9. Selected Title Issues

Paul A. Strickland
Hargrove, Smelley, Strickland & Langley
Shreveport, Louisiana

I. General Rules of Contractual Interpretation

A. General Rules from Louisiana Civil Code Articles

1. Interpretation of a contract is the determination of the common intent of the parties. La. Civ. Code art. 2045.

2. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent. La. Civ. Code art. 2046.

3. The words of a contract must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the contract involves a technical matter. La. Civ. Code art. 2047.

4. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. La. Civ. Code art. 2048.

5. A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective. La. Civ. Code art. 2049.

6. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. La. Civ. Code art. 2050.

7. Although a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include. La. Civ. Code art. 2051.

8. When the parties intend a contract of general scope but, to eliminate doubt, include a provision that describes a specific situation, interpretation must not restrict the scope of the contract to that situation alone. La. Civ. Code art. 2052.

9. A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties. La. Civ. Code art. 2053.

10. When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose. La. Civ. Code art. 2054.
11. Equity, as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another. Usage, as intended in the preceding articles, is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation. La. Civ. Code art. 2055.

12. In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party. La. Civ. Code art. 2056.

13. In case of doubt that cannot be otherwise resolved, a contract must be interpreted against the obligee and in favor of the obligor of a particular obligation. Yet, if the doubt arises from lack of a necessary explanation that one party should have given, or from negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party whether obligee or obligor. La. Civ. Code art. 2057.

II. Property Descriptions

A. General Rules from Louisiana Civil Code Articles

1. The transfer or encumbrance of an immovable includes its component parts. La. Civ. Code art. 469.

2. Component parts include the following:
   a. Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees when they belong to the owner of the ground. La. Civ. Code art. 463.
   c. A general category of things permanently attached to a building or other construction that cannot be removed without substantial damage to themselves or the building or other construction, or if, according to prevailing notions in society, they are considered to be its component parts. La. Civ. Code art. 466.

3. The ownership of a thing includes by accession the ownership of everything that it produces or is united with it, either naturally or artificially. La. Civ. Code art. 482.

4. In the absence of rights of other persons, the owner of a thing acquires the ownership of its natural and civil fruits by accession. La. Civ. Code art. 483.
   a. Natural fruits are products of the earth or of animals. La. Civ. Code art. 551.
b. Civil fruits are revenues derived from a thing by operation of law or by reason of a juridical act, such as rentals, interest, and certain corporate distributions. La. Civ. Code art. 551.

c. Mineral substances extracted from the ground and the proceeds of mineral rights are not fruits because their production results in depletion of the property. Comment (c) to La. Civ. Code art. 551. Mineral substances are considered to be products because they are derived from a thing as a result of diminution of its substance.

5. 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. La. Civ. Code art. 490.

B. General Rules from Louisiana Case Law

1. The deed conveying title to immovable property must contain a description that properly identifies the property. Wilson v. Head, 707 So. 2d 127 (La. App. 3 Cir. 1998).

2. In order for the description of the property given to be sufficient to transfer title to the immovable property, one must be able to identify and locate the property from the description in the deed itself or from other evidence appearing in the public records. McClendon v. Thomas, 768 So. 2d 261 (La. App. 1 Cir. 2000).

3. The description of the property must fully appear within the four corners of the instrument, unless the deed refers to a map, plat or other deed as part of the description. Energy Development Corp. v. Quality Environmental Processes, Inc., 777 So. 2d 481 (La. App. 5 Cir. 2000), writ denied, 786 So. 2d 734 (La. 2001).

4. Real estate may be transferred by name, such as a plantation, farm or estate designated by a certain name, and when this is done, in case of error in the tract described such as in bounds, the name of the property will prevail. Succession of Simms, 371 So. 2d 272 (La. App. 3 Cir. 1979), writ denied, 374 So. 2d 656 (La. 1979).

5. A description of property as being bounded on various sides by the estate of another is a sufficient description for purposes of just title necessary for acquisitive prescription because this type of description is susceptible of location and identification. Snelling v. Adair, 199 So. 782 (La. 1941); Authement v. Theriot, 292 So. 2d 319 (La. App. 1 Cir. 1974).

6. A description of land that refers to the lands of adjoining owners is sufficient to effect a conveyance. Gary v. Bullock, 19 So. 2d 120 (La. 1944).
7. Omnibus provisions in deeds are sufficient to effectively transfer immovables between the parties, but they are not sufficient to give adequate notice to third parties. 

*Williams v. Bowie Lumber Co., Ltd.*, 38 So. 2d 729 (La. 1948). The language of the omnibus clause in this case reads as follows:

"The vendor herein declares that it is his true intent and purpose to sell to the purchaser herein all the property owned by him in the Parish of Lafourche. . . ."

The court found that this language of the description was sufficient to transfer title to the immovable property as between the parties; however, the description was not sufficient or specific enough to give notice to third parties.

8. If the description in the deed refers to all land in two townships without referring to sections or subdivisions, then the description is inadequate to form the basis of a title translative of property. *Waterman v. Tidewater Assoc. Oil Co.*, 35 So. 2d 225 (La. 1948). In Waterman, the plaintiffs tried to rely on a quitclaim deed to establish ten-year acquisitive prescription by just title. The deed did not identify the particular land; rather, it merely gave an omnibus description of two entire townships comprising approximately 46,080 acres of land. The court found that this description was inadequate to be considered a title translative of property.


10. In construing ambiguous or uncertain descriptive terms of deeds, the court will give them a construction against the grantor and in favor of the grantee with respect to the quantity of land conveyed. *United States v. 12,9'8.28 Acres of Land in Webster Parish, Louisiana*, 61 F. Supp. 545 (D.C. La. 1945).


12. In the case of an inconsistency with the description of the property in the deed, a map controls over a metes and bounds description, and a metes and bounds description controls over a general description. *Iselin v. C. W. Hunter Co.*, 173 F.2d 388 (5th Cir. 1949).

13. If a map or a survey is attached to the deed, the map controls the worded description of the deed if there is a conflict. *Casso v. Ascension Realty Co.*, 196 So. 1 (La. 1940); *Buras v. United Gas Pipe*
14. The order of importance of calls which may be included in a land description, beginning with the most important, are as follows:
   a. Natural monuments
   b. Artificial monuments
   c. Distances
   d. Courses
   e. Quantity


15. If a deed contains both a specific and a general description of the property, and there is a conflict, then the specific description will generally prevail. Arab Corp. v. Bruce, 142 F.2d 604 (5th Cir. 1944).

16. When a person sells by fixed boundaries, the purchaser acquires all the property within the boundaries regardless of the quantity called for and even though, in so doing, he receives an excess of property over that described in the instrument. Lafayette Parish Police Jury v. Perroncel, 212 So. 2d 152 (La. App. 3 Cir. 1968).

17. When the identity of the land excepted from the sale cannot be established, the exception, and not the entire deed, is void. Stuts v. Humphries, 408 So. 2d 940 (La. App. 2 Cir. 1981).

18. When interpreting deeds, the court must first seek to determine the intent of the parties without referring to any extrinsic evidence; however, if the description is so ambiguous as to make it impossible to ascertain the parties’ intent, then the court may resort to extrinsic evidence to aid in construction. Marsh Cattle Farms v. Vining, 707 So. 2d 111 (La. App. 2 Cir. 1998), writ denied, 717 So. 2d 1167 (La. 1998); Williams v. Hawthorne, 601 So. 2d 672 (La. App. 2 Cir. 1992).

C. Specific Rules from Louisiana Revised Statutes

1. It shall be conclusively presumed that any transfer, conveyance, surface lease, mineral lease, mortgage or any other contract or grant affecting land described as fronting on or bounded by, or as described pursuant to a survey or using a metes and bounds description that shows that it actually fronts on or is bounded by a waterway, canal, highway, road, street, alley, railroad, or other right-of-way, shall be construed to include all of the grantor’s interest in and under such waterway, road, street, etc., in the absence of any express provision therein particularly excluding the same therefrom; provided that, if the seller owns the land on both sides thereof and makes a transfer affecting 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 shall include the seller's interest to the center of such waterway, canal, highway, road, etc. See La. R.S. 9:2971 (added by Acts 1956 and amended by Acts 2003). (Note: the bolded language was added by Acts 2003).

a. "This statute providing that the transfer of land bounded by a road includes all of the transferor's interest in the road cannot be retroactively applied to transfers of ownership executed prior to 1956, the date the statute was made effective. State Department of Highways v. Tucker, 170 So. 2d 371 (La. 1964).

b. Before the statute was amended in 2003, courts held that the presumption that the transfer included all of grantor's interest in and under such road was not applicable to deeds which were intended to convey only the property within the exact and precise limits of the surveyed description. Before 2003, only transfers which described the property transferred as fronting on or bounded by a right of way were subject to the presumption. Crown Zellerback Corp. v. Heck, 407 So. 2d 770 (La. App. 1 Cir. 1981).

