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COMMENTS

Mineral Rights and Forced Pooling

The only geological concept considered by the courts in the early formulation of mineral law principles was a somewhat blurred notion of the fugitive nature of oil and gas.¹ From this belief developed the "law of capture,"² a rule that minerals were incapable of being owned separately from the surface rights, and would be subjected to ownership only when reduced to physical possession. With this beginning, the courts followed the policy that, since the minerals were likely to migrate from beneath a particular tract of land, the interests of the holders of mineral rights would best be served by prompt exploration, and the rules of law were construed to reach that purpose. This judicial atti-

1. "The decisions of this court are . . . 'in accord with the general law' that the fugitive minerals, oil and gas, while at large beneath the surface of the earth, are not, and in their very nature cannot be, the subject of private ownership." O'Niell, J., in *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 770, 91 So. 207, 212 (1922).

2. DAGGETT, MINERAL RIGHTS IN LOUISIANA 419 (rev. ed. 1949).

tude has been appropriately termed the "policy of production."³ Although the rules were not entirely responsible for the ensuing waste of the limited resource,⁴ they were certainly conducive to that end, and the waste led to the enactment of the present Conservation Act.⁵ This statute changed the legal attitude toward mineral law from the "policy of production" to a "policy of conservation."⁶ However, the legal rules formulated under the law of capture were not supplanted by the Conservation Act, and the task of the courts has been the onerous one of adjusting the old rules to fit the new policy. This process of adjustment has been particularly apparent in regard to the effect of forced pooling provisions of the Conservation Act⁷ on the rules of law applicable to the prescriptive period of a mineral servitude and the primary term of a mineral lease.

THE MINERAL SERVITUDE

The sale or reservation of minerals, separate and apart from the surface ownership, results in the grant of the right to search for the minerals and reduce them to possession.⁸ This right is classified as being "in the nature of a servitude,"⁹ and is subject to the ten-year prescription liberandi causa of Article 789 of the Civil Code.¹⁰ The Code provisions applicable to servitudes allow

3. Summers, *The Modern Theory and Practical Application of Statutes for the Conservation of Oil and Gas*, 13 TUL. L. REV. 1, 5 (1938).

4. Boatner, *Legal History of Conservation of Oil and Gas in Louisiana*, in LEGAL HISTORY OF CONSERVATION OF OIL AND GAS: A SYMPOSIUM (1938). In speaking of the Rodessa Louisiana Field, the author states, at page 69: "[T]he gas waste was terrific, approaching 600,000,000 cubic feet per day, an amount equal to one-half the daily domestic consumption of natural gas in the United States."

5. La. Acts 1940, No. 157, now LA. R.S. 30:1-20 (1950).

6. Summers, *The Modern Theory and Practical Application of Statutes for the Conservation of Oil and Gas*, 13 TUL. L. REV. 1, 5 (1938).

7. LA. R.S. 30:9B (1950) requires the Commissioner of Conservation, if he finds it necessary to prevent waste and avoid the drilling of unnecessary wells, to establish a drilling unit or units for each pool, and provides that the owners may validly agree to pool their interests and develop their lands as a drilling unit. Under R.S. 30:10A, if the parties fail to so agree, the Commissioner may compel them to join their interests in a pooling unit. In the case of *Smith v. Holt*, 223 La. 821, 67 So.2d 93 (1953), the Supreme Court held that automatic pooling results from the creation of a drilling unit even in the absence of an order expressly providing for forced pooling. Therefore, as far as the lives of the mineral interests on tracts affected by the order are concerned, forced pooling results from an order which divides the land into units susceptible of legal identification. See Lewis, *The Effective Date of Forced Unitization Orders on Mineral Servitudes and Leases*, 1 LA. B.J. 31 (1954).

8. *Wemple v. Nabors Oil & Gas Co.*, 154 La. 483, 97 So. 666 (1923); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

9. DAGGETT, *MINERAL RIGHTS IN LOUISIANA* 20 (rev. ed. 1949).

10. LA. CIVIL CODE art. 789 (1870): "A right to servitude is extinguished by the non-usage of the same during ten years."

the running of the liberative prescription to be either interrupted¹¹ or suspended.¹² Good faith drilling on the tract of land on which the servitude exists is held to be a *user* of the servitude,¹³ and interrupts the running of prescription.¹⁴ A suspension of prescription may occur when there is an obstacle preventing any exercise of the right to search.

