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COMMENTS

The Top Lease and the Reversionary Right in the Louisiana Law of Oil and Gas

As early as 1865, a contract in Louisiana by which one person agreed to search for minerals on the land of another, for their mutual benefit, was termed a "lease."¹ Despite dissimilarities between the oil and gas "lease" and the ordinary lease of land,²

1. *Escoubas v. Louisiana Petroleum and Coal Oil Co.*, 22 La. Ann. 280 (1870).

2. One difference is that the law relative to leases of land was formulated in a time when transfers of the lessee's interest were rare. In the oil and gas industry, however, the transfer of the working interest is a common, if not usual, occurrence. See *SEC v. Joiner Leasing Corp.*, 320 U.S. 344 (1943). Also, the notions of privity of contract and privity of estate have no place in the law of oil and gas because whereas their purpose is to see to whom the parties are to look for performance of the obligations under the lease, the custom in the industry is to look to the owner of the working interest. For an illustration of the hardship wrought by the application of the lease articles of the Civil Code to an oil and

this classification has continued to be used both by the courts and in the industry. Although the kinds of oil and gas leases are varied, certain provisions appear in nearly all of them.³ For instance, a typical oil and gas lease is for a fixed term and ordinarily provides that in consideration of giving up his right of exploration the lessor is to receive a bonus, possible delay rental payments if lessee elects not to drill, and a percentage of production benefits if the drilling proves successful.

A top lease is a second lease granted by a mineral owner while a first lease is still in existence. The top lease is analogous to the situation in which a landowner who has already sold minerals attempts to convey his reversionary right to the outstanding minerals. While the reversionary right has been held invalid as an article of commerce,⁴ the top lease, while apparently recognized, has never been challenged in the appellate courts.⁵ The purpose of this Comment is to discuss the validity of the top lease in Louisiana in light of the attitude toward the reversionary right.

A top lease can be created only when a prior lease is in existence and a reversionary right can arise only when a mineral servitude is outstanding. Therefore, before any discussion of the top lease and the reversionary right can be undertaken, the mineral lease and mineral servitude must be examined.

Mineral Lease and Mineral Servitude Distinguished

Early mineral law decisions were not concerned with the classification of the mineral contract, the issue being whether minerals could be the subject of ownership separate and apart from the land.⁶ The question was more than an academic one

gas lease, see *Broussard v. Hassie Hunt Trust*, 231 La. 474, 91 So.2d 762 (1956) (lessor not entitled to cancel lease in hands of sublessee for failure to develop because of lack of privity of estate and privity of contract).

3. See Moses, *The Evolution and Development of the Oil and Gas Lease*, SECOND ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 1 (1951).

4. *Hicks v. Clark*, 225 La. 133, 72 So.2d 322 (1954).

5. See *Wier v. Glassell*, 216 La. 828, 44 So.2d 882 (1950). In *Amos v. Waggoner*, 229 La. 134, 85 So.2d 58 (1956), it was held that a mineral lease from one who owned the land and one-half the mineral rights, but who did not have authority to lease, was invalid. However, the second lease was not a top lease because it was not granted by one who had already leased his property. Also, the interest retained by the landowner could be interpreted as a royalty right since there was no right to explore.

6. *Rives v. Gulf Refg. Co.*, 133 La. 178, 62 So. 623 (1913) (landlord and tenant rules of law inapplicable to mineral contract because landowner could not deliver oil and gas beneath the surface of the land); *Cooke v. Gulf Refg. Co.*, 135 La. 609, 65 So. 758 (1914) (oil and gas in their natural state under the ground

because it was thought that if minerals were held insusceptible of ownership a prescriptive limitation would be imposed on mineral rights.⁷ After hinting at non-ownership several times,⁸ the court gave the answer in 1922 in the case of *Frost Johnson Lumber Co. v. Salling's Heirs*.⁹ Basing its decision on a notion of the migratory nature of oil and gas, despite authority to the contrary,¹⁰ the Supreme Court held that minerals were insusceptible of private ownership until reduced to possession.¹¹ Hence, a conveyance of mineral rights created in the transferee nothing more than a servitude subject to the ten year liberative prescription of the Louisiana Civil Code.¹²