2. Any transfer, grant, sale or mortgage of land and property abutting or contiguous to an abandoned road, street or alley shall be construed to include all of the grantor/mortgagor's interest in and to the abandoned road, street or alley, unless otherwise expressly excluded. See La. R.S. 9:2981 (added by Acts 1958).

3. Road Dedications in Subdivision Plats

a. Louisiana Revised Statute 33:5051 governs the creation of subdivisions and requires, inter alia, that the filed subdivision plat (1) provide the section, township and range in which the subdivision is located, (2) describe the dimensions of the various lots and reference the lots by lot numbers and (3) be certified and signed by a registered surveyor.

b. Streets and roads described on subdivision plats which have been filed for record and which are in substantial compliance with Louisiana Revised Statute 33:5051 are statutorily dedicated to the public. Statutory dedication of a street or road for public use vests full ownership, including the minerals, in the public. Boutte Assembly of God, Inc. v. Champagne, 777 So. 2d 619 (La. App. 5 Cir. 2000).

c. As a general rule, recordation of a survey which shows a highway traversing a subdivision is a statutory dedication, even though the road pre-existed the subdivision and was tacitly dedicated to public use. See Chevron Oil Co. v. Wilson, 226 So. 2d 774 (La. App. 1 Cir. 1969), writ denied, 227 So. 2d 593 (La. 1969).

d. However, it has been held that when an existing right of way or highway which merely borders the subdivided area is shown...
on the survey or subdivision plat, no dedication has occurred. 


**D. Conveyance of a Servitude or Full Ownership of a Strip of Land**

A question can arise as to whether certain instruments convey a strip of land or merely a servitude.

1. "A right of way may consist either of the fee, or merely of a right of passage and use, or servitude. Whether the one or the other is meant in any particular instrument must be gathered from the instrument as a whole. As a general rule, a servitude is meant." _John T. Moore Planting Co. v. Morgan's Louisiana & B.R. & S.S. Co._, 53 So. 22 (La. 1908).

2. The Louisiana Supreme Court has used the following general principles when determining whether a strip of land or servitude has been conveyed:

   a. In considering the instrument as a whole to determine the intent of the parties, all provisions must be given effect if possible. _Noel Estate v. Kansas City Southern & Gulf Ry. Co._, 175 So. 468 (La. 1937).

   b. Use of the phrase "right of way" is considered, but does not necessarily mean that the conveyance is limited to a servitude. _Arkansas Improvement Co. v. Kansas City Southern Ry. Co._, 181 So. 445 (La. 1938).

   c. If the use granted is restricted (as in limiting the use to highway purposes), that is an indication a servitude was intended. _Jones Island Realty Co. v. Middendorf_, 185 So. 881 (La. 1939).

   d. In granting a servitude, it is not unusual for the instrument to contain language generally used in a sale of land, qualified by clauses designating a servitude. _Noel Estate v. Kansas City Southern & Gulf Ry. Co._, 175 So. 468 (La. 1937).

   e. The term "in perpetuity" indicates a servitude, while the term "forever" indicates a conveyance of fee title. _Arkansas Improvement Co. v. Kansas City Southern Ry. Co._, 181 So. 445 (La. 1938).

   f. A restricted or limited purpose (as "for railroad purposes") is not consistent with a fee simple title conveyance and indicates a servitude. _Noel Estate v. Kansas City Southern & Gulf Ry. Co._, 175 So. 468 (La. 1937). But, this is not a hard and fast rule. _See Arkansas Improvement Co. v. Kansas City Southern Ry. Co._, 181 So. 445 (La. 1938).

   g. A reversionary clause to take effect when the land is abandoned for the purpose the instrument is granted indicates a

h. Consideration must be adequate enough to be consistent with the idea of a sale of fee simple title for the instrument to be considered such a sale. *Noel Estate v. Kansas City Southern & Gulf Ry. Co.*, 175 So. 468 (La. 1937).

i. Abandonment by the grantor indicates conveyance of fee, while abandonment by the grantee indicates conveyance of a servitude. *Arkansas Improvement Co. v. Kansas City Southern Ry. Co.*, 181 So. 445 (La. 1938).

j. "[T]he conveyance of a right of way is to be regarded as a mere servitude and not as a transfer of a fee-simple title of the land unless the deed itself evidences that the parties intended otherwise." *Texas & Pac. Ry. Co. v. Ellerbe*, 6 So. 2d 556 (La. 1942).

k. Assessment and payment of taxes is relevant if extrinsic evidence is considered. *Rock Island, A. & L.R. Co. v. Gournay*, 17 So. 2d 8 (La. 1944).

l. The use of such a phrase as "over and upon" indicates a limited grant: *Rock Island, A. & L.R. Co. v. Gournay*, 17 So. 2d 8 (La. 1944).

m. Additional provision granting other rights (as to take earth, gravel, timber, etc.) indicates a servitude, for it would be unnecessary to state these rights in a conveyance of fee title. *Rock Island, A. & L.R. Co. v. Gournay*, 17 So. 2d 8 (La. 1944).

n. An additional provision granting the right to take earth, gravel, timber, etc., and providing that the compensation paid for the instrument was adequate to cover damages is indicative that fee title was not conveyed, because the grantee would not owe itself any additional compensation for damages done to its own land. *Rock Island, A. & L.R. Co. v. Gournay*, 17 So. 2d 8 (La. 1944).

III. Warranty of Title

A. General Rules from Louisiana Civil Code Articles

1. The seller warrants the buyer against eviction, which is the buyer’s loss of, or danger of losing, the whole or part of the thing sold because of a third person’s right that existed at the time of the sale. The warranty also covers encumbrances on the thing that were not declared at the time of the sale, with the exception of apparent servitudes and natural and legal nonapparent servitudes, which need not be declared. La. Civ. Code art. 2500.

2. The warranty against eviction is implied in every sale, but it may be modified by the parties. La. Civ. Code art. 2503.
3. The warranty against eviction also extends to those things that proceed from the thing sold, which things include fruits and products. La. Civ. Code art. 2512.

B. General Rules from Louisiana Case Law


2. A mineral servitude, in the absence of visible signs of its use, is a nonapparent servitude burdening the land that must be declared by the seller of the land to the purchaser under a warranty deed or otherwise revealed to the purchaser to avoid the effect of the warranty. Dillon v. Morgan, 362 So. 2d 1130 (La. App. 2 Cir. 1978); Richmond v. Zapata Development Corp., 350 So. 2d 875 (La. 1977).

C. Example of “Warranty” v. “Reservation”

A sells land to B and reserves 1/2 of the minerals. B later sells land to C with warranty and reserves 1/2 of the minerals without mentioning A’s prior reservation. Who gets what?

1. In general, warranty takes precedence over a reservation. B warranted to C that B owned full title to the property, including the minerals, and would only be reserving 1/2 of the total minerals on the property. In this situation, because the warranty controls over the reservation, A is entitled to 1/2 of the minerals and C is entitled to the other 1/2 of the minerals. B gets nothing because of his warranty to C that C would acquire 1/2 of the minerals. See Dillon above.

2. But note that in Richmond v. Zapata Development Corp., 350 So. 2d 875 (La. 1977), the court found that, where there were various drilling structures on the land, buyer under a warranty deed who made no pre-sale inspection could not recover in warranty from his vendor who failed to disclose the existence of a mineral lease. Specifically, the court held that “an undisclosed mineral lease which produces on the property ample signs of its existence is a real charge of which it is the buyer’s business not to be ignorant and against which he cannot claim warranty.”

D. Quitclaim Deeds

General Rules from Louisiana Case Law:

1. A quitclaim deed is one which purports to transfer the interests which the grantor may have, if any, at the time of the transaction, and it excludes any implication that he has any title or interest in the described property. Sabine Production Co. v. Guaranty Bank & Trust Co., 432 So. 2d 1047 (La. App. 1 Cir. 1983), writ denied, 438 So. 2d 570 (La. 1983).

