Private Law: Mineral Rights

George W. Hardy III
dict prior to her death and the curator had filed a provisional account (including a doctor's bill) which was approved and homologated by the district court. This account was not rendered contradictorily with anyone, nobody had been notified, there was no proof and no hearing. Such an account is not res judicata, and did not interrupt the prescription which ran against part of the doctor's claim for services. A minority of the court would have granted a rehearing to consider whether there had been a suspension of the running of time between the start of the interdiction suit and the appointment of a curator. This is not mentioned expressly in the official opinion of the court, but a negative answer is necessarily implicit. The prescription in this case was running against the doctor and not against the interdict, but since there is so little material on this particular point, it would have been useful to have a good discussion and open treatment of the question whether during this period the doctor had any avenue of recourse which he had failed to exercise.

MINERAL RIGHTS

George W. Hardy, III*

MINERAL LEASES

Implied Covenants

Kimbrough v. Atlantic Refining Co.\(^1\) raises the question of the applicability of the implied covenant of diligent development under an agreement compromising a dispute over lease development. One producing well had been drilled on plaintiffs' lease. As a result of a demand for further development a compromise agreement was executed. Defendant lessee agreed to release all but ninety acres of the leased tract. The agreement also provided that lessee would be free of further development obligations, except to protect against drainage, and that the lease would remain in force as to the retained acreage "so long as production is being obtained from said tract."\(^2\)

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1. 152 So. 2d 412 (La. App. 1st Cir. 1963).
2. The pertinent portion of the agreement in question reads as follows: "In consideration for the partial release so granted by Atlantic, lessors acknowledge that said mineral leases are and shall remain in full force and effect insofar as
The original well had been producing a rim of oil under pressure from a gas cap. When it became clear that the oil rim was about to be depleted, the Commissioner of Conservation established a unit with boundaries including only part of the retained tract, reclassified the sand as a gas sand, and designated a well at the top of the structure as the unit well. The original well was shut in upon depletion of the oil rim, and it is clear that continued production from it would have resulted in improper withdrawal of the gas cap, damaging chances for optimum recovery. Lessors received their full share of royalty from the unit well.

Plaintiffs brought suit for cancellation of the lease as to the acreage outside the unit, contending that there was no producing well on the premises as contemplated by the agreement and there had been no further development in accordance with lessee's implied obligation.

The Court of Appeal for the First Circuit held that the compromise agreement did not require that production maintaining the lease as to the retained acreage be from a well located on the lease premises but only that there be production from the tract. Under R.S. 30:10A(1) (b) that portion of production allocated to a tract included in a forced unit is considered as having been produced from a well thereon. Therefore, reasoned the court, lessee being subject to no other development obligation under the terms of the agreement, the production in question maintained the lease on the retained acreage in its entirety. The court added that even if the agreement required production from a well physically located on the tract, unit production would still constitute production from the tract and would relieve defendant of any development obligation, citing Delatte v. Woods, Hunter Co. v. Shell Oil Co., and Landry v. Flaitz. Writs the retained tract described in the preceding paragraph is concerned so long as production is being obtained from said tract or Atlantic is conducting operations in an effort to restore such production pursuant to the terms of said contract; and it is agreed specifically by lessors that Atlantic shall be free of any development demands or obligation in connection with the tract so retained under the terms of said leases and, therefore, shall not be required to drill any additional wells on said tract, unless the drilling of such additional well may be required to comply with the offset requirements of said leases.” Kimbrough v. Atlantic Refining Co., 152 So. 2d 412, 413 (La. App. 1st Cir. 1963).

3. LA. R.S. 30:10A (1) (B) (1950): “The portion of the production allocated to the owner of each tract included in a drilling suit formed by a pooling order shall, when produced be considered as if it had been produced from his tract by a well drilled thereon.”

4. 232 La. 341, 94 So. 2d 281 (1957).

5. 211 La. 893, 31 So. 2d 281 (1947).

6. 148 So. 2d 360 (La. App. 1st Cir. 1962). This decision was later reversed.
were refused by the Supreme Court with the notation: "The result is correct." 7

There can be no question that under ordinary circumstances the entirety of a lease containing no Pugh Clause is maintained by production from a unit well, even though it is located off the leased premises. 8 Applicability of this principle was questioned by lessor in this case on the ground that the compromise agreement waiving further development was executed with reference to a well on the retained acreage. From this it was reasoned that to maintain the lease without obligation to further develop the retained tract, production had to be from a well located on the premises.

From the facts it appears that the unit well was established to complete production of the horizon known and contemplated by the parties at the time of their agreement. Therefore, the holding that under the agreement production from the unit well maintained the lease without need of further development seems correct. The production, legally speaking, is as if it came from the original well. Extraction through the unit well is solely for good engineering purposes.

Despite the correctness of the decision on its specific facts, there is a danger that similar agreements might be construed in the future to have waived the diligent development obligation as to all sands. Suppose that the unit established by the Commissioner had been for a sand different from that originally being produced and had included only one or two acres of the retained area. Would the implied covenant be inoperative? It seems that it should not. It is true in such a case that the production involved is, legally, "production from the tract." However, it is from a sand not known and not within contemplation of the parties at the time of the execution of their agreement. Therefore, the development obligation should not be read out of the lease as to newly discovered sands.