Total Inclusion of a Tract Within a Unit

The concept of user is somewhat altered when a tract on which a servitude exists is totally included within a forced pooling unit. In such a case, either *drilling on* the tract or *production from* a well located in the unit but not on the tract is a user of the servitude and interrupts the running of prescription.¹⁵ When the drilling occurs on the tract, there is an exercise of the right to search as originally contemplated by the parties, and therefore the prescription is interrupted. The reason for allowing production from a unit well not located on the tract to interrupt the prescription of the servitude on the tract is that a well in a unit supposedly drains all the minerals underlying the tracts which make up the unit, and therefore an actual use of the minerals occurs when they are extracted from under the land. Hence, it is immaterial whether the operations are conducted on the land burdened by the servitude or from without.¹⁶ An unproductive well on one tract in the unit does not interrupt the prescription of the servitudes on other tracts in the unit, for the dry hole constitutes neither drilling on nor production from the other tracts in the unit, and therefore is not a user of the servitudes on those tracts.¹⁷ A factor which has not been presented to the courts in this regard is that when a forced pooling unit is established and one person receives a permit to drill in the unit, the parties who have working rights on other tracts in the unit have the oppor-

11. LA. CIVIL CODE arts. 3516 et seq. (1870).

12. LA. CIVIL CODE art. 792 (1870): "If the owner of the estate to whom the servitude is due, is prevented from using it by any obstacle which he can neither prevent nor remove, the prescription of non-usage does not run against him as long as this obstacle remains."

13. DAGGETT, MINERAL RIGHTS IN LOUISIANA 96 (rev. ed. 1949).

14. Hunter Co. v. Ulrich, 200 La. 536, 8 So.2d 531 (1942); Louisiana Petroleum Co. v. Broussard, 172 La. 613, 135 So. 1 (1931); Keebler v. Seubert, 167 La. 901, 120 So. 591 (1929); Lee v. Giaouque, 154 La. 491, 97 So. 669 (1923).

15. Union Oil Co. v. Touchet, 229 La. 316, 86 So.2d 50 (1956); Smith v. Holt, 223 La. 821, 67 So.2d 93 (1953); Sanders v. Flowers, 218 La. 472, 49 So.2d 858 (1950); Ohio Oil Co. v. Kennedy, 28 So.2d 504 (La. App. 1946).

16. Boddie v. Drewett, 229 La. 1017, 87 So.2d 516 (1956).

17. *Ibid.* See also White v. Frank B. Treat & Son, Inc., 89 So.2d 883 (La. 1956).

tunity to contribute to the drilling expense, their share depending on the proportionate amount their acreage bears to the unit size.¹⁸ If the owner of a servitude on a tract in a unit pays a portion of the cost of good faith exploration in the unit, and the well results in a dry hole, there is a question as to whether the contribution to the drilling expense would be such an exercise of the right to search as to warrant an interruption of prescription of the servitude. Although such a contribution results in neither drilling on nor production from the tract burdened by the servitude, it is a bona fide attempt to extract the minerals underlying the tract. As such, it should be held to interrupt the prescription.

The suspension of prescription due to an obstacle preventing any exercise of the right has been urged infrequently, and usually without success.¹⁹ A forced pooling order was mentioned as such an obstacle in a prior case,²⁰ but *Boddie v. Drewett*,²¹ a 1956

18. According to LA. R.S. 30:10A(c) (1950): "In the event pooling is required, the cost of development and operation of the pooled unit chargeable by the operator to the other interested owners shall be limited to the actual reasonable expenditures required for that purpose, including a charge for supervision. In the event of a dispute relative to these costs, the commissioner shall determine the proper costs, after notice to all interested persons and a hearing."

