arising with respect to drilling and mining for minerals in this State those civil law principles on which we were raised, upon which our predecessors at the bar were raised and upon which we expect our successors at the bar to be raised.⁸⁷

The work of the Commission continued at a later date under the capable direction of its last Reporter, George W. Hardy, III, Professor of Law at LSU Law School and later Dean of the University of Kentucky School of Law, who succeeded Professor Nabors in 1963.

In a precursor publication to the eventual Mineral Code, Professor Hardy noted the following:

As is commonly known, the mineral property system in Louisiana has been built piece by piece through analogies to articles of the Civil Code which were not structured specifically to cope with the legal problems attendant upon exploration for and extraction of minerals on the broad scale which has occurred in Louisiana as the result of intensive petroleum exploration and production. The bending and warping of Civil Code concepts, the application of articles from varying parts of the Code in sometimes awkward circumstances, and the flimsiness of some of the analogies which have been made inhibit, if not

86. W. LEE HARGRAVE, *LSU LAW—THE LOUISIANA STATE UNIVERSITY LAW SCHOOL FROM 1906 TO 1977* 99 (LSU Press 2004).

87. Herold, *General Statement of Codal Provisions*, 12 *TULANE L. REV.* 552, 569 (1938).

prohibit, intelligent, organized consideration of Louisiana mineral law in the conceptualism of the Civil Code.⁸⁸

B. A Mineral Code is Enacted

The efforts of the various commissions finally came to fruition in 1974 when the Legislature enacted Act Number 50 of 1974. The Louisiana Mineral Code was codified as Title 31 of the Revised Statutes. It became effective on January 1, 1975.

As originally enacted, the Code contained 214 articles. Since its inception, additional sections have been added, others repealed, and various amendments have been adopted.

As was the purpose of the Commission, the Code generally represents a codification and clarification of the body of mineral law theretofore established by the judiciary. This was explained by Professor Hardy, as follows:

The Mineral Code is designed in large measure to supplant by way of codification the extensive jurisprudence that developed in this area of the law. Louisiana's existing mineral law was a product of jurisprudential development principally by way of analogy to the provisions of the Louisiana Civil Code relating to servitudes but including particularly also the general rules of conventional obligations and leases. In other words, before the adoption of the Mineral Code, the mineral law reposed in decisions of the courts, principally the Louisiana Supreme Court, rather than in a codification. The basic result of the judicial determination that sales and reservations of minerals do not constitute a dismemberment of ownership in perpetuity but merely give rise to servitudes is that under the provisions of the Civil Code the servitudes so established expire for nonuse in ten years and the land is no longer burdened by them. There has been general agreement with the wisdom that characterized the adoption of these basic principles by the courts; nevertheless, the extensive volume of jurisprudence that had been developed was lacking, as must necessarily be the case, in the coherence that is characteristic of a code.

While, for the most part, the Mineral Code represents a codification (with associated clarifications) of the law of oil and

88. GEORGE W. HARDY, *EXPOSÉ DES MOTIFS: SUGGESTED PRINCIPLES OF LOUISIANA MINERAL LAW—A BASIS FOR REFORM* 3 (Louisiana State Law Institute, 1971).

gas as such had been developed by the courts, it also changed the law in certain respects. The process of creating the Code afforded an opportunity for the committee to recommend to the Legislature that particular decisions be repudiated as a matter of public policy. Examples of this include: (1) creating a meaningful remedy available to a lessor for unpaid or improperly paid royalties, and the concomitant suppression of the jurisprudential rule that dispensed with the need for a “putting in default” prior to filing suit against the mineral lessee;⁸⁹ (2) altering the rule that the use of a mineral servitude to a lesser extent than contemplated by the grant (or reservation) resulted in the limitation of the servitude as to modes of use in which the servitude owner had not engaged;⁹⁰ (3) overruling cases which had held that production from a well situated off of a tract burdened by a mineral royalty, but situated within a conventional unit, had the effect of interrupting prescription as to the entire tract burdened by the mineral royalty;⁹¹ and (4) providing that there must be some relationship between the servitude owner and the person using the servitude in order for prescription to be interrupted by such use.⁹²

Like all other statutory enactments, the Louisiana Mineral Code is subject to continuous review by the Louisiana State Law Institute through its Mineral Code Committee.⁹³ The purposes and