This decision should not be held to limit the established jurisprudence as to diligent development, or further exploration, as is sometimes the case, nor should it be extended to situations involving new sands. Nevertheless, the result suggests that

by the Supreme Court, 157 So. 2d 892 (La. 1963).
those drafting or entering into agreements of this kind may have to be specific about the extent of any waiver of the development obligation in order to protect against possible misconstruction of the instrument.

*McDonald v. Grande Corp.* presents two interesting problem areas: determination of what acts or events will terminate a declared unit, and the duty of fair dealing between lessee and lessor. Plaintiff appealed from a summary judgment denying his demand for cancellation of a mineral lease held by defendant. Under the pooling clause, defendant had formed a 160 acre unit, concomitantly executing an operating agreement with other working interest owners in the unit. Drilling operations resulted in a dry hole.

Subsequently the lessees in the unit terminated their operating agreement. Under the terms of unrecorded instruments effecting this termination, each lessee could apparently drill his own tract and retain the entire working interest share of production. In the event defendant drilled its tract, it was obligated to pay royalty to all of the lessors in the previously declared unit. However, there was no reciprocal obligation on the part of the other lessees to make payment to plaintiff in the event there were successful drilling operations on any of their own tracts.

Defendant ultimately drilled a producing well on plaintiff's property. Division orders were circulated showing participation among the royalty owners according to the unit declaration. Plaintiff refused to sign, contending that the well was a "lease" well and that he was entitled to all of the lessor's share of production. Demand for payment was made on defendant lessee and refused. Plaintiff sued for cancellation.

Defendant's motion for summary judgment stemmed from the fact that plaintiff had demanded only cancellation. Defendant urged that as the law in Louisiana is unclear concerning the termination of units of this kind, it acted in good faith in refusing to make payment of the entire lessor's share of royalties to plaintiff.

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10. The statement that these documents were unrecorded deserves some clarification in that they were ultimately recorded, but only approximately ten and one-half months after their execution and six weeks after institution of suit by plaintiff.
Plaintiff made two arguments against defendant’s contention that its good faith should prevent cancellation. The declaration had recited that it was executed in part for the purpose of securing “to each of the parties hereto its fair share of the gas and gas condensates produced from the unitized property.” Upon disclosure of the fact that part of the unitized acreage was unproductive, plaintiff argued, the unit was obviously terminated, and lessee was therefore arbitrary in failing to meet the demand for payment. The court of appeal tentatively rejected this argument, stating that “it is probable that he [plaintiff] would not be entitled to the relief sought, since we could not say that the lessee acted in clear violation of the terms of the lease.”

Plaintiff’s second argument was that defendant had viewed the unit as terminated insofar as its own interest was concerned and had thus dealt unfairly with plaintiff’s interest in executing the unrecorded instruments outlined above.

The court noted the fact that the unrecorded agreements provided for payment of the lessor’s share of royalties according to the unit declaration only if production were achieved from operations by defendant on plaintiff’s property. Although the lessors of other tracts were protected, defendant had failed to procure similar protection for its own lessor. Judge Tate saw this failure to extricate the lessor from a unit evidently considered uneconomic from the lessee’s standpoint as a possible breach of an implied obligation or duty of fair dealing legally imposed upon the lessee. Prior decisions involving exercise of the pooling power were interpreted as establishing the principle that exercise of that power is subject to “such restrictions as will prevent arbitrary and unfair dealings and as will therefore enforce a ‘standard of good faith’ on the part of mineral lessee.” The lessee operates under a duty to exercise the power to secure the greatest possible ultimate return to the landowner, and it must act with the good faith intention of serving lessor-landowner’s interest, or at least must refrain from acting to his detriment.

As pointed out in this survey last year, there is increasing

12. Mallett v. Union Oil & Gas Corp., 232 La. 157, 94 So. 2d 16 (1957); Union Oil Co. of California v. Touchet, 229 La. 316, 86 So. 2d 50 (1956); Wilcox v. Shell Oil Co., 226 La. 417, 76 So. 2d 416 (1954).
utilization of what might be termed a fiduciary principle in oil and gas law.\textsuperscript{14} This case, in essence, appears to take note of the fact that the pooling power is in the nature of a mandate or agency and therefore requires that a lessee deal with his lessor's interest accordingly. As the case is not yet finally decided, however, no extended commentary is appropriate.

\textit{Express Clauses}

\textit{Greene v. Carter Oil Co.},\textsuperscript{15} involves interpretation of a lease containing a clause stipulating that for the computation of “rentals and royalties based upon acreage” the tract “shall be deemed to comprise exactly 82.5 acres whether there actually be more or less.” The leased acreage was included in two separate drilling and production units. The third party purchaser of the unit production circulated division orders showing plaintiff's participation figures based upon a total acreage in the tract of 70.24 acres. Plaintiff refused to sign the division orders and also rejected a formal tender by the purchaser on that acreage basis, contending that he should be paid royalties according to the stipulated figure.

Initially, the court pointed out that as plaintiff had sought only cancellation of the lease, it might be that the case could be disposed of solely upon a question of whether a good faith dispute existed between lessor and lessee.\textsuperscript{16} However, the court deemed it best to render a decision on the issues presented.