19. In a footnote in *Boddie v. Drewett*, 229 La. 1017, 1023, 87 So.2d 516, 518 (1956), the court reviewed the jurisprudence concerning the suspension of prescription due to an obstacle preventing user under Code Article 792: "In the following cases relief was denied on the ground that no obstacle existed to the exercise of the mineral servitude: *McDonald v. Richard*, 203 La. 155, 13 So.2d 722 (Art. 792 does not permit a landowner to suspend the prescriptive period by selling his so-called reversionary interest in a mineral servitude which he previously imposed upon his land); *Deas v. Lane*, 202 La. 933, 13 So.2d 270 (the oversale of minerals by a landowner is no obstacle to the exercise of a prior recorded mineral servitude); *Gayoso v. Arkansas Natural Gas Corp.*, 176 La. 333, 145 So. 677 (the lease by a landowner of his reversionary interest in the minerals prior to the expiration of the servitude held no obstacle since the lease did not prevent the mineral owner from using the servitude); *Coyle v. North Central Texas Oil Co.*, 187 La. 238, 174 So. 274 (where there is a purchase of minerals already subject to a mineral lease, the lease is no obstacle to the exercise of the servitude); *Gayley v. McFarlain*, 194 La. 150, 193 So. 570 (prior recorded mineral lease on land upon which mineral servitude is subsequently created does not constitute an obstacle); *Hightower v. Maritzky*, 194 La. 998, 195 So. 518 (held no obstacle where landowner in selling minerals reserved the power to lease and the right to receive bonus and delay rentals therefor); *Perkins v. Long-Bell Petroleum Co.*, 227 La. 1044, 81 So.2d 389 (filing of jactitation suit by landowner no obstacle to use of servitude since mineral owner always had free access to the land for exploration purposes). But see *White v. Hodges*, 201 La. 1, 9 So.2d 433, holding that an oversale of minerals by a landowner became a mineral servitude on the date on which liberative prescription returned the minerals to the owner and that the existing servitude operated as an obstacle to the running of prescription on the after-acquired servitude."

20. *Sanders v. Flowers*, 218 La. 472, 498, 49 So.2d 858, 867 (1950): "The conclusion we have reached in this case necessarily reflects that we have given consideration to this question, and whether the order of the Commissioner unitizing the area had the effect of suspending the running of prescription by placing an obstacle to drilling on defendants' property . . . is immaterial in this case."

21. 229 La. 1017, 87 So.2d 516 (1956).

decision, was the first actually to hold that the pooling order may suspend prescription. There it was held that when a drilling unit is formed and a certain space within the unit is designated as the permissible drilling area, there is a suspension of the running of prescription of a mineral servitude on a tract of land which is located within the unit but not within the drilling area. The reason assigned for allowing the suspension is that in such a case the order of the commissioner creating the unit presents an obstacle to any exercise of the servitude, and the prescription should not be allowed to run against an owner of a mineral servitude who is prohibited from exercising his right to search. The suspension runs from the date of the order creating the unit and lasts until the obstacle is so removed that "[proceedings may be initiated] for the allowance of drilling in areas theretofore prohibited by the order."²² The *Boddie* case is sound in that it recognizes the principle that one who is prevented from exercising a right should not be penalized for any failure to do so. However, the decision is subject to some criticism in that the beginning of the suspension is fixed at the date of the issuing of the unitization order, whereas the obstacle does not actually exist at that time. Even though a tract is not located within the permissible drilling area, the owner may apply to the Conservation Department for a permit to begin explorations within the drilling area. Therefore, the creation of the unit actually presents no obstacle to the exercise of any right to search. However, once a drilling permit has been issued, an obstacle is presented to the exercise of any servitude on tracts in the unit other than the one on which the drilling is to take place, and the prescription should be held to be suspended.

Partial Inclusion of a Tract Within a Unit

In the 1956 case of *Childs v. Washington*²³ it was held that when only part of a tract on which a mineral servitude exists is included within a forced pooling unit production from a well in the unit but not on the tract does not interrupt the prescription of the servitude on that part of the tract which lies outside of the unit. The reasoning of the opinion is that even though the Civil Code provides that a servitude is indivisible,²⁴ and a min-

22. 229 La. 1017, 1026, 87 So.2d 516, 519 (1956).

23. 229 La. 869, 87 So.2d 111 (1956).