Another problem with which the court was faced was whether a lease of minerals and a sale of minerals created the same rights in the grantee. In *Logan v. State Gravel Co.*,¹³ a mineral lease and a mineral servitude were declared to be different kinds of contracts.¹⁴ This distinction later manifested itself in the

are not owned by the landowner); *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914) (oil and gas beneath the earth are part of the realty and are therefore not subject to ownership apart from the land); *Strother v. Mangham*, 138 La. 437, 70 So. 426 (1915) (although a landowner does not own oil and gas beneath the surface he has an exclusive right to reduce it to possession); *Saunders v. Busch-Everett Co.*, 138 La. 1049, 71 So. 153 (1916) (same); *Hanby v. Texas Co.*, 140 La. 189, 72 So. 933 (1916) (a right in oil and gas under the land is an immovable, title to which cannot be destroyed by parol testimony); *Higgins Oil and Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206 (1919) (analogy between subterranean oil and subterranean or percolating waters).

7. In speaking of the issue before the court in the *Frost Johnson* case, Justice O'Niell stated: "I imagine, therefore, that laymen who have read the newspaper comments upon the importance of the case now before us, and who are not aware of the question of prescription, are apt to recall the familiar lines of the famous stenographer, Byron, 'Strange all this difference should be 'twixt Tweedledum and Tweedledee.' But the question is indeed an important one, with reference to the plea of prescription." *Frost Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 835, 91 So. 207, 235 (1922).

8. See note 6 *supra*.

9. 150 La. 756, 91 So. 207 (1922).

10. "[T]he geologic fact may be said to be now reliably ascertained that these minerals are contained in shale and sand strata, which they permeate, and that the lateral movement of the oil is sluggish, and more often than not restricted within narrow bounds." Provosty, J., concurring on first rehearing in *Frost Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 799, 91 So. 207, 222 (1922). The opinion relied on Veazy, *The Law of Oil and Gas*, 18 MICH. L. REV. 445, 652, 749 (1920), 19 MICH. L. REV. 161 (1920).

11. The *Frost Johnson* case was concerned with a reservation of minerals when the land was sold. A later case, *Nabors Oil and Gas Co. v. Louisiana Oil Refg. Co.*, 151 La. 361, 91 So. 765 (1922), applied the same rule to a sale of minerals by a landowner.

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

13. 158 La. 105, 103 So. 526 (1925).

14. 158 La. 105, 110, 103 So. 526, 528 (1925): "But there are two ways in which that incorporeal right may be dealt with, viz.: (1) It may be sold outright, as may 'a servitude' or any other incorporeal thing (R.C.C. art. 2449); or (2)

different legal rules which were applied to the two contracts.¹⁵ However, a few decisions obscured the notion that a lease and servitude differ by stating, in dicta, that the two are the same.¹⁶ The matter was cleared up by *Gulf Refg. Co. v. Glassell*¹⁷ which reiterated the fact that a lease and a servitude are separate kinds of contracts and declared prior statements to the contrary to be nothing more than dicta.

Since the time of the *Glassell* decision, the jurisprudence seems to indicate that the distinction between the mineral lease and mineral servitude is similar to the common law distinction between a mineral lease and a deed.¹⁸ Whereas the right to

the land may be leased for mining purposes for a fixed rental, or on a royalty basis (R.C.C. art. 2671)."