Accordingly, it was decided that the royalty payments should be made on the basis of the actual acreage included in the two units. In reaching its conclusion the court viewed the phrase “royalty based upon acreage,” used in fixing the estimated acreage figure in the granting clause, as being synonymous with and referring to “acreage-based royalty” in the shut-in and force majeure clauses and the various references thereto in other parts of the lease. Thus, these “royalties based on acreage” were distinguished from production royalties.

The court's decision is clearly consistent with the general

\textsuperscript{15} 152 So. 2d 611 (La. App. 2d Cir. 1963), \textit{writs denied}, 244 La. 621, 153 So. 2d 414 (1963).
\textsuperscript{16} Green v. Carter Oil Co., 152 So. 2d 611, 615 (La. App. 2d Cir. 1963). Bolin, J., concurred in the result but dissented on the ground that the case should have been disposed of because of the presence of a good faith dispute between lessor and lessee, 152 So. 2d 611, 619 (La. App. 2d Cir. 1963).
intent of this type of stipulated acreage figure. It provides a fixed basis for payment of delay rentals, shut-in payments and similar payments computed purely on a per acre basis which may have to be made to maintain the lease in force. Particularly in the case of delay rentals, these payments may have to be made at a time when there has been no survey of the leased premises and the exact acreage is unknown. The stipulated figure avoids any possible argument as to the correctness of rental or other payments because of a mistake in determination or lack of any information concerning exact acreage.

Production royalties, however, represent a share of production or its economic value and are subject to exact measurement upon extraction. The fact that the lessor’s share of production had to be computed by use of an acreage figure does not change the nature of the royalty; it is merely a necessary element in calculating the amount of lessor’s share of the product. Where geological, geophysical, and engineering data permit, unit participation is often calculated on a volumetric basis. Use of an acreage factor is simply another method of computing the volume of product belonging to lessor.

_Landry v. Flaitz,_ decided within the past term by the First Circuit,\(^17\) has since been reversed by the Supreme Court.\(^18\) Therefore, the latter opinion is discussed. Approximately two months prior to termination of defendant’s lease, a well offsetting plaintiff’s property was completed by another operator as an oil producer and shut in. As a condition of the permit for this well it was provided that no allowable would be issued for it until formation of a unit in accordance with Statewide Order #29-E.

One day before expiration of the primary term, a unit was formed including a portion of the leased acreage. An allowable was applied for and secured one week after the expiration date, effective two days after the expiration date.

Defendant lessee was contending that issuance of the conservation order establishing the unit including part of the lease maintained it in force. The court, consistently with prior decisions,\(^19\) held that the order did not satisfy the requirement of the

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17. 148 So. 2d 360 (La. App. 1st Cir. 1962).
18. 157 So. 2d 892 (La. 1963).
19. Cases cited by the court were Davis v. Laster, 242 La. 735, 138 So. 2d 558 (1962) and Cox v. Acme Land & Investment Co., 192 La. 688, 188 So. 742 (1939). A more direct holding on this point, however, is Smith v. Sun Oil Co., 172 La. 655, 135 So. 15 (1931). None of these cases involved directly the effect
habendum clause that there be production at termination of the lease to extend it beyond the primary term. This result would, of course, have followed in Louisiana even if the oil well had been on the leased premises—unless the shut-in clause were made applicable to both oil and gas wells.  

Defendant further argued that the condition of the drilling permit prohibiting issuance of an allowable until establishment of a unit constituted a force majeure under the terms of the lease, precluding production for a period running beyond the expiration date because of necessary administrative delays in forming the unit and securing an allowable. The record seems quite clear that the delays involved in applying for a hearing, awaiting an order, and then requesting an allowable were necessary administrative delays and that formation of the unit and obtaining an allowable had been carried out with diligence on the part of those in interest.

The Supreme Court, however, rejected defendant's argument, relying heavily on a conservation official's testimony that a temporary unit could have been formed in this instance and a temporary allowable secured at any time within twenty-four hours after completion and shutting in of the well. Therefore, it was held that there was no obstacle to production and thus no force majeure.

This decision is certainly one which could have fallen to either party. One cannot quarrel with the court's opinion, though it is a hard one for the lessee. This is a situation in which no development had taken place on the lease during the three years of its primary term, and lessee was attempting to take advantage of a well drilled off the premises to extend his lease. The decision is, therefore, harmonious with similar prior cases in which the court has been quite strict with lessees attempting to extend their leases by exercise of the pooling power.

It should be observed that if the factual situation in this case of a conservation order establishing a unit including part of the acreage subject to lease. However, it seems that this situation should be no different from the location of a shut-in oil well on the premises. Although the area of the lease included in the unit constitutes a "developed area" under La. R.S. 9B (1950), this fact does not satisfy the requirement of production under the habendum clause.

21. See, for example, Mallett v. Union Oil & Gas Corp., 232 La. 157, 94 So. 2d 16 (1957); Wilcox v. Shell Oil Co., 226 La. 417, 76 So. 2d 416 (1954).
had not permitted issuance of a temporary allowable, there is at least a basis for implication that the force majeure argument would have been successful.

_Wehran v. Helis_22 contains three lease interpretations which may be briefly noted. First, the Fourth Circuit Court of Appeal construed a lease providing for a primary term running “from” the date of execution as excluding the date of execution from computation of the term.