89. LA. REV. STAT. ANN. §§ 31:136–41 (West 2011) (overruling a line of cases which had held that the failure to pay royalties without justification for an appreciable length of time constituted an active breach, thereby dispensing with the need to put the lessee in default). *See, e.g.*, *Melancon v. Texas Co.*, 230 La. 593, 89 So. 2d 135 (1956) (coercive conduct on part of lessee in withholding royalties in order to pressure lessor into giving consent to formation of voluntary units); *Bollinger v. Texas Co.*, 232 La. 637, 95 So. 2d 132 (1957) (coercive conduct on part of lessee in withholding royalties in order to pressure lessor into giving consent to formation of voluntary units); *Bailey v. Meadows*, 130 So. 2d 501 (La. App. 2 Cir. 1961) (lessee withheld royalties because it had not settled a well cost dispute with operator); *Pierce v. Atlantic Refining Co.*, 140 So. 2d 19 (La. App. 3 Cir. 1962) (delay caused by internal reorganization); *Sellers v. Continental Oil Company*, 168 So. 2d 435 (La. App. 3 Cir. 1965) (lessee paid royalties on leased premises contained in only one of two producing units).

90. LA. REV. STAT. ANN. § 31:40 (West 2011) (making inapplicable the rule of Civil Code articles 796 and 798). *See Continental Group, Inc. v. Allison*, 404 So. 2d 428 (La. 1981).

91. LA. REV. STAT. ANN. § 89 (overruling *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So. 2d 575 (1960), *Montie v. Sabine Royalty Company*, 161 So.2d 118 (La.App. 3 Cir.), *writ denied* 246 La. 84, 163 So.2d 359 (1964)).

92. *Id.* at §§ 42–43, 53 (overruling *Nelson v. Young*, 255 La. 1043, 234 So. 2d 54 (1970)).

93. Although currently inactive, this Committee was last chaired by Professor Emeritus Patrick H. Martin of the Paul M. Hebert Law Center at Louisiana State University.

duties of the Louisiana State Law Institute include the duty to “consider needed improvements in both substantive and adjective law and to make recommendations concerning the same to the legislature;”⁹⁴ “[t]o examine and study the civil law of Louisiana and the Louisiana jurisprudence and statutes of the state with a view of discovering defects and inequities and of recommending needed reforms,”⁹⁵ and “[t]o recommend from time to time such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state, both civil and criminal, into harmony with modern conditions.”⁹⁶

C. Retroactive Application of the Louisiana Mineral Code

As stated, the Louisiana Mineral Code went into effect on January 1, 1975. Obviously, on that date, there were many mineral rights—mineral servitudes, mineral royalties, mineral leases—then in existence. To what extent can the provisions of the Mineral Code be constitutionally applied to mineral rights then in effect?⁹⁷

Article 214 speaks to the issue of the permissible retroactive application of the Mineral Code. It reads that, “[t]he provisions of this Code shall apply to all mineral rights, including those existing on the effective date hereof; but no provision may be applied to divest already vested rights or to impair the obligation of contracts.”⁹⁸

Beyond this statutory statement, there is a constitutional prohibition against the enactment of an “ex post facto law, or law impairing the obligation of contracts”⁹⁹

The Comments to Article 214 state, as follows:

There are strong reasons why the Mineral Code should be retrospective, at least in the sense that to the extent possible it should apply to existing rights. There are many mineral servitudes, mineral royalties, and mineral leases outstanding at any given point in time. If comprehensive mineral legislation were made applicable only to rights created after its effective date, the number of outstanding

94. LA. REV. STAT. ANN. § 24:204A(1) (West 2011).

95. *Id.* at § 204A(2).

96. *Id.* at § 204A(5).

97. For an excellent discussion of the retroactivity of the Mineral Code, see Day, *Applicability of the New Mineral Code to Existing Mineral Rights*, 22 INST. ON MIN. LAW 205 (1975).

98. LA. REV. STAT. ANN. §31:214 (West 2011).

99. LA. CONST. art. I, §23 (1974).

rights at that time would assure that there would be two clear and distinct bodies of mineral law in the state for many years to come. One would be the 'old law' as developed by analogy to provisions of the Civil Code which would apply to rights already existing on the effective date of the legislation. The other would consist of the Mineral Code and the interpretive jurisprudence applicable to rights created after enactment of the Mineral Code. The resultant difficulties in judicial administration are readily discernible. Additionally, the purpose of codification would be substantially frustrated.