15. For instance, in order for a lease to be extended beyond its primary term there must be production in paying quantities, *Caldwell v. Alton Oil Co.*, 161 La. 139, 108 So. 314 (1926); *Smith v. Sun Oil Co.*, 165 La. 907, 116 So. 379 (1928), whereas even a dry hole will interrupt the prescription running against a mineral servitude, as long as the drilling is a good faith attempt to secure production, *Louisiana Petroleum Co. v. Broussard*, 172 La. 613, 135 So. 1 (1931); *Taylor v. Dunn*, 97 So.2d 415 (La. 1957). Another difference is found in unitization cases. When a portion of a leased tract is included within a drilling unit and production is secured from a well in the unit but not on the tract, the entire lease, not merely that concerning the portion of the tract in the unit, is extended beyond the primary term, *Hunter v. Shell Oil Co.*, 211 La. 893, 31 So.2d 10 (1947); *LeBlanc v. Danciger Oil Co.*, 218 La. 463, 49 So.2d 855 (1950); *Delatte v. Woods*, 232 La. 341, 94 So.2d 281 (1957). However, when the same factual situation is presented but the property is encumbered by a servitude rather than a lease, the interruption of prescription is limited to the servitude on that portion of the tract included within the unit, *Childs v. Washington*, 229 La. 869, 87 So.2d 111 (1956); *Jumonville Pipe and Machinery Co. v. Federal Land Bank*, 230 La. 41, 87 So.2d 721 (1956).

16. *Exchange National Bank v. Head*, 155 La. 309, 316, 99 So. 272, 274 (1924) ("it indubitably follows that the only right which was conveyed . . . under the oil lease was a right of servitude"); *Vander Sluys v. Finrock*, 153 La. 175, 180, 103 So. 730, 732 (1925) ("an oil and gas lease, quoad the land, is an incorporeal thing, a real right or servitude"); *Wiley v. Davis*, 164 La. 1090, 1092, 115 So. 280, 281 (1928) ("the granting of a mineral lease on property is the granting of a servitude thereon"); *Arent v. Hunter*, 171 La. 1059, 1072, 133 So. 157, 161 (1931) ("thus a mineral lease conveys to the lessee nothing more than a servitude on the lands covered thereby"); *Federal Land Bank v. Mulhern*, 180 La. 627, 636, 157 So. 370, 373 (1934) ("these oil and gas leases were in the nature of servitudes on the property").

17. 186 La. 190, 171 So. 846 (1936).

18. The distinction recognized by the common law is well stated in a Texas case, *Danciger Oil & Refining Co. v. Powell*, 137 Tex. 484, 491, 154 S.W.2d 632, 635 (1941): "But the most essential difference [between a lease and a deed] is the fact that the predominating purpose of a lease is to secure the exploitation and development of the property for the purposes set out in the lease. Often the consideration paid to the lessor as a down payment is very small, and it is evident that the main purpose in granting the lease is the lessor's desire to have his land promptly explored, and thoroughly and diligently developed, with the hopes of receiving more handsome returns in royalties. . . . On the other hand, conveyances of minerals are frequently actuated by a motive of investment on the part of the grantee and the cash consideration or other down payment is the moving cause for the conveyance by the grantor."

search for oil and gas is the same in both cases,¹⁹ the consideration for the grantor's promise differs. When a landowner grants a mineral lease his usual purpose is to secure the development of the premises.²⁰ Although he profits from the receipt of a bonus and rentals, the main profit is derived from royalties received through exploration and development. Therefore, courts have presumed that the lessor bargained primarily for production and have imposed certain implied duties on the lessee to secure that production.²¹ On the other hand, since a servitude is the result of a sale, the consideration for the vendor's promise is the price.²² Therefore, it would appear that whether a particular contract is a lease or a servitude hinges on a determination of the intent of the parties. It is submitted that if the purpose of the conveyance is to have the land explored and developed, the contract is a lease and the lease rules should apply. However, if the intention of the grantor is to procure the price for the transfer, the contract would seem more likely to be a servitude.

The Reversionary Right

When mineral rights are sold, the servitude will return to the land after ten years if nothing occurs to interrupt, suspend, or extend the prescription.²³ Therefore, when a landowner sells minerals the possibility exists that the mineral rights will eventually return to the land. This prospect has come to be known as the reversionary right, reversion, or reversionary interest.²⁴

19. See DAGGETT, MINERAL RIGHTS IN LOUISIANA 15 (rev. ed. 1949).

20. "[T]he main consideration of [a mineral lease] is the development of the land for oil and gas." *Caldwell v. Alton Oil Co.*, 161 La. 139, 142, 108 So. 314, 315 (1926). In order for a lease to be maintained beyond its primary term there must be more than mere production; the production must afford a net profit to the lessee and adequate consideration for the lessor. *Wier v. Grubb*, 228 La. 254, 82 So.2d 1 (1955).