3. A quitclaim deed does not convey property itself; it effectively conveys such title or interest the grantor has at the time the deed is given. *Sabourin v. Jilek*, 128 So. 2d 698 (La. App. 4 Cir. 1961); *Evans v. Waguespack*, 638 So. 2d 1153 (La. App. 1 Cir. 1994).

4. A deed which conveys to the purchaser "any right, title, and interest which the vendors might have" in and to conveyed property is also an act which is sufficient to transfer title, and the fact that the property is transferred without warranty does not preclude title from being valid. *Clifton v. Liner*, 552 So. 2d 407 (La. App. 1 Cir. 1989).

E. Words/phrases included in deeds which modify the seller's warranty or exclude property from the sale.

1. "Subject to"
   a. When the words "subject to" are used, as with "less" below, the deed conveys the entirety of the land subject only to a servitude and does not except the land underlying the servitude from the sale. *Welsh Southern Oil Co. v. Scurlock Oil Co.*, 201 So. 2d 376 (La. App. 3 Cir. 1967).
   b. The mention of the words "subject to" and "less" in a deed operates as an acknowledgment of the particular servitude being described and therefore removes the servitude from the seller's warranty. *Hendrick v. Texas & P. Ry. Co.*, 212 So. 2d 745, 747 (La. App. 2 Cir. 1968).
   c. The "subject to" clause is generally used to avoid liability of the grantor on his warranty.
   d. Louisiana courts have interpreted the phrase "subject to" as the recognition of rights previously in existence rather than the creation of new rights. *Patton v. Frost Lumber Industries*, 147 So. 33 (La. 1933).

2. "Less"
   a. The words "less the right of way" operated only as an acknowledgment of the existence of a right of way servitude; the entire tract described in the deed, including the land under the right of way, was conveyed in the sale. *Hendrick v. Texas & P. Ry. Co.*, 212 So. 2d 745 (La. App. 2 Cir. 1968).
   b. The Fifth Circuit Court of Appeals held that "less a right of way 100 feet in width reserved," meant that an easement was established and that all of the property described in the deed, including the property under the right of way, was conveyed. *Kansas City Southern Ry. Co. v. Marietta Oil Corp.*, 102 F.2d 603 (5th Cir. 1939).

3. "Less and Except"
a. The term “less and except” generally means that a smaller tract is excepted (or carved out) from a larger tract. *Succession of Brassette v. Armand*, 799 So. 2d 816, 818 (La. App. 3 Cir. 2001).

b. When the words “less and except” are used, the indication is that a portion of the property is omitted or excluded from the sale. *See generally In re Huber Oil of Louisiana, Inc.*, 311 B.R. 440 (Bkrtcy. WD La. 2004).

c. Example of “less” v. “less and except”:

A landowner owns a tract of land. A portion of the land is expropriated by the government in order for the government to construct a highway. The landowner is left with a mineral servitude under the expropriated portion of his land. The landowner then sells his land to another, and in the deed, the language reads, “less that portion of land subject to expropriation.”

The question becomes what exactly was included in the deed? By using the term, “less,” the effect will be that the buyer takes the entire tract owned by the landowner, including the minerals under the highway.

Had the deed used the language, “less and except,” the original landowner may still own the mineral rights underlying the highway because that portion would have been carved out of the tract sold to the buyer.

Furthermore, if the deed had used the language, “less and except the rights expropriated,” the new landowner arguably may own the mineral rights underlying the highway because the “rights expropriated” included no mineral rights.

4. “Reserve”

a. A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession. La. R.S. 31:15.

b. “Reservation” is defined as the creation on behalf of the grantor of some new right issuing out of the thing which did not exist as an independent right before the grant. *Demoss v. Sample*, 78 So. 482 (La. 1918).

c. If the language making the exception or reservation in a deed is doubtful, it must be construed most favorably to the grantee. *Doyal v. Pickett*, 628 So. 2d 184 (La. App. 2 Cir. 1993).

d. It is unclear whether a mineral servitude is created when a clause reads as follows: “This sale is made subject to a reservation of all of the minerals.”
IV. General Rules of Interpretation Regarding the Term “Minerals” and Variations Thereof

A. General Rules from Louisiana Mineral Code Articles

1. The provisions of this Code are applicable to all forms of minerals, including oil and gas. They are also applicable to rights to explore for or mine or remove from land the soil itself, gravel, shells, subterranean water, or other substances occurring naturally in or as a part of the soil or geological formations on or underlying the land. La. R.S. 31:4.

2. Ownership of land includes all minerals occurring naturally in a solid state. Solid minerals are insusceptible of ownership apart from the land until reduced to possession. La. R.S. 31:5.

3. 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. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership. La. R.S. 31:6.

B. General Rules of Interpretation from Louisiana Case Law

1. The term “mineral” is not a definite one and instead is susceptible of limitation according to the intention of the parties using it, the language of the deed in which it occurs, and the relative positions of the parties. Holloway Gravel Co. v. McKowen, 9 So. 2d 228 (La. 1942).

In Holloway, the court interpreted a reservation of “all the mineral, oil and gas rights.” The court stated that this reservation meant the same as if it had read, “mineral rights, oil rights and gas rights.” Therefore, the court said that the reservation should be confined to things of the same nature. To aid in the interpretation of the clause, the court considered the negotiations that took place as to the reservation, activity in the area, the burden that would be put on the owner of the land if sand and gravel were included, and who prepared the instruments. Ultimately, the court determined that sand and gravel were not included in the reservation.

2. In Huie Hodge Lumber Co. v. Railroad Lands Co. Ltd., 91 So. 676 (La. 1922), the Louisiana Supreme Court attempted to determine the intent of the parties when interpreting what was included within the language, “iron, coal, and other minerals.” The reservation of “iron, coal, and other minerals” was made subject to the rule of ejusdem generia, which requires that the words “other minerals” be construed to include other minerals of a character similar to coal and iron, such as solids or minerals in place that require mining for removal.

3. In River Rouge Minerals, Inc. v. Energy Resources of Minnesota, 331 So. 2d 878 (La. App. 2 Cir. 1976), the court had to decide whether a Bath form oil, gas and mineral lease included the right
to strip-mine lignite coal. The court interpreted the standard form lease to give the right to explore for and produce minerals of the same physical properties as oil and gas, which meant those minerals that are produced in liquid or gaseous form by drilling wells into the subsurface and not other minerals such as lignite coal that require mining for removal.

4. A reservation of "all mineral rights," with no other qualifying language, was interpreted to include hard minerals as well as those minerals that are produced in liquid or gaseous form by drilling wells into the subsurface. *Continental Group, Inc. v. Allison*, 404 So. 2d 428 (La. 1981), *writ denied*, 456 U.S. 906 (1982).

The language used in the contract of sale read, "there is expressly excluded from this sale, and the vendor reserves, all mineral rights in the lands conveyed hereunder...." On rehearing, the Louisiana Supreme Court conceded that the phrase, "all mineral rights," is ambiguous and the court referred to extrinsic evidence to determine the parties' intent with respect to what was meant to be included within the reservation. Because the parties in this case specifically discussed whether to restrict the reservation or leave it broadly worded, the court found that the parties ultimately intended for lignite and other solid minerals to be included in the broad reservation of "all mineral rights."

5. In *West v. Godair*, 542 So. 2d 1386 (La. 1989), the court interpreted a reservation that had been made of an undivided 1/2 interest in and to "all of the minerals of every nature or kind situated in, on and under the hereinabove described property." The issue in this case was whether sand, gravel, topsoil and pit run were considered "minerals" under the reservation quoted above. The trial court held that hard minerals were included in the reservation; the appellate court reversed and held that hard minerals were not included in the reservation; and the Louisiana Supreme Court reversed the appellate court and reinstated the opinion of the trial court without opinion.

At the trial court level, the sellers who conveyed the property under a cash warranty deed that contained a mineral rights reservation argued that sand, gravel, topsoil and pit run were included within the mineral rights reservation. The reservation contained the language quoted above. The issue over what was included within the reservation arose when the sellers demanded an accounting of all pit run, field dirt, wash gravel, top soil and sand mined or removed from the property the buyers acquired. The trial court agreed with the sellers and found that the doctrine of *ejusdem generis* was inapplicable to the case and that the intent of the parties concerning the mineral reservation was not helpful since the parties did not discuss the subject.
C. Common Problem Areas

1. Mineral Royalty or Mineral Servitude

Instruments are often ambiguous as to whether a mineral servitude or a mineral royalty is conveyed or reserved.

a. General Rules from the Louisiana Mineral Code

(1) A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another. Unless expressly qualified by the parties, a royalty is a right to share in gross production free of mining or drilling and production costs. La. R.S. 31:80.