24. LA. CIVIL CODE art. 656 (1870): "The rights of servitudes, considered in themselves, are not susceptible of division, either real or imaginary."

eral servitude has been held to be indivisible,²⁵ it has also been held that there is nothing which prevents the parties who created the right from entering into a contract whereby a division of the servitude results.²⁶ Since the parties could divide the servitude, the orders of the Commissioner of Conservation could have the same result. The rule of *Childs* decision was re-affirmed in the case of *Jumonville v. The Federal Land Bank of New Orleans*,²⁷ in which the court observed that the order of the Commissioner was never intended to have any effect on the mineral interests on tracts outside of the boundaries of the unit which it created. The result reached by the decisions is equitable and finds ample support in the jurisprudence. However, it is submitted that the reasons for the decision could have been placed on a sounder basis. In dealing with the concept of the divisibility or indivisibility of a servitude, there is a great deal of uncertainty. Although the contracting parties are allowed to divide a servitude, there is no assurance as to when an outside element may create such a division. What is really meant in considering the concept of divisibility is that when the exercise of the right is accomplished in a real sense, that is, in a manner contemplated by the original grant, then the effects of such an exercise should extend to the entire right, and the prescription should be interrupted as to the entire servitude. However, when the exercise of the servitude is done in a manner other than that contemplated by the parties, since there is no user in a real sense, the prescription should be interrupted only as far as the effects of the exercise extend, and the servitude should be divided into that part on which the interruption occurs, and that part to which the interruption does not extend.

This is the position taken by Justice McCaleb in his concurring opinion in the *Childs* case.²⁸ According to his thesis, a producing well in a unit drains all the minerals from a sand underlying the unit. Therefore, any production from a well in a unit is production from the individual tracts which make up the unit

25. *Frost Lumber Industries v. Republic Production Co.*, 112 F.2d 462 (5th Cir. 1940), cert. denied, 311 U.S. 676 (1940); *Lenard v. Shell Oil Co.*, 211 La. 265, 29 So.2d 844 (1947); *Hunter Co. v. Ulrich*, 200 La. 536, 8 So.2d 531 (1942); *Patton v. Frost Lumber Industries*, 176 La. 916, 147 So. 33 (1933).

26. *Elson v. Mathewes*, 224 La. 417, 69 So.2d 734 (1953). See Daggett, *Brief Comment and Speculation re Elson v. Mathewes*, 14 LOUISIANA LAW REVIEW 547 (1954). See also *Ohio Oil Co. v. Ferguson*, 213 La. 183, 34 So.2d 746 (1947); *Byrd v. Forgotson*, 213 La. 276, 34 So.2d 777 (1947).

27. 87 So.2d 721 (La. 1956).

28. 229 La. 869, 881, 87 So.2d 111, 115 (1956).

and, being an actual use of the minerals underlying the tracts, interrupts the prescription of the servitudes on those tracts. However, when a tract of land affected by a mineral servitude is included only partially in a unit, and a producing well in the unit is not located on the particular tract, since "no drilling explorations [are] ever conducted on any part of the land subject to the servitude,"²⁹ there is no user of the servitude in a real sense on those tracts on which the drilling does not occur, for the use is not done in the manner contemplated by the original grant. Therefore, since the prescription was interrupted only because of the inclusion of the tract in the unit, and not by means of any exercise of the right to search on the tract, this interruption should extend only as far as the drainage actually occurs, that is, to the boundaries of the unit. Since there is an interruption of the prescription of the servitude on only a portion of the tract, the result is to divide the servitude. In other words, the division of the servitude is a result of the court's decision rather than a reason for it.

The reasoning of the concurring opinion is more sound in that it is more consistent with the intentions of the parties and the policy of conservation. If a servitude were divided every time that a unit included only a portion of the tract on which the right existed, then a situation might arise wherein a person would have to exercise his right to search more than once to effect an interruption of the prescription of the entire servitude. For instance, if a tract of land subject to a mineral servitude was included only partially in a unit, and a producing well was drilled on that part of the tract in the unit, the exploration would not be considered an exercise of the servitude on that portion of the tract lying outside of the unit because the effect of the unit would be to divide the servitude. The reasoning of the concurring opinion would reach a different result in that since the drilling took place on the tract on which the servitude existed, the exploration is a "user of the servitude in a real sense,"³⁰ and there should be an interruption of the prescription of the servitude on the entire tract. Such a result would provide a better reconciliation of the interests served by the conservation policy and the rights as originally created by the parties in that exercise of the servitudes on tracts within the unit would remain the same, and the effect of

29. *Ibid.*

30. *Ibid.*

the drilling within the unit on servitudes on those parts of tracts lying outside of the unit would be more consistent with the intentions of the parties.