21. The most important of these covenants are the covenants of protection, production, and marketing. See MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES (2d ed. 1940).

22. LA. CIVIL CODE art. 2439 (1870): "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself."

23. Prescription can be *interrupted* by user: *Lee v. Giaouque*, 154 La. 491, 97 So. 669 (1923); *Keebler v. Seubert*, 167 La. 901, 120 So. 591 (1929); or by express acknowledgment: *Nabors Oil and Gas Co. v. Louisiana Oil Refg. Co.*, 151 La. 361, 91 So. 765 (1922); *James v. Noble*, 214 La. 196, 36 So.2d 722 (1948); *Haynes v. King*, 219 La. 160, 52 So.2d 531 (1951). Prescription may be *extended* for the duration of a lease term if the lease is jointly executed by the landowner and the servitude owner. *Achee v. Caillouet*, 197 La. 313, 1 So.2d 530 (1941). Prescription may also be suspended by an obstacle which prevents exercise of user. *Boddie v. Drewett*, 229 La. 1017, 87 So.2d 516 (1956).

24. DAGGETT, MINERAL RIGHTS IN LOUISIANA 134 (rev. ed. 1949); Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Min-*

Under Louisiana civil law there is no other land tenure than perfect and imperfect ownership.²⁵ Therefore, the reversionary right differs from the common law future interest of reversion, which is a separate estate in land.²⁶ It appears that in order to avoid confusion between this right in Louisiana and the common law reversion, the jurisprudence tends to favor calling the right a reversionary right rather than a reversion or reversionary interest.

An early decision declared, in dicta, that the reversionary right was a certain object, capable of being sold.²⁷ Despite this dicta, subsequent decisions refused to recognize the validity of a *reservation* of a reversionary right in a sale of land, usually on the ground that one could not reserve that which he did not own.²⁸ However, the jurisprudence gave an impression that a *sale* of a reversionary right would be valid if two limitations were imposed: (1) if prescription were deemed to run from the date of the sale rather than the date the interest vested, and (2) if the object sold were specifically labelled "reversionary right."²⁹

If prescription on the reversionary right were held not to run until the interest vested, the following situation could arise: A landowner could sell minerals to X and then sell to X his reversionary right. When X's servitude prescribed, the reversionary right would vest and a new ten year mineral right would be in effect. There would be nothing to prevent a landowner from selling successive reversionary rights to the same person, thereby

eral Law Committee of the Louisiana State Law Institute, 25 TUL. L. REV. 30, 182 (1951).

25. Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 43 So.2d 782 (1949).

26. MOYNIHAN, A PRELIMINARY SURVEY OF THE LAW OF REAL PROPERTY 45 (1940).

27. "It is clear that the reversionary mineral interest of the owner of the fee simple is 'a certain object,' which can be legally sold." Gailey v. McFarlain, 194 La. 150, 157, 193 So. 570, 573 (1940). However, the court found that the landowner had not, in fact, conveyed the reversionary right. See also St. Landry Oil and Gas Co. v. Neal, 166 La. 799, 118 So. 24 (1928) (if a vendor who had no title to that which he sold acquires ownership prior to the institution of suit by his vendee, title enures to the vendee automatically; but if title is acquired by vendor after suit but before judgment, vendee has option to take title or continue with suit); Gayoso Co. v. Arkansas Natural Gas Corp., 176 La. 333, 145 So. 677 (1933) (although landowner did not own minerals when he granted lease, minerals reverted to him and the lease was therefore valid).

28. Liberty Farms v. Miller, 216 La. 1023, 45 So.2d 610 (1950) (one may not reserve reversionary rights to minerals when he is not the owner of the minerals at the time the reservation is made); McMurrey v. Gray, 216 La. 904, 45 So.2d 73 (1949) (same). See also McDonald v. Richard, 203 La. 155, 13 So.2d 712 (1943); Gulf Refining Co. v. Orr, 207 La. 915, 22 So.2d 269 (1945).