(2) The owner of a mineral royalty has no executive rights; nor does he have the right to conduct operations to explore for or produce minerals. However, a mineral servitude owner has the right to enjoy the land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership. See La. R.S. 31:81 and 31:21.

(3) A mineral royalty and a mineral servitude are extinguished by prescription resulting from nonuse for ten years. See La. R.S. 31:85(1) and 31:27.

(4) Prescription of nonuse of a mineral royalty and a mineral servitude commence from the date on which it is created. See La. R.S. 31:86 and 31:28.

(5) Prescription of nonuse running against a mineral royalty is interrupted by the production of any mineral covered by the act creating the royalty. Prescription is interrupted on the date on which actual production begins and commences anew from the date of cessation of actual production. La. R.S. 31:87.

(6) To interrupt prescription running against a mineral royalty it is not necessary that minerals be produced in paying quantities but only that they actually be produced and saved. However, to interrupt prescription running against a mineral servitude, it is only necessary to have good faith operations for the discovery and production of minerals. See La. R.S. 31:88 and 31:29.

b. Thus, the owner of a mineral servitude has the right to receive bonus, rentals, and shut-in rentals, and has the right to execute mineral leases. A royalty owner has the right to receive royalties and shut-in royalties, and has no right to execute mineral leases. Furthermore, the rules for interruption of prescription running against a mineral servitude are different from the rules for interruption of prescription running against a mineral royalty interest, as is indicated above.
c. The Louisiana Supreme Court has found that the following language conveys/reserves a mineral interest (servitude):

(1) One instrument read, "An undivided 1/2 interest in and to all the oil, gas, sulphur and other minerals of every character in, on or under or that may be produced from the following described property . . . to have and to hold . . . the said 1/2 interest in and to . . . with the right of ingress and egress and possession at all times for the purpose of mining, drilling, etc." *Standard Oil Co. of Louisiana v. Futral*, 15 So. 2d 65 (La. 1943).

(2) Another instrument read, "1/64 of all the oil, gas, sulphur, and other minerals in and under, and that may be produced and saved from the following described land...." *Standard Oil Co. of Louisiana v. Futral*, 15 So. 2d 65 (La. 1943).

(3) "There is excepted from this conveyance and reserved unto The Federal Land Bank of New-Orleans a 1/2 mineral interest in and to all minerals and mineral rights in and under [note: does not say "and that may be produced from"] the above described property. It is provided, however, that the purchaser is hereby granted the privilege of leasing the minerals and mineral rights, including the said reserved interest, without joinder of The Federal Land Bank of New Orleans on the following conditions, to-wit...."

The court found that the bank "in unmistakable language" reserved unto itself a 1/2 interest in and to all minerals and mineral rights, which constituted a servitude giving the owner thereof the right of ingress and egress for the purpose of exploring for and reducing to possession the minerals thereunder. The court found the right to execute mineral leases, which the bank conveyed to the grantee, to be a mandate coupled with an interest, observing that only the owner of minerals has the right to grant such a leasing privilege. *Horn v. Skelly Oil Co*, 70 So. 2d 657 (La. 1954).

d. The Louisiana Supreme Court has found that the following language conveys/reserves a mineral royalty:

(1) "... said Mrs. Edna Gibson retains 1/64 royalty in all oil, gas and mineral rights in the above described lands." *Gulf Refining Co. v. Goode*, 32 So. 2d 904 (La. 1947).

(2) "1/32 of the whole of any oil, gas or other minerals, except sulphur, on and under and to be produced from said lands, delivery of said royalties to be made to the purchaser herein in the same manner as is provided for the delivery of royalties by any present or future mineral lease affecting said lands." *Continental Oil Co. v. Landry*, 41 So. 2d 73 (La. 1949).

2. Mineral Conveyance for a Term or Altering the Rules of Prescription
Questions can arise as to whether certain language contained in a deed is intended to fix the duration of a mineral servitude or to alter the prescriptive period that would otherwise be applicable.

a. General Rules from the Louisiana Mineral Code Articles

(1) Unless expressly or impliedly prohibited from doing so, individuals may renounce or modify what is established in their favor by the provisions of this Code if the renunciation or modification does not affect the rights of others and is not contrary to the public good. La. R.S. 31:3.

(2) A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession. La. R.S. 31:15.

(3) The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease. This enumeration does not exclude the creation of other mineral rights by a landowner. Mineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence. La. R.S. 31:16.

(4) A mineral servitude is extinguished by:

(a) prescription resulting from nonuse for ten years;

(b) confusion;

(c) renunciation of the servitude on the part of him to whom it is due, or the express remission of his right;

(d) expiration of the time for which the servitude was granted, or the happening of the dissolving condition attached to the servitude; or

(e) extinction of the right of him who established the servitude. La. R.S. 31:27.

(5) Parties to an act creating a mineral servitude may alter the applicable legal rules subject to the limitations provided in La. R.S. 31:73-79. La. R.S. 31:72.

(6) Parties may either fix the term of a mineral servitude or shorten the applicable period of prescription of nonuse or both. If a period of prescription greater than ten years is stipulated, the period is reduced to ten years. La. R.S. 31:74.

b. General Rules from Louisiana Case Law

(1) When dealing with this issue, courts will look to the rules of contractual interpretation to resolve any ambiguities. St. Mary Operating Co. v. Champagne, 945 So. 2d 846 (La. App. 3 Cir. 2006), writ denied, 954 So. 2d 140 (La. 2007).
(2) "A fixed term means that the mineral right will end at the terminus of the number of years stated, regardless of whether prescription might have been interrupted . . . Even if parties create a fixed term, it will still be subject to prescription if the right goes unused for ten years from the date it was created." *St. Mary Operating Co. v. Champagne*, 945 So. 2d 846 (La. App. 3 Cir. 2006), *writ denied*, 954 So. 2d 140 (La. 2007).

(3) If parties intend to create a mineral servitude for a fixed term, that intention must be made by a clear affirmative statement. *See St. Mary Operating Co. v. Champagne*, 945 So. 2d 846 (La. App. 3 Cir. 2006), *writ denied*, 954 So. 2d 140 (La. 2007), discussing the Comment to La. R.S. 31:74.

(4) The following language has been interpreted by a Louisiana court to merely be a restatement of the default prescriptive period:

"Vendors reserve unto themselves all of the minerals underlying or which may be produced from the above described tracts for a period of ten years, this being a reservation of royalties, executive rights, bonuses, delay rentals, and all other mineral rights whatsoever." *St. Mary Operating Co. v. Champagne*, 945 So. 2d 846 (La. App. 3 Cir. 2006), *writ denied*, 954 So. 2d 140 (La. 2007).

(5) The following language has been interpreted by a Louisiana court as a conveyance of a mineral royalty for a term:

"This conveyance shall be for a period of *Four (4) years & Six (6) months* from July 18, 1996, and as long thereafter as oil, gas or other minerals are produced from said lands, or from lands with which said lands are pooled or unitized, and also as long thereafter as drilling or reworking operations are being conducted on said lands, or on lands pooled or unitized therewith, without more than 90 days cessation of operations . . ." *Lamaco, Inc. v. Hughes*, 850 So. 2d 67 (La. App. 3 Cir. 2003), *writ denied*, 860 So. 2d 1156 (La. 2003).

(6) The following language was examined in the pre-Mineral Code case of *Hodges v. Norton*, 8 So. 2d 618 (La. 1942):
"... and there is specially reserved, for a period of Fifteen years from and after this date an undivided one-half interest in and to all oil, gas and mineral rights...."

Although noting that the prescriptive period could not be extended beyond the ten years provided by law, the Louisiana Supreme Court found that this mineral servitude ended at the end of the fifteen year term despite continuous production on the servitude tract.

3. Mineral Acres

When a mineral conveyance uses the term “mineral acre,” several problems can be created.

a. A mineral acre has been defined as all of the minerals on and under one acre of land. Luther L. McDougal III, Louisiana Mineral Servitudes, 61 Tul. L. Rev. 1097 (1987).

b. In a Louisiana Supreme Court case, the mineral deed contained the following language:

"1/16 of 8/8ths of the oil, gas and other minerals, in and under and that may be produced from the following described property... approximately 366 acres, more or less. (description omitted)

“It is the intention of the Vendor to convey and Vendee to purchase sixty-one (61) mineral acres in and under the above described lands.” (emphasis added)

The court, noting the conflict between 1/16 mineral interest and the 61/366 mineral acres (or 1/6), stated that documents with conflicting provisions should be resolved against the party who furnished the instrument. Light v. Crowson Well Service, Inc., 313 So. 2d 803 (La. 1975).

c. The following problems can also be created by using the term “mineral acre”:

(1) Assume that a mineral deed purports to convey 20 mineral acres of a 40 acre tract. If the tract actually contains 42 acres, does the grantee receive only 20 mineral acres regardless? Or, did the parties intend to convey a fractional interest of the “actual acreage,” 20/40, being 1/2 of the total?