THE MINERAL LEASE

The usual method of developing properties for oil and gas is through the medium of the mineral lease.³¹ The typical lease is granted for a fixed period, generally called the primary term, during which the lessee has the right to conduct drilling operations on the land. If production in commercial quantities is secured during the primary term, the lease is maintained in force and effect for at least as long as the production continues. Unlike the mineral servitude, the primary consideration for the granting of a mineral lease is the development of the land for oil and gas.³² Therefore, a mineral lease is not maintained beyond its primary term by unsuccessful drilling; it is necessary that the explorations be commercially productive, "affording the lessee a net profit and the lessor an adequate consideration."³³

Total Inclusion of a Tract Within a Unit

One of the early problems litigated under the present Conservation Act was whether the life of a mineral lease on a tract of land totally included in a forced pooling unit is extended beyond its primary term by production from a well located elsewhere in the unit. It is now well established that production from a well in the unit is production under the terms of the mineral leases on all of the tracts in the unit even though there is no actual drilling on every single tract of which the unit is comprised.³⁴ This result is based on the fact that even though a lessee might not actually conduct drilling operations on a particular leased tract, there is an actual drainage of the minerals underlying the tract, and the lessor receives a share of the royalty payments.

31. Brown, *Elemental Principles of the Modern Oil and Gas Lease*, A.B.A. SECTION ON MINERAL LAW 146, 154 (1955); Moses, *The Evolution and Development of the Modern Oil and Gas Lease*, SECOND ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 1 (1951).

32. *Melancon v. The Texas Co.*, 89 So.2d 135 (La. 1956); *Wier v. Grubb*, 228 La. 254, 82 So.2d 1 (1955); *Caldwell v. Alton Oil Co.*, 161 La. 139, 108 So. 314 (1926).

33. *Wier v. Grubb*, 228 La. 254, 268, 82 So.2d 1, 6 (1955).

34. *Hunter v. Vaughn*, 217 La. 459, 46 So.2d 735 (1950); *Crichton v. Lee*, 209 La. 561, 25 So.2d 229 (1946); *Hardy v. Union Prod. Co.*, 207 La. 137, 20 So.2d 734 (1945). See Comment, 12 LOUISIANA LAW REVIEW 445 (1952) for a discussion of these cases.

Whether the creation of a forced pooling unit has the effect of "suspending" the primary term of a lease on a tract in the unit which does not lie within the permissible drilling area is an open question. An analogy to the *Boddie* case, which held that the prescription of a mineral servitude is suspended when a unit presents an obstacle to the exercise of the servitude, cannot be drawn too closely because the decision was based on a Code article dealing with servitudes, and there is no provision in the Code for suspending the term of a lease.³⁵ A provision in a lease contract which could be held to cover the situation is the *force majeure* clause,³⁶ which may provide that when any cause beyond the lessee's control prevents him from drilling, there is a suspension of the obligation to drill, and the time during which the lessee is prevented from drilling is not counted against him.³⁷ However, as a practical matter, the pooling of land in which the lessee has an interest is not usually done without his participation or acquiescence, and therefore such unitization should not be held to be a cause which is beyond the lessee's control. Any obstacle which would arise due to the pooling of the leased tract would be self imposed, and ought not to be held to suspend the primary term of the lease so as to allow a greater time during which the lessee may exercise his right to drill.

Partial Inclusion of a Tract Within a Tract

The lessee's obligation to drill established by a mineral lease is indivisible in nature, and therefore the securing of production from any part of the leased tract has the effect of satisfying the obligation to drill as to the entire leased tract and will maintain the entire lease beyond its primary term.³⁸ In the case of *Hunter*

35. See LA. CIVIL CODE art. 1933(2), (3) (1870), concerning damages when the obligor is prevented from performing because of a fortuitous event or irresistible force.

36. See Brown, *Elemental Principles of the Modern Oil and Gas Lease*, A.B.A. SECTION ON MINERAL LAW 146, 156 (1955).

37. An excerpt from a typical mineral lease: "It is further agreed that should Lessee be prevented from complying with any expressed or implied covenants of this lease, from conducting drilling . . . thereon . . . by operation of force majeure, any federal or state law, or any order, rule or regulation of governmental authority, or other cause beyond Lessee's control, then while so prevented, Lessee's obligation to comply with such covenant shall be *suspended* . . . and this lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling . . . or from producing oil, gas or other minerals from the leased premises, and the time while Lessee is so prevented shall not be counted against Lessee." (Emphasis added.) See *Hunter v. Vaughn*, 217 La. 459, 46 So.2d 735 (1950).