29. See DAGGETT, MINERAL RIGHTS IN LOUISIANA 140 (rev. ed. 1949).

defeating the ten year prescriptive limitation.³⁰ However, if prescription on the reversionary right were held to run from the date of its sale, then the interest would be in existence for no more than ten years in the absence of some act to interrupt, extend, or suspend prescription. In other words, the ten year limitation would not be violated by allowing prescription to run from the date of sale rather than the date of vesting.

The idea that a specific label of "reversionary right" would help the validity of the sale could have been deduced from dicta in the jurisprudence.³¹ The rationale behind this idea was that, while attempts to have a sale of minerals declared to encompass a sale of the reversionary right had failed,³² since the thing being conveyed was actually a reversionary right, those specific words would promote recognition of the sale of the right.

The precise issue of the validity of a sale of a reversionary right was presented to the Supreme Court in *Hicks v. Clark*³³ in 1954. It was there held that even if the object sold were labelled "reversionary rights" and even if prescription on the right were deemed to run from the date of the sale the transaction would be void as contrary to the public policy that mineral rights must lapse in ten years if nothing occurs to interrupt, suspend, or extend the prescription. Therefore, in order to understand the reason for the rejection of the reversionary interest as an article of commerce, an investigation must be made into the public policy.

The Public Policy

It has been stated that the public policy emanates from the civilian concept that immovables are not to be so encumbered as to be kept from commerce for long periods of time.³⁴ The most recent statement of the Supreme Court on the policy is: "the right to explore for oil, gas, and other minerals in the absence of use reverts to the land in a period of ten years."³⁵ It is apparent that the word "use" in the statement is meant to cover the situations where there is interruption by user or acknowl-

30. See 1A SUMMERS, THE LAW OF OIL AND GAS 357 (perm. ed. 1954).

31. See note 27 *supra*.

32. *Liberty Farms v. Miller*, 216 La. 1023, 45 So.2d 610 (1950); *McMurrey v. Gray*, 216 La. 904, 45 So.2d 73 (1949). See also *Dees v. Hunt Oil Co.*, 123 F. Supp. 58 (D.C. La. 1954).

33. 225 La. 133, 72 So.2d 322 (1954).

34. DAGGETT, MINERAL RIGHTS IN LOUISIANA 16 (rev. ed. 1949).

35. *Hicks v. Clark*, 225 La. 133, 141, 72 So.2d 322, 325 (1954).

edgment, suspension by an obstacle, and extension by a joint lease, because these situations have been found not to violate the policy.³⁶ In the case of an acknowledgment or extension of prescription, as well as a sale of a reversionary right, the mineral rights are kept from the land for more than ten years.³⁷ However, neither acknowledgment nor extension has been held to violate the policy, whereas a sale of a reversionary right is such a violation. Therefore, it appears that the purpose of the policy is more than a requirement that mineral rights return to the land in ten years. It is submitted that the principal benefit derived from the policy is simplicity of titles.

Economic stability is promoted by security in transfers of land. There are several factors which make this security difficult to maintain in the oil and gas industry: changes in ideas of the nature of the minerals,³⁸ the frequency of transfer of oil and gas interests,³⁹ the transfer of fractional rights,⁴⁰ and the fact that the types of contracts dealing with mineral rights are limited only by the ingenuity of the authors.⁴¹ By requiring a periodical return of mineral rights to the land, title simplicity, and hence security, is promoted.

36. See note 23 *supra*.

37. Of course, interruption of prescription by user and suspension of prescription because of an obstacle will keep the mineral rights away from the land for more than ten years. However, for the sake of simplicity, the acknowledgment and extension situations will be used as examples. However, the same principles apply because the effect of interruption by user and suspension by an obstacle is to extend the life of the existing mineral servitude, whereas the sale of the reversionary right introduces an entirely new interest into the mineral title.