The chosen approach to this problem is to adopt a general principle making the provisions of the code retrospective in operation to the extent not violative of the state and federal constitutions. Thus, unless an individual can satisfy a court that he is deprived of a vested right without just compensation or that the obligations of a contract are impaired, the rules specified in the Mineral Code apply to both existing and future rights. This approach was regarded as the only practical one.¹⁰⁰

Louisiana courts have grappled with this issue of the applicability of the Mineral Code to mineral rights that were in existence on its effective date. Hence, guided by Article 124, the court in *GMB Gas Corporation v. Cox* stated:

The rights in dispute were created prior to the January 1, 1975, effective date of the Mineral Code. Although the Code clearly resolves the issue presented in this case, there may be constitutional questions presented in giving retroactive effect to the provisions of the code that affect vested rights. To establish stability in this area of the law, the provisions of the Mineral Code should be followed on pre-code issues which have not been clearly resolved by the jurisprudence. This approach to the problem is supported by the pronounced intent in the introduction to the Code by the Louisiana Law Institute that it is intended to be a codification and clarification of the already existing body of jurisprudence relating to mineral ownership in this state. The Code further represents an expression of the legislature as to what it considered the law should be in those areas where the courts had not specifically ruled.¹⁰¹

100. LA. REV. STAT. ANN. §31:214, Comment (West 2011).

101. 340 So. 2d 638, 640 (La. App. 2 Cir. 1976).

In *Continental Group, Inc. v. Allison*, the Louisiana Supreme Court, on original hearing, applied Article 40 of the Mineral Code to a pre-Code factual situation, and held that the “production of oil and gas would suffice to interrupt prescription for the strip-mining of lignite.”¹⁰²

On rehearing, the Court reversed itself, finding that it could not apply Article 40 (which unquestionably represented a change in the prior law), saying:

Concerning the court of appeal’s application of the logic as expressed in *GMB Gas Corp., supra*, we respond by quoting the following excerpt from 38 La. L. Rev. 378 (1978):

An inquiry into the meaning of the old law should be guided by article 1 of the Civil Code, which states ‘Law is a solemn expression of the legislative will.’ Therefore, in seeking to ascertain whether new law has destroyed rights under old law, courts must do more than merely examine whether there is a four-square case in point. Rights long established under the Civil Code or legislation are often so clearly vested that there is no need for controversy or litigation. Legislation, as much as any case, can vest rights. Therefore, future decisions ought to analyze Civil Code regimes antedating the Mineral Code, irrespective of jurisprudence or the absence thereof.¹⁰³

Finding, on rehearing, that the pre-Code mineral law was not to the same effect as Article 40, the court held that “the right to strip-mine for lignite has prescribed. Furthermore, since the defendants enjoyed the right by title to “all mineral rights” and only drilled for oil and gas, their servitude is reduced to that which they preserved (art. 798).”¹⁰⁴

In *Andrus v. Kahao*, the Louisiana Supreme Court, on rehearing, reversed its original opinion and held that its prior precedents (originally overruled in the original opinion) “created rules of property” which should not be overruled.¹⁰⁵ The court found the holding in those cases to have been codified in the Mineral Code, and, thus, to overrule the prior precedents would be inconsistent with the pronouncements of the Code.¹⁰⁶

102. 404 So. 2d 428 (La. 1981), writ denied 456 U.S. 906 (1982).

103. *Id.* at 436.

104. *Id.* at 438.

105. 414 So. 2d 1199, 1205–06 (La. 1982).

106. *Id.* at 1206.