38. *Cochran v. Gulf Refg. Co.*, 139 La. 1010, 72 So. 718 (1916); *Murray v. Barnhart*, 117 La. 1023, 42 So. 489 (1906).

*v. Shell Oil Co.*³⁹ it was held that the conservation orders do not have the effect of dividing the obligation to drill under a lease by including only a portion of the tract in a forced pooling unit and, therefore, production in paying quantities from a well in the unit, even though not located on the leased premises, is compliance with the obligation to drill and extends the life of the entire lease beyond its primary term.⁴⁰ One reason underlying the decision is that if the conservation orders were allowed to divide the lease, a producing well drilled on that portion of the tract located in the unit would have no effect on the primary term of the lease on that part of the property lying outside of the unit, and a situation would arise in which the lessee would have to drill two wells in order to fulfill his original obligation, one within the unit and one outside the unit. Another reason for the decision is that even though the production from the unit maintains the entire lease beyond its primary term, the lessee is under a further obligation, either express or implied, to adequately develop the remainder of the tract, and upon a failure to do so, the lessor can maintain an action for cancellation or reduction of the lease.⁴¹ The *Hunter* decision was affirmed in the case of *LeBlanc v. Danciger Oil Co.*,⁴² wherein it was shown that the result is based entirely on the indivisibility of the obligation to drill and not on any idea that the conservation orders were intended to produce such a result.

39. 211 La. 893, 898, 31 So.2d 10, 12 (1947). According to the opinion, "the only issue presented . . . is: When an oil and gas lease covers land both within and without a drilling unit pooled by order of the Commissioner of Conservation during the primary term of such lease, and when production in paying quantities is secured while such lease is in effect by payment of delay rentals from a well within the pooled unit but not on any portion of the leased land, does such production maintain the lease in effect beyond its primary term as to the part of the land leased which lies outside such unit?"

40. In a dissenting opinion in the *Hunter* case, Justice Hamiter posed the following hypothesis: "[I]f a lease contained 1000 acres and only one acre happened to be placed within a unit and no well was drilled on that particular acre, nevertheless, the entire 1000 acres would be held indefinitely beyond the primary term but would share in only 1/640th x 1/8, or 1/5120ths of the production from the unit. Such a result as this makes it obvious that neither the Legislature nor the Commissioner intended any such thing." *Id.* at 911, 31 So.2d at 17.

41. In the case of *Nunley v. Shell Oil Co.*, 76 So.2d 111 (La. App. 1954), the Court of Appeal, Second Circuit, granted this remedy to the lessor. It was held that even though a mineral lease is maintained beyond its primary term by production from a forced pooling unit of which the leased tract forms a part, the lessee is still under an obligation, either express or implied, to develop adequately the remainder of the leased tract, and that any failure to do so would result in a cancellation of the lease on that part of the tract lying outside of the unit. See Note, 15 LOUISIANA LAW REVIEW 853 (1955).

42. 218 La. 463, 49 So.2d 855 (1950).

As a technical legal proposition, the *Hunter* and *LeBlanc* decisions seem to be sound. However, from a practical standpoint, the remedy which is given to the lessor is circuitous and expensive, and the decisions have therefore met with considerable criticism.⁴³ The burden of proof in showing that a prudent operator would have developed the property is onerous in that the pertinent geological information is more accessible to the lessee than to the lessor.⁴⁴ Even though the law gives the lessor an award of a reasonable attorney's fee and any damages he may have incurred from his inability to release the land,⁴⁵ the gamble in bringing such a suit is greater than the average lessor can afford.