38. Originally, oil and gas were thought to flow freely beneath the ground. See *Higgins Oil and Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206 (1919). It was later believed that the lateral movement was confined within certain bounds, and was sluggish even within those bounds. See note 10 *supra*. The most recent discovery of note seems to be the realization that pressure reduction is wrought over an extensive area by a single well and that, therefore whereas drainage is not as fluid as originally conceived, the effect of a single well is more far reaching than thought. See *Craze & Glanville, Well Spacing*, FIFTH ANNUAL MINERAL LAW INSTITUTE 68 (1957).

39. See *SEC v. Joiner Leasing Corp.*, 320 U.S. 344 (1943), wherein the Supreme Court of the United States recognizes the fact that the promiscuity of transfers of oil and gas interests is a necessary stimulant to the industry.

40. Professor Daggett points out that interests as small as 1/200,000 have been conveyed in some sections of the United States and that contracts are in existence in Louisiana containing fractional interests of 119,317/5,000,000 and 3,340,909/11,000,000. DAGGETT, *MINERAL RIGHTS IN LOUISIANA* 269 (rev. ed. 1949).

41. For instance, there are servitudes, leases, royalties, oil payments, production payments, carried interests, farmouts, subleases, assignments, overriding royalties, casinghead royalties, top leases, and nonparticipating mineral interests, to name a few familiar ones. The modern lease may contain, inter alia, a granting clause, Mother Hubbard clause, habendum clause, rental clause, clauses for implied covenants, assignment clause, pooling clause, and a force majeure clause. For the best example of the exercise of ingenuity the reader is directed to any unitization agreement.

Of necessity, some confusion has been wrought by the adoption of the policy limitation. However, it appears that the security of titles brought about by the policy outweighs any confusion engendered by it. This is shown by comparison with common law states, which have found their land titles in considerable disorder.⁴²

If title simplicity is the basis of the policy, then it would follow that to allow a reversionary right to become an article of commerce would violate that simplicity while neither an acknowledgment nor extension of prescription would be such a violation. The fact that a sale or reservation of a reversionary right would upset title simplicity is best illustrated by hypothesis:

(1) *A*, the landowner, sells minerals to *B*. *A* then sells the land to *C*, reserving to himself a reversionary right. If the reversionary right were held valid both *B*'s servitude and *A*'s reversionary right would have to prescribe before the mineral rights returned to the land. Thus the land would be burdened by two mineral interests, thereby unnecessarily complicating the title. The complexity would be furthered if *C* transferred his ownership in the land, reserving a reversionary right, or merely transferred his reversionary right to the minerals.

(2) Landowner, *A*, sells minerals to *B*. Then landowner sells his reversionary right to *C*. The land is then sold to *D*. If the reversionary right were held valid both *B*'s servitude and *C*'s reversionary right would have to prescribe before the mineral rights would return to the land, thereby unnecessarily complicating the title. Both *C* and *D* would have a reversionary right which could be conveyed. The example would be further complicated if *A* had reserved a reversionary right when the land was sold to *D*. There would then be three reversionary rights.

(3) Landowner, *A*, sells minerals to *B* and then sells a reversionary right to *C*. Even if *A* remained owner of the land the title would be complicated by the fact that the land would be subject to two mineral interests. Further, there is no assurance that *C*'s reversionary right will ever vest and his transferees, like *C*, would own little more than a speculation — an unstable situation in property law. Also, there is no certainty that *A* would remain the landowner. He could add to the title confusion

42. WILLIAMS, MAXWELL, & MEYERS, CASES AND MATERIALS ON THE LAW OF OIL AND GAS 27 (1956).

by transferring the land and reserving a reversionary right. There would then be three reversionary rights: *A*'s, *C*'s, and the one belonging to the new landowner. This would obviously complicate the title.

(4) Landowner, *A*, sells minerals to *B* and then sells *B* a reversionary right. In this situation title simplicity does not seem to be violated as much as in the others because the transactions take place between the landowner and the owner of the outstanding mineral rights. There is some belief that a second sale of minerals will be allowed in this situation by means of the doctrine of after-acquired title.⁴³ However, it would appear illogical to allow a sale of minerals in this situation when a sale of a reversionary right has been held to violate public policy. There would also be administrative difficulties because there would be no assurance that *A* would not sell the land and reserve a further reversionary right, or retain ownership of the land and transfer a further reversionary right to a third person. In either case title simplicity would suffer.