Second, the operation of a dredge over the well site was deemed not to constitute the placing of materials to be used in drilling the well on the premises. Thus, operations were not commenced within the meaning of the lease by presence of the dredge. This holding suggests that lease draftsmen might revise their definitions of “commencement of operations” to meet the peculiar requirements of waterbottom operations.

The third issue was raised by a drilling clause providing for continuation of the lease beyond the primary term in this manner: “If at the expiration of the primary term, oil, gas or other mineral is not being produced . . . but lessee is then engaged in drilling or reworking operations . . . or lessee shall have abandoned a dry hole thereon, or production previously had on the premises shall have ceased for any cause, within sixty days prior to the end of the primary term.” Lessor contended that this clause required that drilling operations be initiated more than sixty days from the end of the primary term to extend the lease by that means. Despite the fact that the phrase “within sixty days prior to the end of the primary term” was set off by a comma from the disjunctive series which preceded it, which lessor argued indicated an intent that it modify all elements of the series, the court refused to accept lessor’s interpretation. The provision that the lease was to continue beyond term if lessee was “then” engaged in drilling was deemed to negate the lessor’s argument. This is consistent with the plain meaning of the clause; indulgence in technicalities would have avoided the intent of the parties in this instance.

_In Texas Gulf Producing Co. v. Gulf Coast Drilling & Exploration Co._23 plaintiff sublessee was seeking damages from its

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22. 152 So. 2d 220 (La. App. 4th Cir. 1963). A prior appeal on other grounds was dismissed, 147 So. 2d 260 (La. App. 4th Cir. 1962).

23. 154 So. 2d 559 (La. App. 1st Cir. 1963), _writs denied_, 245 La. 68, 156 So. 2d 606 (1963).
sublessee for failure to maintain a lease in force in accordance with their sublease agreement. Loss of the lease, which contained a Pugh Clause, had resulted from failure to pay the full amount of delay rentals due on a part of the sublet acreage. Despite the fact that defendant was clearly responsible for payment of rentals under its sublease agreement, plaintiff's demand was rejected. The record disclosed that plaintiff had advised defendant of the method to be utilized in computing the delay rentals and on two occasions, including the one resulting in loss of the lease, had made the rental payment to the lessor for the account of defendant. The error in computation resulted from failure to correct the rental figure after reduction in the size of a conservation unit containing a part of the sublet acreage.

The First Circuit properly held that plaintiff's participation in making the rental payments coupled with its knowledge of the conservation order precluded it from fixing legal responsibility for loss of the lease on defendant. The conduct of the parties in administering the contract constituted a pattern of conduct which made the obligation to pay rental a joint responsibility of sublessor and sublessee, despite the express provisions of the sublease. Defendant's demand for damages against plaintiff was similarly rejected.

_Sharpe v. Jenkins_24 provides an interesting comparison with _Davis v. Laster_,25 discussed in detail in last year's symposium.26 Plaintiff executed a sand and gravel lease in favor of defendant which provided that "the term of this lease shall be for a period of one year, and lessee shall have the option of annually renewing said lease for a period of four years, provided that lessee notifies lessor in writing 30 days prior to the expiration of said lease each year that he renews this lease that he is exercising his option to renew it, and further provided that if at any time lessee is removing sand, gravel or clay gravel in paying quantities that this lease shall automatically continue as long as the production is had in paying quantities."

Both parties continued to treat the property as leased after the initial term. Plaintiff continued to receive rentals or royalties resulting from defendant's operations. Plaintiff later gave notice to vacate. He then sought possession by rule, claiming

24. 157 So. 2d 353 (La. App. 1st Cir. 1963).
25. 242 La. 735, 138 So. 2d 558 (1962).
that the maximum term of the lease was five years, that a tacit reconduction had taken place on a month to month basis, and that he was entitled to possession of the lease.

Reading the habendum clause as a whole, the First Circuit felt that the parties had executed a lease with a maximum term of five years, the provision for maintenance by production in paying quantities constituting only a substitute mode of continuation in lieu of giving notice prior to each anniversary date. Reliance was also placed on the rule that leases drawn by one party, in this instance the lessee, shall be construed against such party. It was held that a tacit reconduction had occurred on a month to month basis and that plaintiff was entitled to possession as he had complied with the formal requirements of article 470 of the Code of Civil Procedure.

Recognizing that it is "one man's opinion," it is respectfully suggested that the intent of the habendum clause in this instance was to make this lease conform to the "unless" type of oil and gas lease, providing for a primary term with extension by production in paying quantities. Still, there is an ambiguity, and the court's opinion is not without foundation.

The comparison suggested initially, however, is that in *Davis v. Laster*, the Louisiana Supreme Court utilized the conduct of the parties to an oil and gas lease as an indication of their own interpretation of its meaning and held them to the pattern established by their conduct. In the instant case, no weight was given to the fact that the parties continued to treat the property as leased after the term of the lease expired. This pattern of conduct might as easily be construed as evidence of the parties' mutual understanding of their ambiguously drawn contract as the basis of a tacit reconduction.

The decision is not, however, one which works great violence to the law. It does give warning to those drafting similar instruments in the future.