In dicta in the *LeBlanc* case, the Supreme Court has said that a different result could have been reached in the *Hunter* and *LeBlanc* cases had different kinds of lease contracts been involved.⁴⁶ The *Hunter* lease came into existence prior to the present Conservation Act, and made no mention of pooling.⁴⁷ Similarly, the *LeBlanc* lease, even though granted after the enactment of the Conservation Act, had no pooling clause.⁴⁸ However, a different

43. In *THE CONSERVATION OF OIL AND GAS, A LEGAL HISTORY* 248 (Louisiana chapter) (1948), the author states in connection with the *Hunter* decision: "From a practical standpoint the right to rescind a lease for failure to adequately develop is a circuitous and expensive remedy for the average lessor. In view of the expressed desire of the court in previous cases to prevent a tying up of valuable mineral property and circuitry in litigation, the court (in the interest of public policy) might have found a means of giving the lessor relief without leaving the matter to be corrected by legislative action." See also Daggett, *The Work of the Louisiana Supreme Court for the 1946-1947 Term — Mineral Rights*, 8 *LOUISIANA LAW REVIEW* 212, 216 (1948); Lewis, *Recent Developments in Pooling and Unitization*, A.B.A. SECTION ON MINERAL LAW 11 (1955); Meadors, *What Legislation, If Any, Is Desirable*, SECOND ANNUAL INSTITUTE ON MINERAL LAW 145 (1954).

44. In an attempt to ease this burden, courts have held that, in spite of competent geological testimony on the part of the lessee that exploration would be unsuccessful, cancellation of the lease is proper if the lessor can show that he has been assured by a third party that there will be drilling, *Romero v. Humble Oil & Refg. Co.*, 194 F.2d 383 (5th Cir. 1952), or even that the lessor has received an offer for a lease, *Nunley v. Shell Oil Co.*, 229 La. 349, 86 So.2d 62 (1956).

45. LA. R.S. 30:102 (1950): ". . . If a lessee, having been given written notice demanding cancellation of the lease, fails or refuses to comply within ten days, he shall be liable to the lessor for a reasonable attorney's fee incurred by the lessor in bringing suit to have the cancellation adjudged. He shall also be liable to the lessor for all damages suffered by him by reason of his inability to make a lease because of the non-cancellation." This statute has been held to apply to a suit for cancellation of a portion of a leased tract lying outside of a forced pooling unit, *Nunley v. Shell Oil Co.*, 229 La. 349, 86 So.2d 63 (1956).

46. *LeBlanc v. Danciger*, 218 La. 463, 470, 49 So.2d 855, 857 (1950): "Had [the contracting parties] intended any action in pursuance to such provisions segregating and placing only a portion of the leased property in a pooling unit to have the effect of dividing the lease, they could have so stipulated in their contract."

47. See *Conveyance Book 108*, p. 425, Records of DeSoto Parish. There are actually two leases, one Bath's Form 10 and the other the Form 15.

48. The contract is registered in Lease Book 43, Folio 198, St. Landry Parish.

kind of lease was involved in the federal case of *Smith v. Carter Oil Co.*⁴⁹ There the plaintiff sued for cancellation of a portion of a lease on property which lay outside of a forced pooling unit on the ground that there had been no drilling on the tract during the primary term of the lease. The lease provided that in the event it became necessary to establish a unit in accordance with governmental orders, the lessee could pool any portion of the land under contract, but that only the term of the lease on the portion of the tract which was included in the unit would be continued by production from a well on other property in the unit.⁵⁰ The court held that since the pooling had not been accomplished by the lessee, but was done by the Conservation Department, the lease provision had no application, and the principle of the *Hunter* case should apply. That the decision seems to be contrary to the intentions of the parties is shown by the fact that the lessee paid the delay rentals on the part of the tract which lay outside of the unit even after the producing well was brought in on the unit, thereby indicating his belief that the production from the unit did not have the effect of maintaining the entire lease beyond its primary term.

The Louisiana Supreme Court has not had the opportunity to determine the effect of such a provision in a lease on property which lies partially within and partially without a forced pooling unit. The dicta in the *LeBlanc* case⁵¹ indicates that such a provision in the contract would allow the production from the unit to affect only that part of the lease on the tract included in the unit. There is no reason why the pooling provision in a lease should have any effect on a forced pooling unit different from that on a voluntary pooling unit. It would appear that such a

49. 104 F. Supp. 463 (W.D. La. 1952).