On the other hand, the acknowledgment and extension situations do not create the same confusion of ownership as does the sale or reservation of the reversionary right. An acknowledgment takes place only between the landowner and the owner of the outstanding mineral rights; no third party can be involved in the situation. Also, when an acknowledgment is effected there is no question of a speculative interest which may or may not vest in the future because the interruption of prescription is wrought immediately. The same applies to the extension: it is always brought about by agreement between the landowner and the servitude owner and there is no speculative future interest. In other words, an acknowledgment or an extension of prescription would not seem to create a new burden on the mineral title because each is a continuation of an existing right. However, a sale of a reversionary right does introduce into the title an entirely new right, outside of the outstanding mineral interests. It is therefore more of a burden on the title than the acknowledgment or extension. It appears that for this reason the sale of a reversionary right violates public policy.

43. See Comment, *Mineral Rights and After-Acquired Title*, 18 LOUISIANA LAW REVIEW 312 (1958).

Validity of the Top Lease

Although the top lease has apparently been recognized,⁴⁴ its validity has never been put in issue in the appellate courts. This seems curious in view of the rejection of the sale of the reversionary right. In the case of a top lease, a landowner grants a second lease while a first lease is still in existence. In the case of a reversionary right, a landowner sells his reversionary right while the land is encumbered by a prior servitude. The top lease has not been challenged, whereas a sale of a reversionary right has been declared invalid.

The reason for the rejection of the reversionary right as an article of commerce is the public policy that minerals must return to the land within ten years in the absence of interruption, suspension, or extension of prescription. Therefore, in order for a top lease to be valid, two questions must be asked: whether a lease (or top lease) is subject to the public policy and, if so, whether a top lease will violate the policy.

The question of whether or not a mineral lease is subject to this policy is actually an inquiry into whether or not a lease is subject to the same prescriptive limitation as the servitude. Although no case has been decided on the matter, most text writers conclude that the lease will be subject to some kind of ten year limitation.⁴⁵ From a practical standpoint, a failure to subject the mineral lease to a ten year limitation would upset the title simplicity brought about by public policy. Since title simplicity is so difficult to achieve in oil and gas conveyancing,⁴⁶ security in transfers of mineral interests would be nearly impossible if the policy limitation were not applied to the lease. Therefore, it seems reasonable to assume that the oil and gas lease will be so limited. Of course, if the lease is held subject to the limitation, the same would hold true for the top lease.

The probable reason that the validity of the top lease has

44. See note 5 *supra*.

45. DAGGETT, *MINERAL RIGHTS IN LOUISIANA* 16 (rev. ed. 1949). Risinger, *Does 10-Year Liberative Prescription Apply to Oil and Gas Leases?*, 1 LA. B.J. 39 (1954), contends that the mineral lease may have already been held subject to the ten-year prescription, citing especially *Arent v. Hunter*, 171 La. 1059, 133 So. 157 (1931). Yancey, *Mineral Lease—Lease or Servitude?*, 1 LA. B.J. 48 (1954), illustrates lines of logic which the court might follow in holding a mineral lease subject to prescription. For an excellent discussion of the so-called "long term predial lease" see Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 25 TUL. L. REV. 30, 172 (1951).

46. See page 307 *supra*.

never been questioned is that situations are rare in which a top lease keeps the right to explore from the land for more than ten years. Normally, mineral leases are not granted for long terms. A possible reason is that a lessor may not want his mineral rights tied up for an extended period, and a lessee may not want to obligate himself to pay rentals for more than a short term. Therefore, even though a top lease will be a further encumbrance on the mineral rights, the burden will not normally exist for a long time. This fact alone does not justify existence of the top lease. However, the public policy is stated in terminology indicating that there will be no violation thereof unless the mineral rights are kept from the land for more than ten years.⁴⁷ Therefore, any attack on the top lease on the ground that it violates the policy must be based on the idea that more than a ten year burden is imposed on the minerals.