In *Adobe Oil and Gas Corporation v. MacDonell*, the Louisiana Third Circuit had before it the issue of a mineral royalty interest created prior to the effective date of the Louisiana Mineral Code, and whether the provisions of the Code could validly be applied to the pre-Code factual situation.¹⁰⁷ In particular, the court noted that the new Article 89 of the Mineral Code altered pre-Code jurisprudence as it relates to the interruptive effect of production from a unit well as it related to a portion of the unit tract situated outside of the geographic confines of the voluntary unit.¹⁰⁸

The Court—relying on jurisprudence to the effect that “rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest”—held, “[g]iven the conflicting state of the pre-code jurisprudence in this area, we conclude that the [identified parties] acquired no vested rights which would prohibit the retroactive application of Louisiana Revised Statutes section 31:89.”¹⁰⁹

D. Influence of Laws and Decisions of Other States

Because of the nature of the oil and gas industry, and in recognition of the fact that there are certain issues, practices and instruments which are common in many oil and gas producing states, the courts of Louisiana have occasionally taken cognizance of the published decisions of other states where a particular issue has not previously been considered by a court in Louisiana.

As the Louisiana Supreme Court has stated, “[a]lthough the decisions of other jurisdictions are not controlling on the Courts of Louisiana, if they determine an issue practically identical with the one under consideration, they possess at least a persuasive effect and merit attention.”¹¹⁰

It has additionally been stated by another court, as follows:

Of course, such authorities [from courts of another state] are not binding on the courts of Louisiana; but as they determine an issue practically identical with the one in the instant case and constitute expressions of the highest courts of the named states, they possess at least a persuasive effect

107. 480 So. 2d 961 (La. App. 3 Cir. 1985).

108. See *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So. 2d 575 (1960).

109. *Tennant v. Russell*, 214 La. 1046, 39 So. 2d 726 (1949).

110. *C H F Fin. Co. v. Jochum*, 127 So. 2d 534, 539 (La. 1961).

and merit our consideration and a discussion in this opinion.¹¹¹

The most prominent example of the influence of a foreign court is the fact that the Louisiana law pertaining to the doctrine of production “in paying quantities” finds its genesis in a ruling of the Supreme Court of Texas. Indeed, as noted in the official comment to Article 124 of the Mineral Code, Louisiana’s current law on this subject is fashioned in large part on the pronouncements of the Supreme Court of Texas in *Clifton v. Koontz*.¹¹² Cases from other oil and gas producing states have also been considered in litigation over royalty payments based upon “market value”¹¹³ and on the interpretation of the model form operating agreement.¹¹⁴

IV. CONCLUSION

The enactment of the Louisiana Mineral Code represented the culmination of many years of labor by the academia and practicing bar in Louisiana. The fact that the Code has been amended on so few occasions since 1975 is a testament to those who lent their talent and knowledge to its creation. Those who engage in the oil and gas industry—as well as landowners and other stakeholders in that endeavor—have benefited greatly by the ability to go to one consolidated source in order to ascertain the “ground rules” which govern that undertaking.

It is hoped that an understanding of the history which culminated in the adoption of the Mineral Code would be beneficial to all constituencies of the industry, in order to determine how those “ground rules” affect their property interests which the Louisiana Supreme Court has characterized as “the most valuable property in the state.”¹¹⁵ Referring later to this statement, Justice Fournet stated that, “since [1918],” such “property has . . .

111. *Michiels v. Succession of Gladden*, 180 So. 862, 864 (La. App. 2 Cir.), *aff’d* 190 La. 917, 183 So. 217 (1938).

112. 325 S.W.2d 684 (1959).

113. *See, e.g., Henry v. The Ballard & Cordell Corporation*, 418 So. 2d 1334 (La. 1982) (“We note that the same or similar contract language has often been interpreted by the courts of other jurisdictions . . .”); *Shell Oil Company v. Williams, Inc.*, 428 So. 2d 798 (La. 1983) (“In our review of the jurisprudence of other jurisdictions, we note that the Texas Supreme Court and the United States Court of Appeals, Fifth Circuit, have addressed this issue.”).

114. *See, e.g., Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC*, 2012-142 (La.App. 3 Cir. 6/6/12), -- So.3d --, 2012 WL 2016225.

115. *DeMoss v. Sample*, 143 La. 243, 249, 78 So. 482, 484 (1918).

mushroomed into an industry of almost unbelievably gigantic proportions.”¹¹⁶

Credit for the development of this “unbelievably gigantic” industry is due to both the aforementioned “pioneers,” and, most importantly, the judges who sorted out the various arguments and in large part established a basic set of “ground rules” that were both thoughtful and consistent.

116. *Ohio Oil Company v. Ferguson*, 213 La. 183, 264, 34 So. 2d 746, 773 (1947).