**UNITIZATION AGREEMENTS**

*Texaco, Inc. v. Vermilion Parish School Board* required interpretation of the Erath unitization and operating agreements for the purpose of calculating participation shares in newly dis-
covered productive areas. Participation figures were established volumetrically at the time of unitization. Difficulty arose from the fact that the newly discovered sand underlay only a portion of the unitized area. The court of appeal had ordered that participation be calculated on a volumetric basis, but that it be limited to the acreage directly overlying the new sand.

The Supreme Court agreed that the agreement contemplated a recalculation of participation figures to take into account the volume of the discovered reserves. However, it required that all interests in the unit be allowed to participate. Thus, the volume of the new reserves was added to the total unit volume and credit was given to the tracts overlying the reserves for the increase in volume of hydrocarbons beneath them.

Under the agreements in question, the decision of the court seems correct. As it is merely a question of construction, the decision is not of great importance. It does, however, present the attorney with one more problem which must be considered and perhaps given some drafting solution where possible.

**DRILLING CONTRACTS**

*Duncan Drilling & Well Servicing Co. v. Robinson Research, Inc.*

**29** is noteworthy because of its interpretation of a standard drilling contract. Plaintiff contractor was seeking the balance of his drilling contract price, lien costs, and attorney's fees.

The evidence disclosed that plaintiff had lost circulation in the process of drilling, causing a blowout. No blowout preventer had been furnished. After bringing the well under control and reconditioning the hole, drilling operations were resumed. Loss of circulation was again experienced. On defendant's order the well was completed at approximately one-third the contract depth.

Plaintiff urged that he had complied with the contract and the repeated loss of circulation constituted an abnormally difficult and hazardous condition for which he was not responsible. Defendant, on the other hand, contended that failure of normal completion resulted from plaintiff's breach of contract in neglecting to equip the rig with a blowout preventer and to maintain on hand and readily available an adequate supply of control.

29. 147 So. 2d 95 (La. App. 2d Cir. 1962).
materials. Defendant reconvened for damages for breach of contract.

The Second Circuit Court of Appeal held that plaintiff had
breached his contract by failing to furnish a blowout preventer
and maintain an adequate supply of control materials. He was,
therefore, responsible for the failure to reach contract depth.
General provisions of the contract required that plaintiff per-
form with “due diligence and care and in a good and workman-
lke manner” and that he maintain well control equipment in
good condition and use all reasonable means to control and pre-
vent fires and blowouts and protect the hole.

Plaintiff maintained that these general provisions of the
contract were modified by the “Specifications and Special Pro-
visions” attached to the contract, one clause of which was en-
titled “Equipment, Materials and Services to be Furnished by
Contractor.” The blanks containing specifications for rig equip-
ment, including a blowout preventer, were not filled out in the
disputed contract. Therefore, plaintiff contended that he was
not required to furnish a blowout preventer and could not be
held responsible for the events which occurred.

The court rejected this argument, however, pointing out that
none of the specifications for rig equipment had been filled out.
That being so, plaintiff could as easily have contended that he
was “not required to furnish engines or any other items of
equipment which would be absolutely essential to the operation
of the rig.” 30 Thus, the court felt that the general provisions of
the contract were controlling. Under the circumstances of the
case the use of a blowout preventer and other well control equip-
ment constituted “reasonable means” for preventing the diffi-
culties encountered.

The court also noted, and apparently gave some effect to
Statewide Order No. 29-B of the Department of Conservation,
which requires the use of blowout preventers. A petroleum in-
spector for the department testified that he had no authority to
relax these provisions of the order.

In rejecting plaintiff’s demand, the court held that the rec-
ord did not clearly disclose whether the failure to reach the con-
tract depth resulted from lack of a blowout preventer, as urged
by defendant, or from loss of circulation. In either event, how-

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30. Id. at 98.
ever, the contractor was responsible as he was in breach of his obligations in both respects.

Defendant’s reconventional demand was also denied. The court noted that the contract contained default procedures which were available to defendant in the event of breach of the obligations of the contract. However, defendant had not chosen to utilize them but had voluntarily ordered completion at a depth shallower than specified. This action had the effect of annulling the original contract provisions and precluded recovery for breach of contract.

WATER RIGHTS

Adams v. Grigsby,31 noted elsewhere in this Review,32 raised the problem of subsurface water rights. The Second Circuit refused to apply the articles of our Civil Code granting landowners the natural servitude of drainage and the right to use running water to an oil operator engaged in authorized water flood operations causing depletion of the fresh water sand from which plaintiffs secured their water supply.

The decision strongly underscores the need for the legislature to give attention to growing problems involving water rights. It is predictable that increased urbanization and industrialization will aggravate these problems. Use of foresight now could avoid a great deal of difficulty in the future.