(2) Assume that a mineral deed purports to convey 20 mineral acres of a 40 acre tract. The deed further states that “it is the intent of the parties to convey 1/2 of the oil, gas and other minerals.” If the tract actually contains 42 acres, what interest is conveyed, 20 mineral acres or 1/2 of the oil, gas and other minerals (21/42 mineral acres)?

(3) Neither of these situations has come before a Louisiana court, but based on the Light case, quoted above, it appears that, as
with most contracts, Louisiana courts will use the basic principles of contractual construction to resolve ambiguities that exist in mineral deeds.


V. Successions and Related Matters

A. Administration of Community Property by a Succession Representative

1. The usual purpose of an administration is to determine and liquidate the obligations of the community in order to determine the net assets and distribute them between the surviving spouse and the heirs of the deceased. *Succession of Sharp*, 288 So. 2d 413 (La. App. 4 Cir. 1974), writ denied, 290 So. 2d 911 (La. 1974).

   a. When a succession is not relatively free of debt, community property, including the surviving spouse's 1/2 interest therein, may be sold by the administrator of the deceased husband's succession to pay the community debts. *Poindexter v. Louisiana & A. Ry. Co.*, 128 So. 297 (La. 1930).

   b. A succession shall be deemed relatively free of debt when its only debts are administration expenses, mortgages not in arrears, and debts of the decedent that are small in comparison with the assets of the succession. La. C.C.P. art. 3001.

   c. *Gauthier v. Gauthier*, 502 So. 2d 140 (La. App. 3 Cir. 1987): Gerard Gauthier died on March 3, 1960 and Eunice Broussard Gauthier, his widow, was appointed administratrix of his succession. In her capacity as administratrix, she obtained court authorization to sell a community immovable. The deed was signed by Eunice Broussard Gauthier in her capacity as administratrix. She did not sign in her individual capacity. Eunice subsequently passed away, and her heirs brought suit alleging that she had only conveyed the 1/2 interest owned by the succession in the above referenced deed. In ruling that Eunice had conveyed not only the 1/2 interest owned by the succession, but also her 1/2 interest, the court noted the succession was not free of debt, and that the sale was authorized to pay debts of the succession which were almost entirely community debts. The court also noted that the property sold for $8,500 which was the appraised value of the property, not a 1/2 interest.

According to Prejean, Louisiana "jurisprudence has historically assumed that the succession representative of a deceased spouse in community was empowered to administer the surviving spouse's one-half interest in the community."

In Prejean, Louis S. Prejean, Sr., died on April 27, 1974, and Mary Ann Antrobus, one of his children, was appointed administratrix of his succession. The succession of Louis S. Prejean, Sr., was relatively free of debt. As administratrix, she applied for and was given authority to grant a mineral lease on certain succession property. Subsequently, Gusta Mae Bourg Prejean, widow of the decedent, executed a mineral lease which purported to cover her 1/2 interest in the property which was covered by the original mineral lease. The sole issue in this case was whether a mineral lease from a solvent succession covering property belonging to the community formerly existing between the deceased and his surviving spouse, encumbers the surviving spouse's 1/2 interest therein. Relying on Gauthier, the court noted that when a succession is under administration, the surviving spouse's undivided 1/2 interest in the community is possessed by the administrator and as such is under administration until the surviving spouse is placed in possession by judgment of possession. Based on the foregoing, the court ruled that the mineral lease executed by the administratrix, prior to the judgment of possession and without opposition by the surviving spouse, covered the undivided 1/2 interest of the surviving spouse.

e. Succession of Pailet, 602 So. 2d 152 (La. App. 5 Cir. 1992): Ellenor Anderson Paxton Pailet died on December 27, 1987, and her succession was placed under administration. At the time of her death, the succession of her deceased husband, Sidney Pailet, was also under administration. Both successions listed certain immovables as community property. The administrator of the Succession of Ellenor Anderson Paxton Pailet petitioned the court to sell her 1/2 interest in certain of the community immovables. The court determined that the Succession of Ellenor Anderson Paxton Pailet could not alienate her 1/2 interest in the community immovables prior to a judgment of possession being rendered in the Succession of Sidney Pailet.

2. Due Process Concerns: In the recent case of Mayo v. Doherty, 952 So. 2d 853 (La. App. 3 Cir. 2007), several heirs of Edward and Virginia Milburn brought suit against the administrators of their successions contending that their due process rights had been violated and that the sale of succession property should be annulled because certain of the heirs did not receive actual notice of the impending sale. In
ruling against the heirs, the court distinguished several cases involving
tax sales where improper notice allowed the tax debtors to annul the sale
of their land. The court noted that in this case, the succession property
was merely converted to cash and the heirs could still make their claim to
their respective portions of the proceeds. The interests of all the heirs
was protected because the sale was under court supervision and there
was a court order setting the minimum price for the sale. The heirs in this
case had no claim that their due process rights had been violated because
they had not properly alleged any deprivation of property. Based on the
court's reasoning, the result may be different with an independent
executor because the independent executor can act "without the necessity
delay for objection, or application to, or any action in or by, the
court." La. C.C.P. art. 3396.15.

B. Judgments of Possession

1. A judgment of possession shall:
   a. recognize the petitioners as heirs, legatees, surviving
      spouse, or usufructuary, as the case may be;
   b. send the heirs and legatees into possession of the property
      of the deceased; and
   c. send the surviving spouse into possession of his undivided
      one-half of the community, and of the other undivided one-half to
      the extent he has the usufruct thereof. La. C.C.P. art. 3061.

2. Legal Effect of a Judgment of Possession. A judgment of
   possession is only prima facie evidence of the relationship of the
   deceased to the heirs or legatees and of their right to the possession of the
   estate of the deceased. La. C.C.P. art. 3062.
   a. Judgments of possession are not conclusive. Succession of
      Feist, 287 So. 2d 514 (La. 1973).
   b. Prima facie evidence is evidence that will establish a fact
      or sustain a judgment unless contradictory evidence is produced.
      State ex rel. C.D., 971 So. 2d 496, 501 (La. App. 3 Cir. 2007).
   c. A person claiming to be an heir of the deceased may
      appeal from an ex parte judgment placing others into possession of
      the estate and this remedy by appeal is independent of an action of
      nullity, which can be maintained at the same time. David v. David,
      347 So. 2d 885, 888 (La. App. 3 Cir. 1977).

3. Res Judicata. A judgment of possession is not a basis for the
   plea of res judicata or conclusive evidence against persons having an
   adverse interest in or a claim against the estate. Guidry v. Dufrene, 687
   So. 2d 1044 (La. App. 1 Cir. 1996).

4. Reopening of Succession. After a judgment of possession is
   entered, a succession may be reopened "if other property is discovered,
or for any other proper cause.” However, “the reopening of a succession shall in no way adversely affect or cause loss to any bank, savings and loan association or other person, firm or corporation, who has in good faith acted in accordance with any order or judgment of a court of competent jurisdiction in any previous succession proceedings.” La. C.C.P. art. 3393. There is no jurisprudence which discusses the requirements for showing that an entity acted in “good faith.” Also, note that a court of competent jurisdiction must have rendered the judgment in order for the protection to apply.

5. **Description of Immovable Property.** A particular description of immovable property affected by a judgment of possession is not required. La. C.C.P. art. 1919.

6. **Basis for Acquisitive Prescription.** A judgment of possession is not a just title and cannot serve as a basis for ten year acquisitive prescription. *Boyet v. Perryman*, 123 So. 2d 79 (1960).