As to the matter of title simplicity, it must be conceded that the top lease will complicate titles to some degree because it is a further encumbrance on the mineral rights. However, it does not seem to be as objectionable to title simplicity as the reversionary right because the top lease would be used less extensively. For instance, a sale of a reversionary right would be a speculative investment because the purchaser would not be certain that the interest would ever vest. However, in no case would the purchaser stand to lose more than he invested. On the other hand, a lessee assumes various obligations along with his contract which would fall to the top lessee if the drilling right vested. Among these is the covenant to drill an offset well, which is implied in every lease. If a person realizes that he might be required to drill an oil well because of his speculation, he will be less likely to speculate. Hence there is less likelihood of a multiplicity of top leases, as in the reversionary right situations. It follows that, as a practical matter, a recognition of the validity of the top lease will not disrupt title simplicity as much as in the case of a sale of a reversionary right.

Summary

Public policy requires a periodical return of mineral rights to the land in the absence of some occurrence which lengthens the life of the mineral rights. A primary basis for this ten year policy limitation seems to be the fact that it maintains title

47. See page 306 *supra*.

simplicity and therefore aids security in oil and gas conveyancing. A sale or reservation of a reversionary right seems objectionable to this policy because it disturbs title simplicity.

A top lease is analogous to a sale of a reversionary right. However, its validity has never been questioned in the appellate courts. A probable reason for this is the manner in which the lease contract is used. Since mineral leases usually have short terms, the mineral rights normally will not be kept from the land for more than ten years. And since, by its nature, the top lease would not be used as extensively as a sale of a reversionary right, title simplicity would not seem to be disrupted. Therefore, even though it would seem conceptually inconsistent to recognize a top lease while refusing to allow a sale of a reversionary right, such an inconsistency could be justified on practical grounds.

John B. Hussey, Jr.

Mineral Rights and After-Acquired Title

The only person capable of conveying title to property is the owner.¹ However, when a vendor sells property which he does not own and later acquires title, ownership vests in the vendee.² This doctrine, known as after-acquired title, does not appear in the Civil Code, but has been developed in the jurisprudence as a means of enforcing the vendor's warranty against eviction.³ The

1. LA. CIVIL CODE art. 2452 (1870): "The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person."

2. *St. Landry Oil Co. v. Neal*, 166 La. 799, 118 So. 24 (1928); *Wolf v. Carter*, 131 La. 667, 60 So. 52 (1912); *Bonin v. Eyssaline*, 12 Mart. (O.S.) 185 (1822). See Comment, 23 TUL. L. REV. 533, 541 (1949). See also Comment, 15 TUL. L. REV. 115, 121 (1940).

3. *Wells v. Blackman*, 121 La. 394, 46 So. 437 (1908); *Bonin v. Eyssaline*, 12 Mart. (O.S.) 185 (1822). The jurisprudence heretofore has been concerned only with situations where warranty has been express or implied, but it would seem that the doctrine should apply when there has been an exclusion of warranty, if the purchaser had no knowledge of the danger of eviction. See *Waterman v. Tidewater Assn.*, 213 La. 588, 35 So.2d 225 (1948); *Rapp v. Lowry*, 30 La. Ann. 1272 (1878). See also Comment, 23 TUL. L. REV. 533, 542 (1949), where it is stated: "However, it appears that the doctrine should also be applied where the vendor is liable only for restitution of the purchase price." The doctrine of after-acquired title would also be applicable to a sale where warranty was express or implied even if the purchaser had knowledge of the danger of eviction but did not purchase at his risk and peril. See LA. CIVIL CODE arts. 2500-2519, 2453 (1870).

It has been held that the doctrine of after-acquired title does not apply to a sale by quitclaim deed. *Waterman v. Tidewater Assn.*, 213 La. 588, 35 So.2d 225 (1948). Historically, the purpose of a quitclaim deed was to release any interest the vendor had in the property and any acquisition of title by the vendee was only