PUBLIC LANDS

Acquisitive Prescription

The decision rendered in King v. Board of Commissioners for Atchafalaya Basin Levee District33 is one of the most significant rendered during the past term. The issue raised was whether a title perfected by thirty-year acquisitive prescription against defendant levee district included minerals. In essence, the holding of this case is that as prescription runs against a levee board,34 and as the constitutional prohibition against aliena-

31. 152 So. 2d 619 (La. App. 2d Cir. 1963), writs denied, 244 La. 662, 153 So. 2d 880 (1963).
33. 148 So. 2d 138 (La. App. 3d Cir. 1962), writs denied, 244 La. 118, 150 So. 2d 585 (1963). In denying writs the Supreme Court merely stated: “The result is correct.”
34. See Haas v. Board of Commissioners of Red River, Atchafalaya and Bayou Boeuf Levee District, 206 La. 378, 19 So. 2d 173 (1944); Board of Commissioners of Caddo Levee District v. Pure Oil Co., 167 La. 801, 120 So. 373 (1929); Board
tion of minerals by the “state” is inapplicable to such a board or agency, any acquisitive title to lands owned by such an agency includes the minerals. It is true that the basis for the prescriptive title to the land in question was established in 1912, prior to the constitutional prohibition against alienation of minerals, which might serve to distinguish this case from one involving a prescriptive base established after 1921. However, the decision appears to be extremely far reaching and dangerous.

The fiction of distinguishing between the legal personality of the “state” and a state agency may have its proper uses. It has been used to make inroads on the principle that prescription does not run against the “state” in civil matters. However, its use here does not seem justified. Obviously the makers of the Constitution intended that no lands owned by the sovereign should be disposed of in such manner as to alienate the mineral rights on such lands. The logical conclusion of this decision is that mineral rights inalienable as long as title to land remains in the sovereign become alienable upon conveyance of the land to a state agency. Adherence to this ultimate conclusion could make a mockery of the constitutional prohibition, and, as noted by the concurring opinion in this case, seriously endanger the public interest in mineral development of state lands.

This decision has been thoroughly discussed in a student note elsewhere in this Review; therefore, no detailed analysis is necessary. It is hoped that the decision will be reconsidered in some fashion; at the very least, it should be limited to acquisitive titles the basis for which was established prior to 1921.

Title Controversies with Private Owners

In Walmsley v. Pan-American Petroleum Corp. plaintiffs

of Commissioners of Tensas Basin Levee District v. Earle, 169 La. 565, 125 So. 619 (1929); Board of Commissioners of Port of New Orleans v. Toyo Kisen Kaisha, 163 La. 865, 113 So. 127 (1927).

35. LA. CONST. art. IV, § 2.
37. See authorities cited in note 34 supra.
38. King v. Board of Commissioners for Achafalaya Basin Levee District, 148 So. 2d 138, 145 (La. App. 3d Cir. 1963). Judge Tate felt that the decision of the court was correct inasmuch as the basis for the prescriptive title had been established prior to 1921. However, he dissented strongly insofar as the majority’s opinion could be interpreted as holding that the constitutional prohibition would be inapplicable even though the prescription had commenced subsequent to 1921.
40. 244 La. 513, 153 So. 2d 375 (1963).
instituted what they designated as an action to remove a cloud on their title to certain lands in Plaquemines Parish. They alleged title in themselves stemming from a patent granted by the State of Louisiana in the year 1878. Further, plaintiffs alleged that the land in question was included in a lease granted defendant by the State Mineral Board on behalf of the State of Louisiana. Having alleged title in themselves, plaintiffs showed that the State Mineral Board had no authority to execute the lease and that defendant lessees therefore had no right to claim that it was valid.

Plaintiffs’ petition made no clear and unequivocal allegations denying possession in themselves, nor were there any allegations of possession by defendants. It was alleged, however, that “defendants herein are claiming and asserting that the lease is being maintained in full force and effect by production of oil, gas and other minerals from the properties owned by petitioners.” Plaintiffs reserved all rights to recover for minerals which may have been removed from the property by defendants and prayed for judgment decreeing the lease “to be null, void and of no effect and cancelled and annulled” and “decreeing defendants . . . have no interest in and to said property by virtue of said lease.”

Defendants filed exceptions of nonjoinder of an indispensable party (the state) and of no cause or right of action, contending that although plaintiffs characterized their action as one to remove cloud from title, the petition disclosed that defendants were in corporeal possession of the property and that the action to remove cloud from title was not available to plaintiffs. Thus, it was contended that the petition actually alleged a petitory action, requiring that the State of Louisiana be joined as a party.

As stated by the Supreme Court, the issue was said to be whether the state was an indispensable party to the action. Resolution of this issue was deemed to turn upon whether the action was indeed a petitory action or, as contended by plaintiffs, an action to remove a cloud from the plaintiffs’ title. After reviewing the allegations of plaintiffs’ petition, the court concluded that the allegations of title were necessary to establish a basis for plaintiffs’ right to have the cloud removed; that the prayer of plaintiffs’ petition sought only that the lease be decreed null, void and of no effect and that defendants be adjudged to have
no interest in the disputed property by virtue of the lease; and, finally, that the allegations by plaintiffs to the effect that defendants claimed the lease to be maintained in force by production related only to plaintiffs' claim that the lease constituted a cloud on their title.

Conceding arguendo, however, that plaintiffs had alleged that defendants were in possession, the court nevertheless felt that the action to remove cloud from title was not foreclosed for failure to allege possession in defendants. "What is important is that plaintiffs have not, according to the prayer of the petition, sought a judgment 'recognizing their ownership' as they must do for their action to be characterized as a petitory action under Article 3651."