7. **Prescriptive Period to Assert Right of Inheritance.** Louisiana Civil Code article 3502 provides:

   “An action for the recognition of a right of inheritance and recovery of the whole or a part of a succession is subject to a liberative prescription of thirty years. This prescription commences to run from the day of the opening of the succession.”


   b. A succession is opened upon the death, and all rights vest at that time. *Succession of Doll v. Doll*, 593 So. 2d 1239, 1255 (La. 1992).

   c. However, “coheirs or coowners do not as a general rule acquire or lose by prescription against each other.” *Fleniken v. Allbritton*, 566 So. 2d 1106, 1113 (La. App. 2 Cir. 1990).

   d. Furthermore, “only an accepting co-heir or the transferee of an accepting co-heir may assert such prescription against an heir.” *Succession of Book*, 426 So. 2d 769, 772 (La. App. 3 Cir. 1983).

8. **Rights of Third Persons.** La. R.S. 9:5630 provides:

   “An action by a person who is a successor of a deceased person, and who has not been recognized as such in the judgment of possession rendered by a court of competent jurisdiction, to assert an interest in an immovable formerly owned by the deceased, against a third person who has acquired an interest in the immovable by onerous title from a person recognized as an heir or legatee of the deceased in the judgment of possession, or his successors, is prescribed in two
years from the date of the finality of the judgment of possession.”

a. This statute protects only “a third person who has acquired an interest in the immovable by onerous title.” In other words, the third person must have given consideration for his acquisition of the immovable to be protected. The immovable is not protected if it is still owned by the heir or legatee.

b. This statute does not protect a person who has acquired his interest in the immovable from the heir or legatee by donation.

c. This statute also provides that thirty (30) years after a judgment of possession is recorded, there shall be a conclusive presumption that the judgment of possession was rendered by a court of competent jurisdiction.

9. Judicial Estoppel. In Succession of Williams, 418 So. 2d 1317 (La. 1982), the Louisiana Supreme Court held that the heir, who participated in the succession proceeding causing the decedent’s estate to be distributed in a manner different than that provided by law, was judicially estopped from subsequently attacking the judgment of possession. This case was subsequently followed by the Louisiana Supreme Court in Succession of Villarubia, 680 So. 2d 1147 (La. 1996), where a forced heir was prohibited from claiming his forced portion after participating in the succession proceeding in which he accepted a particular bequest and never claimed his forced portion.

a. This case does not offer protection from a claim by an heir who did not participate in the succession proceeding.

b. It is unclear what is necessary to constitute participation in the succession proceeding under Succession of Williams.


1. “Foreign Trust” Definition (La. R.S. 9:2262.1)

A “foreign trust” is any of the following:

a. A trust by which the terms of the trust instrument is governed by the law of a jurisdiction other than Louisiana; or

b. A trust of which the settlor was domiciled in a jurisdiction other than Louisiana at the time the trust was created.

2. Recordation of Foreign Trust Instruments (La. R.S. 9:2262.2)

a. If at any time the trust property of a foreign trust includes an immovable or other property in Louisiana the title to which must be recorded in order to affect third parties, a trustee shall file the trust instrument, or an extract thereof, for record in each parish in which the property is located.

b. For purposes of recording an extract of a trust instrument, such an extract of a trust instrument either shall be in such form and
contain such information as may be lawful under the law of the jurisdiction which the parties have expressly chosen to govern the trust, or shall be executed by either the settlor or the trustee and shall include all of the following:

1. The name of the trust, if any.
2. The name of each settlor.
3. The name of the trustee.
4. The name or other description of the beneficiary or beneficiaries.
5. The date of the trust instrument.
6. A statement whether the trust is revocable or irrevocable.
7. A description of the immovable property or other property subject to the trust.
8. Any other provisions of the trust instrument as the party executing the extract deems useful.

c. The above-described provisions of La. R.S. 9:2262.2 are remedial and are applied retroactively to any trust extract previously filed for record which is in substantial compliance with the provisions of the section. Such extract shall affect third persons as of the date of recordation.

d. Note: This statute is very similar to La. R.S. 9:2092, which provides substantially the same requirements for recordation of Louisiana trust instruments or extracts thereof. In In re Latham Exploration Co., Inc., 83 B.R. 423 (W.D. La. 1988), an assignment of an overriding royalty interest was made to a Louisiana inter vivos trust. The overriding royalty interest was made as to mineral lands located in Point Coupee Parish. Although the assignment was recorded in Point Coupee Parish, the trust instrument was not. The court held that a Louisiana trust instrument that was not recorded in the parish where the immovable trust property was located had “no force or effect as to parties not privy to the unrecorded transaction.” It is possible, and indeed likely, that a Louisiana court would give the same effect to an unrecorded foreign trust instrument.

3. Authority of Trustee to Convey (La. R.S. 9:2262.3)

The authority of a trustee of a foreign trust or his representative to execute and deliver a conveyance of immovable property situated in Louisiana may be evidenced in any manner that is lawful under the law which the parties have expressly chosen to govern the trust.

4. Form Requirement for Foreign Trusts (La. R.S. 9:2262.4)

A trust instrument executed outside this state in the manner prescribed by, and in conformity with, the law of the place of its
execution, or the law of the settlor’s domicile, at the time of its execution shall be deemed to be legally executed and shall have the same force and effect in this state as if executed in the manner prescribed by the laws of this state, provided the trust instrument is in writing and subscribed by the settlor.

5. **Addition of Property to Trusts in General**

   a. A settlor or any other person may make additions of property to an existing trust by donation inter vivos or mortis causa, with the approval of the trustee. The right to make additions may be restricted or denied by the trust instrument. (La. R.S. 9:1931)

   b. An addition of property to an existing trust must be made and accepted in the form required for such a donation free of trust. (La. R.S. 9:1932)

   c. **Note:** The above-mentioned statutes are found under the provisions of the Trust Code affecting trusts in general. There is no jurisprudence applying these provisions to a foreign trust. However, it is likely that a Louisiana court would apply the form requirements imposed by the statutes to transfers of additional Louisiana property into a foreign trust.

D. **Usufruct of Land and Minerals**

1. A usufruct may be established by a juridical act, either inter vivos or mortis causa (testament), or by operation of law. The usufruct created by juridical act is called conventional; the usufruct created by operation of law is called legal. La. Civ. Code art. 544.

2. A usufruct may also be created by a reservation included in the act of donation. The donor is permitted to reserve for his own advantage, or to dispose of for the advantage of any other person, the enjoyment or usufruct of the immovable property given. La. Civ. Code art. 1533.


4. **Usufruct of Land**

   a. The usufruct of land refers to the situation in which title to the mineral rights is part of the ownership of the land itself.

   **Example:** A husband and wife purchase a tract of land, including the mineral rights thereto, during their marriage as community property. The husband subsequently dies intestate, survived by his wife and children. The wife acquires by operation of law the usufruct of the husband’s community 1/2 interest in the tract of land inherited by the children. The usufruct in this situation is a usufruct of land.
b. The general rule is that the usufruct of land does not include the landowner’s rights in minerals, and therefore, the naked owner of the land has all of the rights in the minerals that he would have if the land were not subject to the usufruct. La. R.S. 31:188 and La. R.S. 31:195.

Example: A parent donates a tract of land to his children subject to the reservation of the usufruct. The reservation is silent as to whether the usufruct covers the minerals. Furthermore, at the time of the donation, there are no producing wells or wells shown to be productive by a surface production test. In such case, the usufructuary has no interest in the minerals. The mineral lease may be executed by the naked owners without the consent of the usufructuary, and all bonuses, rentals and royalties are to be paid to the naked owners. However, in enjoying the rights just described, the naked owners are entitled to use only so much of the surface as is reasonably necessary for their operations, and they are responsible to the usufructuary for the value of such use and for all damages caused by mining activities or operations. Furthermore, such rights may not be exercised in the case of coal or lignite without first obtaining the consent of the usufructuary. La. R.S. 31:196.

c. If the usufruct of land is that of parents during marriage, or any other legal usufruct, or if there is no provision including the use and enjoyment of mineral rights in a conventional usufruct, the usufructuary is entitled to the use and enjoyment of the landowner’s rights in minerals as to mines or quarries actually worked at the time the usufruct was created (the “open mine doctrine”). La. R.S. 31:190(A).

Louisiana Revised Statute 31:191 provides guidance as to what is considered an “open mine.” If at the time a usufruct is created minerals are being produced from the land or other lands unitized therewith, or if there is present on the land or other lands unitized therewith, a well shown by surface production test to be capable of producing in paying quantities, the usufructuary is entitled to the use and enjoyment of the landowner’s rights in minerals as to all pools penetrated by the well or wells in question.

d. If the usufruct of land is that of a surviving spouse, whether legal. (La. Civ. Code art. 890) or conventional (includes donations inter vivos or mortis causa), 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 usufructuary’s
rights do not include the right to execute a mineral lease without the consent of the naked owner. La. R.S. 31:190(B).