50. Pertinent provisions from the lease contract: "If . . . lessee in its opinion deems it advisable and expedient, in order to form a drilling unit or units to conform to regular or special spacing rules issued by the Commissioner of Conservation . . . lessee shall have the right, at its option, to pool or combine the lands covered by this lease . . . with other land . . . in the immediate vicinity. . . . Lessee shall execute in writing and record in the conveyance records of the parish in which the land herein leased is situated an instrument identifying and describing the pooled acreage. . . . If operations be conducted on or production be secured from land in such pooled unit other than land covered by this lease, it shall have the same effect as to maintain lessee's rights in force hereunder as if such operations were on or such production from land covered hereby, except that its effect shall be limited to the land covered hereby which is included in such pooled unit." (Emphasis added.) See 104 F. Supp. 463, 466 (W.D. La. 1952), for a quotation of this paragraph of the lease in full. Cf. paragraphs 12 and 13 of Bath's Form 549—R-1 lease.

51. See note 46 *supra*.

provision in a lease should allow the pooling of a portion of the land subject to the mineral lease to affect the primary term of the lease only insofar as the property is included in the unit. This would afford a better remedy to the lessor than the circuitous and expensive one left by the *Hunter* decision and would be more consistent with the original obligation of the lessee. It would also answer the argument that the lessee might have to drill two wells in order to satisfy his obligation, for such a pooling clause in a lease could provide that if the well in the unit is located on the leased property, then the life of the entire lease is continued for the duration of the production.

CONCLUSION

The effect of a forced pooling unit on the laws relating to mineral leases and servitudes as formulated under the rule of capture has resulted in a change in the manner by which the right to search may be exercised. When a tract on which a mineral servitude or lease exists is included in a unit, it is no longer necessary for explorations to occur on the tract in order for the right to search to be exercised, for production from a well anywhere in the unit is considered an actual use of the minerals underlying each tract of which the unit is comprised and is considered to be an exercise of the right to search on each tract.

The different results reached in the case of a mineral servitude and a mineral lease when a tract on which the right exists is included only partially within a forced pooling unit can be justified on the grounds of the difference in the nature of the rights. However, as a practical matter, the different results will cause some difficulty. If an owner of a servitude on a tract which lies only partially in a forced pooling unit should lose his right, then any lease which depends on this right will also fall. In such a case, continued exploration on that part of the tract lying outside of the unit would be to the mutual benefit of both the servitude owner and the lessee. However, if the lessee should derive his right from two parties, a landowner who has a fractional interest in the minerals, and a servitude owner who has a right to the other portion of the minerals, then it would not be necessary for the lessee to continue any exploration in order to maintain his right, whereas it would be necessary for the owner of the servitude to exercise his right to search in order to keep his right in existence. In such a case, the only remedy available

to the owner of the servitude is an enforcement of the adequate development covenant, and this is almost impossible due to the fact that it could not be enforced prior to the expiration of the primary term of the lease, but would have to be enforced before the accrual of the prescription on the servitude. Another fact that would make the remedy less available to the servitude owner is that he would have to show that he had received a bona fide offer of lease from a third party, and it would be difficult for him to secure any such contract in view of the fact that he owns only a fractional portion of the mineral rights. Such a result is indicative of the myriad problems with which the court has been faced in construing the laws formed under the rule of capture to fit the conservation policy. In spite of the reluctance of the court to overturn any prior mineral law decision due to the fact that they establish rules of property, it is apparent that a reconsideration of the *Hunter-Shell* decision is necessary.

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Tax Consequences from Dispositions of Carved Out Oil Payments—Ordinary Income or Capital Gain?

Classification of a particular item of income as either ordinary income or capital gain is a matter of considerable concern in terms of the amount of tax to be paid. One source of income which has posed a difficult problem in regard to its nature for income tax purposes is the "oil payment." For federal income tax purposes, an oil payment¹ has been defined as a right to oil and gas in place that entitles its owner to a specified fraction of his transferor's share of production from the property, limited by a certain sum of money or a specified number of units of oil or gas.² Oil payments are used extensively in the industry, thereby making the classification of income from transfers of such payments particularly important.

The problem of distinguishing between ordinary income and capital gain is not a new one, nor in many areas has it been ade-

1. BREEDING & BURTON, *TAXATION OF OIL AND GAS INCOME* 25 (1954).

2. The law relative to gas payments is the same as that relative to oil payments. For the sake of simplicity, references in the text will mention only the oil payment; however, the discussion is equally applicable to gas payments.