Justices Sanders and Hawthorne dissented from the opinion of the majority on the ground that the court's decision extended the action to remove cloud from title by making it available to one out of possession as against one in possession of property.

Despite the fact that it has become a cliche, the old maxim about hard facts making bad law is starkly revealed by this decision as a basic truth. The hard facts in this instance are obvious. Plaintiffs, finding themselves embroiled in a title dispute with the state, were either unable to secure permission to bring suit or found the procedures for doing so too awesome a prospect. Thus, they brought this action, perhaps contemplating that success would give considerable leverage over the state in ultimately disposing of the basic argument. No matter how appealing the situation of the plaintiffs may have been, the devastating effect of this decision on Louisiana's procedural system, particularly in view of its recent revision, represents an unjustifiably high price to pay for "practical" justice as between the particular parties.

The Supreme Court's opinion misconstrues prior decisions relating to the action to remove a cloud on title and seriously disrupts the basic system of real actions in the new Code of Civil Procedure. To begin with, it is essential to bear in mind that there were two exceptions before the court: (1) the exception of nonjoinder and (2) the exception of no cause. As to the

41. Id. at 513, 153 So. 2d at 379.
42. It should be noted that plaintiffs could have negotiated with the title controversy committee of the Louisiana State Mineral Board concerning their claim. Apparently, however, they chose to assert this action.
exception of nonjoinder, there is some logic in accepting the prayer of plaintiffs' petition as governing; the prayer did not seek an adjudication of title. Therefore, by plaintiffs' own election, the action could be treated as one to remove a cloud from title. Although the writer has some reservations even about this possible holding, it could nevertheless be supported in the light of our jurisprudence.

The exception of no cause of action, however, does not turn solely on the prayer in plaintiffs' petition, which appeared to be persuasive to the court. In considering this exception two facets of the opinion should be analyzed. First, one must view the court's determination that plaintiffs' allegation that defendants contended the lease had been maintained in force by production constituted no more than an allegation of the "slander." It is felt that this sort of highly technical construction of pleadings is in obvious disregard of the truth as revealed by plaintiffs' petition. It revives the sort of technical rules of pleading which, it had been assumed by many, were discarded in this state years ago. Such highly technical construction gives undue recognition to what is vulgarly known as "weasel-wording." Even this holding might have been bearable, however, for if not raised by the petition, at least the legal issue of possession and its impact upon the litigation might still have been raised by defendants. But the court extended its decision when it stated that even conceding plaintiffs had alleged that defendants were in possession, it did not feel that the action was foreclosed "for failure to allege possession in plaintiff or because of an allegation of possession in defendant."

The latter holding is not in accord with prior jurisprudence. One of the cases cited by the Supreme Court as evidence of the vitality of the action to remove cloud on title, Exchange National Bank of Shreveport v. Head,\textsuperscript{43} clearly defines the role of possession in the action to quiet title in Louisiana. Plaintiff had failed to allege possession in either itself or defendant. The court held that this failure did not necessarily warrant sustaining an exception of no cause of action. For the purpose of that particular exception plaintiff was to be regarded as owner and possessor, but even a plaintiff not in actual possession might have an action to quiet title against a party "out of possession."\textsuperscript{44}

\textsuperscript{43} 155 La. 309, 99 So. 272 (1924).

\textsuperscript{44} "For the purpose of this phase of the exception, the plaintiff must be regarded as the owner and possessor of the land, and there can be no possession
Similar language is found in *Atchafalaya Land Co. v. Brown-ell-Drews Lbr. Co.* where it was stated that although a plaintiff not in possession could not bring a jactitory action, he could "bring a suit against another party equally out of possession to procure the cancellation of a title which that other party may have caused to be recorded against the property." A clear implication of these and other decisions considering the nature of the action to quiet title in Louisiana is that the action is available only as against a defendant not in possession. If this were not true, it would entirely destroy, as the principal case may, the role played by possession in our procedure. To hold otherwise denies to the possessor of land the presumption of title granted him by our codified law. Acknowledgment of this truth is found in *Griffon v. Blanc*:

"But where the defendant is actually in possession, the plaintiff cannot be permitted to change his position with the form of action and escape the burden imposed upon him by Art. 44, C.P. In order to recover and turn his adversary out of possession he must establish his title."

As authority for its decision the Supreme Court relied on *Daigle v. Pan American Production Co.* That decision, however, is clearly not authority for the proposition cited. It is true that the court there stated that "possession is not necessary in either plaintiff or defendant." However, that statement should be analyzed in the light of the pleadings before the court, in which plaintiff had categorically alleged that neither she nor defendants were in possession of the property in question. Thus, the court merely stated that in situations where neither party is in possession, the action is available. Any words going beyond the factual allegations presented in the *Daigle* case should be viewed as dictum. Finally, it is to be noted that prior to submission of that case to the Supreme Court, the Louisiana State Mineral Board filed in the record a release and cancellation of the offending mineral lease. Thus, in actuality, any issue of whether

of the land in the defendant under the oil lease separate and distinct from and to the exclusion of the owner of the land.

"But even where the plaintiff, claiming ownership, is not in actual possession of the property, he may yet have his action against a party out of possession for the cancellation of the recorded deed, and to remove the cloud on his title." *Id.* at 313, 99 So. at 273-74.