(1) A surviving spouse, as the usufructuary of land, is to receive all bonuses, rentals and royalties in connection with a mineral lease. However, the surviving spouse has no authority to execute a mineral lease without the consent of the naked owners. The Mineral Code does not provide any incentive for the naked owners to grant such consent, nor does it provide any relief to the usufructuary if the naked owners refuse to grant such consent.

(2) The Mineral Code also does not indicate how the naked owners “consent.” Can the naked owners consent in a different lease? What if this separate lease contains provisions different from the lease granted by the usufructuary? There is no case law to interpret these issues.

e. The usufructuary of land has the right to grant a mineral lease on the estate of which he has the usufruct if his usufruct includes mineral rights susceptible to leasing. However, any such lease is extinguished with the termination of the usufruct. La. R.S. 31:118.

5. **Usufruct of Minerals**

a. The usufruct of mineral rights refers to the situation in which the ownership of the mineral rights is segregated from the ownership of the land, such as the usufruct of a mineral servitude, mineral lease or mineral royalty.

*Example:* A husband and wife sell a tract of land reserving the minerals, and the husband subsequently dies intestate survived by his wife and children. The wife acquires by operation of law the usufruct of the husband’s community 1/2 interest in the mineral servitude created by this mineral reservation which is inherited by the children. The usufruct in this situation is a usufruct of a mineral right.

b. The usufructuary of a mineral right is entitled to all of the benefits of use and enjoyment that would accrue to him if he were the owner of the right. The usufructuary may use the right according to its nature for the duration of his usufruct. La. R.S. 31:193.

c. A usufructuary of a mineral servitude may grant a mineral lease that extends beyond the term of the usufruct and binds the naked owner of the servitude. La. R.S. 31:118.

The surviving spouse, as the usufructuary of a mineral right, is to receive all bonuses, rentals and royalties in connection with a mineral lease, and the surviving spouse may execute a mineral lease without the consent of the naked owner(s). Such lease will not expire at the termination of the usufruct and will bind the naked
owners without their consent thereto. Upon the termination of the usufruct, all bonuses, rentals and royalties in connection with a mineral lease flow to the naked owner(s).

VI. Partitions

A. Definition and Purpose

1. Partition is the division or distribution into distinct physical shares of that which previously has been held in common. *Succession of Ramp*, 212 So. 2d 419 (La. 1968).

2. The purpose of a partition is to terminate ownership of undivided fractional interests in the whole and to create perfect titles in individual physical portions of the former whole. *Succession of Ramp*, 212 So. 2d 419 (I.a. 1968).

B. General Rules from Louisiana Civil Code Articles

1. No one may be compelled to hold a thing in indivision with another unless the contrary has been provided by law or juridical act.

   Any co-owner has a right to demand partition of a thing held in indivision. Partition may be excluded by agreement for up to fifteen years or for such other period as provided in La. R.S. 9:1702 or other specific law. La. Civ. Code art. 807.

2. Partition of a thing held in indivision is excluded when its use is indispensable for the enjoyment of another thing owned by one or more of the co-owners. La. Civ. Code art. 808.

3. The mode of partition may be determined by agreement of all the co-owners. In the absence of such an agreement, a co-owner may demand judicial partition. La. Civ. Code art. 809.

4. The court shall decree partition in kind when the thing held in indivision is susceptible to division into as many lots of nearly equal value as there are shares and the aggregate value of all lots is not significantly lower than the value of the property in the state of indivision. La. Civ. Code art. 810.

5. When the thing held in indivision is not susceptible to partition in kind, the court shall decree a partition by licitation or by private sale and the proceeds shall be distributed to the co-owners in proportion to their shares. La. Civ. Code art. 811.

6. When a thing held in indivision is partitioned in kind or by licitation, a real right burdening the thing is not affected. La. Civ. Code art. 812.

7. When a thing is partitioned in kind, a real right that burdens the share of a co-owner attaches to the part of the thing allotted to him. La. Civ. Code art. 813.
C. Common Problem Areas

1. Failure to Include all Co-Owners
   a. General Rule from the Louisiana Code of Civil Procedure
      When one of the co-owners of property sought to be partitioned is an absentee, the partition may be effected by licitation, as provided in this Chapter, whether the property is divisible in kind or not. La. C.C.P. art. 4621.
   b. General Rules from the Louisiana Revised Statutes
      (1) Where real property is partitioned, either in kind or by licitation, by either judicial or conventional partition the fact that one or more co-owners are not parties thereto shall not affect the validity of such partition as to the co-owners who are parties thereto or their heirs or assigns; provided that the rights of any co-owner not a party to such partition shall not be affected thereby and the interest of such co-owner in the property partitioned shall remain the same as if the property had not been partitioned. La. R.S. 13:4985 (added by Acts 1952).

      Louisiana Revised Statute 13:4985 overruled the prior holding of Sun Oil Co. v. Smith, 43 So. 2d 148 (La. 1949), where the court held that a partition in which all of the co-owners are not represented is absolutely null with no effect on any party to the partition.

      (2) Louisiana Revised Statute 13:4985 through 13:4990 shall affect partitions heretofore or hereafter effected; provided that any co-owner of real property heretofore partitioned or his heirs or assigns, where one or more co-owners were not parties, shall have a period of six months from and after July 30, 1952 within which to file suit to set aside such partition, and if no such suit is filed within said period such partition shall be valid for all purposes as to the interest of the co-owners who were parties thereto. La. R.S. 13:4986.

      (3) The term “co-owner” as used in Louisiana Revised Statute 13:4985 through 13:4990 is defined as the owner of any interest in the real property partitioned or any interest affecting such real property which renders such co-owner a proper party to a partition thereof. La. R.S. 13:4987.

      (4) The provisions of Louisiana Revised Statute 13:4985 through 13:4990 shall be effective as to all parties including absenteees, minors, and interdicts. La. R.S. 13:4988.

      (5) Nothing in Louisiana Revised Statute 13:4985 through 13:4990 shall prevent any court in any judicial proceeding in which real property is sought to be partitioned, upon proper motion or
exception, from ordering that any co-owner not then a party be joined as a party thereto. La. R.S. 13:4989.

(6) In any judicial proceeding in which real property is sought to be partitioned upon the trial of the cause upon the merits or upon confirmation of any preliminary default therein, due proof shall be made of a diligent effort on the part of the plaintiff to locate all co-owners of the property to be partitioned and that all known co-owners have been made parties thereto. La. R.S. 13:4990.

c. **Note:** As a general rule, co-owners are deemed to possess property on behalf of the other co-owners. However, it has been held that the filing of an act of partition can rebut this presumption. Prescription of 30 years begins to run immediately on execution of an act of partition, which constitutes notice that subsequent possession of property is adverse and hostile. *See Minton v. Whitworth*, 393 So. 2d 294 (La. App. 1 Cir. 1980), *Dupuis v. Broadhurs*, 213 So. 2d 528 (La. App. 3 Cir. 1968) and *Towles v. Heirs of Morrison*, 428 So. 2d 1029 (La. App. 1 Cir. 1983).

2. **Single or Multiple Mineral Servitudes**

A question can arise as to whether a partition creates one mineral servitude covering all of the partitioned land or multiple servitudes, each affecting one of the partitioned tracts.

a. Three possible scenarios can arise depending on the way a partition is interpreted. For example, assume three co-owners (A, B and C) own a contiguous tract of land which is comprised of three equally sized and equally valued tracts (1, 2 and 3). The partition of this land could produce the following results:

(1) **Scenario #1** - Each partitioner receives his tract in full ownership, including the mineral rights;

*Example:* Tract 1 - full ownership to A.
Tract 2 - full ownership to B.
Tract 3 - full ownership to C.

(2) **Scenario #2** - One mineral servitude is created covering the entire tract being partitioned and each of the partitioners owns their respective percentage of the servitude which affects all tracts.

*Example:* Tract 1 - surface ownership to A.
Tract 2 - surface ownership to B.
Tract 3 - surface ownership to C.

One mineral servitude affecting Tracts 1, 2 and 3; owned by A, B and C in the proportion of 1/3 each.

(3) **Scenario #3** - Each of the partitioners receives his tract and his percentage of the mineral rights affecting that tract and the
remaining mineral rights affecting his tract are held by the remaining partitioners in the form of a servitude.

Example: Tract 1 - A owns the surface of Tract 1 and 1/3 of the minerals. The remaining 2/3 mineral interest is owned in the form of a mineral servitude in favor of B and C.