45. 130 La. 657, 660, 58 So. 500, 501 (1912).
46. 12 La. Ann. 5, 6 (1857).
47. 236 La. 578, 108 So. 2d 516 (1958).
48. *Id.* at 518.
the petition alleged a cause of action to quiet title became moot upon expiration of the lease and its cancellation from the public records.

As noted, the principal difficulty with the Walmsley decision is its destruction of the presumption of ownership given to the possessor of land. If this dispute had occurred among private parties, our real actions would have afforded plaintiffs a remedy in any conceivable factual situation. One in possession of land, or recently evicted, may protect his bare possession by assertion of the possessory action,49 and, as a result of the merger of the old possessory and jactitory actions, may have the court order the defendant to assert his claim or be precluded thereafter from doing so. One out of possession, as were plaintiffs in this instance, may assert his claim of ownership through the new petitory action,50 which combines the old petitory action and the statutory action to establish title, either against a defendant in possession or out of possession.

To hold, as in the principal case, that the possessor of land, here the agent of one claiming legal title, may not even raise the issue of his possession and take advantage of the presumption given to the possession by law does extreme violence to our system of real actions. Saying that the decision rendered in the Walmsley case does not involve an adjudication of title approaches sophistry. All of the rights exercised by defendants, the State Mineral Board and its lessees, are derived from and dependent upon the title of the State of Louisiana, and the Mineral Board is the agent of the state, standing in its stead. To hold that plaintiffs are entitled to judgment it must be determined that they have title to the property.

It is worthy of observation that saying that there is no question of title involved here is not the same as making that statement with regard to a jactitory (possessory) action. In the latter type of action, evidence of title is admissible to prove nature and extent of possession.51 But the action involves, and the court can protect, only the plaintiff's possession—which gives the presumption of ownership.52

The very nature of the action to quiet title is, however, pro-

49. LA. CODE OF CIVIL PROCEDURE arts. 3655-3662 (1960).
50. Id. arts. 3651-3653.
51. Id. art. 3661.
52. Id. art. 3662.
tection of title. Therefore, the case cannot be decided without adjudication of plaintiff's claim of title. The court, of course, recognized that no judgment issued by it on the issue of title would be binding upon the State of Louisiana. That being true, the decision promotes multiplicity of litigation. It will now be necessary for the state to institute litigation to protect its title, or at least possible for it to do so, and the identical issue of title will have to be relitigated.

The inappropriateness to our system of the action to quiet title is clearly revealed by a brief examination of its historical origins. The action originated in equity. In some of the law courts in England relitigation of certain questions was possible. Actions of ejectment, which became the usual mode of trying title, were at one time among these. To put an end to oppressive relitigation practices, chancery interfered on behalf of those successful in establishing their legal titles in prior actions of ejectment. As a prerequisite to the right to maintain a bill to quiet title, it was, of course, necessary that the complainant have had title adjudicated to him at law. Thus, the issue of legal title was settled before a complainant could seek relief from a court of equity. The inconsistency with the situation under discussion is obvious.

Abolition of the action to quiet title or remove a cloud from title in Louisiana was suggested prior to enactment of the present Code of Civil Procedure. According to the introductory note to Title II of Book VII of the new code, however, abolition was not contemplated in the drafting and passage of the new code.

As a result of the Walmsley decision it is suggested that two remedial legislative actions should be considered. First, the action to quiet title or to remove cloud from title should be formally abolished. Under ordinary circumstances in suits between private citizens there is no conceivable need for the action, as the real actions permit relief in every instance where a plaintiff can demonstrate himself to be entitled to it. Second, citizens having title controversies with the state may very well be in need of special relief which will permit them to obtain judicial settlement without waiting for the state to bring suit.

53. See Pomeroy's Equity Jurisprudence § 248 (5th ed. 1941).
It is true that the Title Controversy Committee of the Louisiana State Mineral Board affords some measure of relief. But negotiations with that body may be unsuccessful, or at least unsatisfactory, and for the ordinary individual claiming title adversely to the state the problems of securing authorization to bring suit may prove insurmountable in such circumstances.

The Walmsley decision appears to be a compassionate response to the plight of citizens with title claims against the state. The court could limit the damage done to the concepts underlying our system of real actions by restricting it to similar situations involving controversy with the state as in other cases litigants have remedies available through the real actions. However, remedial legislation seems preferable.

INSURANCE

G. Frank Purvis, Jr.

The great volume of insurance litigation considered by the Louisiana appellate courts in past years continued during the 1962-1963 term. Over one hundred decisions of our appellate courts were rendered during that time. Those of most general interest and significance are reviewed in these comments. The Supreme Court rendered only two of the decisions, a rather unusual fact in view of the large number of decisions.

I. LIFE COVERAGES

In the field of life insurance, the Fourth Circuit Court of Appeal applied the usual rule in holding that the wife forfeits her rights as the beneficiary of the policy of life insurance on the life of her husband when she feloniously kills him and the insurance proceeds then become the property of the insured's estate. As such the proceeds are property of the decedent's separate estate and are not community property. In the opinion of the court, it would be illogical and against public policy to hold that the wife, denied recovery personally for feloniously killing her husband, yet could recover half of the proceeds as her community interest. The only interest a wife could have, the court says, would be the recovery from her husband's estate of half