Tract 2 - B owns the surface of Tract 2 and 1/3 of the minerals. The remaining 2/3 mineral interest is owned in the form of a mineral servitude in favor of A and C.

Tract 3 - C owns the surface of Tract 3 and 1/3 of the minerals. The remaining 2/3 mineral interest is owned in the form of a mineral servitude in favor of A and B.

b. General Rules from the Louisiana Mineral Code Articles:

(1) The owners of several contiguous tracts of land may establish a single mineral servitude in favor of one or more of them or of a third party. La. R.S. 31:66.

(2) Co-owners of land constituting a continuous whole may partition it and reserve a single mineral servitude in favor of one or more of them. La. R.S. 31:67.

c. General Rules from Louisiana Case Law:

(1) When a provision in a partition is ambiguous, it should be interpreted based on the intent of the parties, as well as other principles of contractual construction. Whitehall Oil Co. v. Heard, 197 So. 2d 672 (La. App. 3 Cir. 1967), writ refused, 199 So. 2d 923 (La. 1967).

(2) When a provision in a partition is ambiguous, the proper interpretation is that which least restricts the ownership of the land conveyed. Servitudes, which tend to affect the free use of property, in case of doubt as to their extent or the manner of use, are interpreted in favor of the owner of the property being affected. Whitehall Oil Co. v. Heard, 197 So. 2d 672 (La. App. 3 Cir. 1967), writ refused, 199 So. 2d 923 (La. 1967); Allied Chemical Corp. v. Dye, 441 So. 2d 776 (La. App. 2 Cir. 1983), writ denied, 449 So. 2d 119 (La. 1984).

(3) When a provision in a partition is ambiguous, extrinsic evidence is admissible to assist in determining the intent of the parties. (See Allied Chemical Corp. v. Dye, 441 So. 2d 776 (La. App. 2 Cir. 1983), writ denied, 449 So. 2d 119 (La. 1984), where the attorney who prepared the partition testified as to the intent of the parties. See also Wall v. Leger, 402 So. 2d 704 (La. App. 1 Cir. 1981) wherein the court examined the subsequent actions of the parties to determine their intent.)
The following partition provisions have been interpreted by Louisiana courts as creating multiple mineral servitudes, as shown above in Scenario #3:

(a) "It is specifically agreed and understood that this partition shall not cover or affect the minerals lying in, on, under, or that may be produced from, the property herein partitioned." Allied Chemical Corp. v. Dye, 441 So. 2d 776 (La. App. 2 Cir. 1983), writ denied, 449 So. 2d 119 (La. 1984). The court in Allied Chemical focused on the intent of the parties not to "affect the minerals." The court went on to say that:

"An agreement which provides that this unsevered right to search for minerals and grant a servitude shall remain unaffected cannot be interpreted to mean that his mineral ownership has changed in form from an element of perfect ownership to an undivided interest in a servitude over the property received."

There was no language within the document and no evidence presented to indicate that the parties intended to have a single servitude over all the minerals. The court found that the language quoted above was intended to preclude the loss by each party of his share of the minerals under the tracts received by the other parties to the partition.

(b) "... (it is) the intention hereof that The lot allotted to Each of the said parties shall be subject to oil, gas and mineral royalty rights vested in the other parties and in the said Richard O. Eckhart to the extent of a total of forty per centum (40%) thereof, leaving vested in the owner of Each of said lots sixty per centum (60%) of all of such royalties to accrue under any lease or other contract affecting said land. ..." Whitehall Oil Co. v. Heard, 197 So. 2d 672 (La. App. 3 Cir. 1967), writ refused, 199 So. 2d 923 (La. 1967). The court in Whitehall determined that the instrument could be interpreted either way, and therefore, it should be interpreted in the way which least restricts the ownership of the land conveyed.

The following partition provisions have been interpreted by Louisiana courts as creating a single mineral servitude, as shown above in Scenario #2:

(a) "It is clearly understood and agreed between the parties hereto that the ownership in the oil, gas and minerals, and oil, gas and mineral rights, are not in any way changed or effected (sic) by this partition, and the co-parceners hereto, hereby declare and acknowledge that the oil, gas and mineral and oil, gas and mineral rights in each and every tract of land hereinabove allocated to each of him, her or them, is owned by the parties hereinafter named, in the proportion set out after each name, to-wit:" (names and proportions omitted) Wall v. Leger, 402 So. 2d 704 (La. App. 1 Cir.)
1981). The court in *Wall* focused on the subsequent actions of the parties, who were treating the instrument as though it created a single mineral servitude.

(b) “It is understood and agreed, however, that no partition is made of the mineral interest and the parties shall continue to remain as owners in indivision with respect to the oil, gas and other minerals in, on and under the property herein partitioned.” *GMB Gas Corp. v. Cox*, 340 So. 2d 638 (La. App. 2 Cir. 1976). In deciding the case, the court said, “the partition agreement...leaves no doubt that they intended to own the minerals under the entire 400 acre tract in indivision and to create a single mineral servitude....”

d. To avoid these types of constructional problems, the drafter of an act of partition should clearly state that the parties do or do not intend to create a single mineral servitude on the partitioned land. Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 Tul. L. Rev. 1097 (1987).

D. Partition by Licitation of Land: Effect on Mineral Rights

1. In *Steele v. Denning*, 456 So. 2d 992 (La.1984), the plaintiffs, who owned an undivided interest in land but none of the attendant mineral rights, sued for partition of both the land and mineral rights. Each of the defendant co-owners of the land owned attendant mineral rights. The court held that the plaintiffs did not hold a thing “in common” with the defendant co-owners with respect to the mineral rights. Therefore, the court found that the plaintiffs did not have the right to provoke the partition of the mineral rights along with the partition of the land.

2. It is unclear whether the mineral interests would be subject to a partition in a scenario opposite of *Steele* – where a plaintiff owns a full interest in the land, including the mineral rights, the defendant owns none of the mineral rights, and the mineral interest owner is not made a party to the suit. According to *Steele*, the mineral rights would not be held “in common” between the parties.

3. In Footnote 8 in *Steele*, the court wrote:

“Plaintiffs’ argument would be correct, for example, in this case, if a full owner of an undivided interest in the property, like Denning, had brought the partition action. Denning, being a full owner of the land (with the attendant mineral rights), holds elements of *ownership in both the land and the mineral rights, and thus, owns “a thing held in common” with all of the other co-owners*. As such, unlike plaintiffs here, she has the right to petition for partition by licitation of both the land and the mineral rights. And then, “if... the land is judicially partitioned,” *with the mineral right owner being made a party to the partition action, and the appropriate*
appraisal's are made in accordance with law, the mineral right owner will share in the proceeds in proportion to the value of his interest and his mineral rights would be extinguished by the sale of the property resulting from the partition action." (citations omitted) (emphasis added).

One could argue that this footnote would not apply where the plaintiff in the partition action owned the attendant mineral rights but none of the defendants owned the attendant mineral rights. In such a situation, the plaintiffs would not own mineral rights in common with any of the defendants. Furthermore, this footnote clearly conditions the extinguishment of the mineral rights upon making the mineral right owner a party to the partition action and upon obtaining the appropriate appraisals in accordance with the Mineral Code.

4. If the owner of a mineral right or interest therein is made a party to an action for partition of the land subject to his right and it is determined that the partition is to be by licitation, the court shall appoint two appraisers who shall separately value the interest in the land or the mineral rights of each party to the action who is or may be entitled to participate in the proceeds of the sale. La. R.S. 31:180.

a. If an appraisal of any mineral right is not made in accordance with Article 180, the partition is not invalid, but the right or any interest therein is not extinguished or otherwise affected. La. R.S. 31:184.

b. In Thigpen v. Boswell, 465 So.2d 865 (La. App. 2 Cir. 1985), a defendant in a partition proceeding who owned mineral rights in and to the subject property argued that the mineral rights were not transferred where the appraisals were not made prior to the sheriff's sale. It is unclear from the court's opinion whether said defendant owned an interest in the land and the minerals or only a mineral servitude in and to the subject property. The court held that in order for the mineral rights to be transferred in the sale, the appraisals must be made prior to the sheriff's sale effecting the partition by licitation.

c. It is unclear whether the appraisal requirements of La. R.S. 31:130 apply in a partition proceeding where the plaintiff owns both the land and mineral rights and the defendant owns only the land. An issue remains regarding whether an appraisal is required where the minerals have not been severed from the land.