Private Law: Mineral Rights

George W. Hardy III
surer was classified as a tort and the one-year prescription was applied. It was pointed out that while the wife had a cause of action against her husband, she did not have a right of action against him; however, since this inability to sue her husband did not obstruct her right to sue the insurer, there was nothing to interfere with the running of prescription against this claim.

A keenly debated issue was presented in National Sur. Corp. v. Standard Acc. Ins. Co. as to whether a suit by the employer’s compensation insurer against the alleged third party tortfeasor also interrupted the prescription with respect to the claim of the injured employee. The court of appeal held that there was no interruption because the nature and extent of the employee’s demand was quite different from the insurer’s claim, so that the defendant in a suit on the latter claim could not be deemed thereby to have been notified of the former. In reversing, the Supreme Court maintained that both demands affected the same cause of action, and held that prescription against the employee’s claim had been interrupted by the insurer’s suit, in which the employee had intervened. Both positions have substantial merit; from the point of view of social policy, and considering that the one-year prescription is rather short in such cases, the Supreme Court’s ruling comes closer to fulfilling the social need.

MINERAL RIGHTS

George W. Hardy, III*

MINERAL SERVITUDEs

Joint Lease Extension

The decision in Armour v. Smith sheds further light on the rules regarding joint lease extension of mineral servitude interests. Plaintiff’s vendor had created a mineral servitude in favor of himself by reservation in 1939. In 1946, plaintiff and her vendor entered into a lease on a standard printed form for a

27. 247 La. 905, 175 So. 2d 263 (1965), reversing 168 So. 2d 858 (La. App. 2d Cir. 1964).
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primary term of ten years. A special provision was, however, added, stating that if production occurred under the lease fifty per cent of the royalty should go to plaintiff and fifty per cent to her vendor. Subsequently, plaintiff’s vendor sold a part of his mineral rights to defendants subject to the outstanding lease. Other instruments having some bearing on the outcome of the case were executed subsequent to the joint lease; however, the focal issue was whether the lease in question was a joint lease for a term running beyond the prescriptive date of the outstanding mineral servitude and was so intended by the parties, resulting in an extension of the mineral servitude created in 1939. The Supreme Court followed prior jurisprudence in this area in deciding that as the lease was a joint lease and was intended to be such by the signatory parties, the life of the mineral servitude was extended by execution of its lease. This decision serves to clear up some doubt which had crept into the jurisprudence regarding the intent factor necessary to work an extension of mineral servitude rights by execution of a joint lease. Language in the earlier decision in Elkins v. Roseberry might have been construed as requiring that there be an express intent to so extend outstanding mineral rights. However, the court adhered to the previously established intent factor — i.e., that the parties must have intentionally executed a joint lease for a term running beyond the prescriptive date of the outstanding mineral rights. Thus, the technique of reasoning by inference from entry into the joint lease appears firmly imbedded in the jurisprudence. The court reasoned that plaintiff landowner could not grant a valid mineral lease covering all of the mineral rights without joinder of her vendor. Thus, it could be inferred from her acceptance of the advantages of receiving bonus, rentals, and participation in royalties, that she intended that the outstanding mineral interest be extended as a result of her entry into the joint lease.

In a vigorous dissenting opinion, one Justice relied on the language in Elkins v. Roseberry, referred to above as supporting the proposition that the intent to extend an outstanding

2. Barnsdall Oil Co. v. Miller, 224 La. 216, 69 So. 2d 21 (1953); Baker v. Wilder, 204 La. 759, 16 So. 2d 346 (1943); Achee v. Caillouet, 197 La. 313, 1 So. 2d 530 (1941); Adam v. Johnson, 133 So. 2d 175 (La. App. 4th Cir. 1961).
3. 233 La. 59, 96 So. 2d 41 (1957).
4. See the authorities cited in note 2 supra.
mineral interest as the result of execution of the joint lease must be express.\(^7\) The presence of his dissent and his reliance on the language from the *Elkins* case serve to underline the meaning of this decision insofar as it affirms the principle that the intent to extend need not be express. The intent factor important in these cases is the intent to enter into a joint lease for a term running beyond the prescriptive date of outstanding mineral rights. The intent to extend outstanding mineral rights is inferred from the circumstances of the transaction.

Criticism may be levelled at the joint lease extension concept on the ground that any intent to prolong the life of the mineral servitude should be express.\(^8\) Louisiana courts have gone to great lengths in requiring that the intent to interrupt by acknowledgment be express\(^9\) and that it meet elaborate formal requirements.\(^10\) In defense of the *Armour* decision it has already been noted that it is consistent with prior jurisprudence.\(^11\) However, it is curious to observe that by executing a joint lease for a primary term of ten years, as in this case, the life of a mineral servitude may be prolonged for the same period which would result from an interruption by acknowledgment, a legal effect which can be wrought only by express intent and obedience to intricate formal rules.

**Use**

Two cases decided during the past term turned on the question whether admitted uses inured to the benefit of all property subjected to mineral servitudes by a single conveyance. In *Spier v. Barnhill*\(^12\) a mineral lessee sought to rescind a previously obtained lease and to recover the bonus paid on the ground that the lessor, who had expressly warranted title to the mineral rights in question, was in breach of his warranty. The original servitude tract was a large body of land across which a public

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7. The confusion as to the appropriate intent factor probably results from a failure to distinguish the joint lease extension cases from the cases involving acknowledgments proper. In the case of acknowledgments, it is clear that the intent to acknowledge must be express. *E.g.*, James v. Noble, 214 La. 196, 36 So.2d 722 (1948). See Donohoe, *Acknowledgments, Joint Leases and Prescription*, 11th Inst. on Mineral Law, 82, 104 (1964).


10. Arkansas Louisiana Gas Co. v. Thompson, 222 La. 868, 64 So.2d 202 (1953); Roberts v. Cooper, 127 So.2d 369 (La. App. 2d Cir. 1961).

11. See the authorities cited in note 2 supra.

12. 168 So.2d 479 (La. App. 3d Cir. 1964).
road had been constructed prior to creation of the mineral servitude in 1927. Production was obtained from one portion of the premises in 1933. The critical issue was whether prescription had been interrupted as to that portion of the original tract lying beyond the public road. On the facts, it was held that the road was a public parish road tacitly dedicated under R.S. 48:49113 and that the public had acquired only a servitude rather than full ownership of the roadway.14 Thus, in accordance with prior jurisprudence,15 it was held that the presence of the road did not divide the original tract into two servitudes, and the production obtained in 1933, which had continued to the present time, constituted an interruption of prescription as to the entirety of the original tract. Plaintiff’s demands were rejected.

In Gunby v. Commercial Solvents Corp.16 mineral rights were sold on three contiguous tracts of land. At the time the servitude was created one-fourth of the mineral rights were outstanding on one of the three tracts. Additionally, a well was producing on a second of the three tracts. The landowner contended that the conveyance had not created a single servitude, urging that as no development had taken place on the third tract the mineral rights had prescribed. The court properly held that the conveyance created a single servitude as the three contiguous tracts formed one large, continuous body of land.17 The presence of the producing well served to interrupt prescription as to the entirety of the servitude.

In Webb v. Carlton18 plaintiffs, nonresidents, were asserting the nullity of a judgment of 1961 declaring mineral rights inherited by them from a nonresident to have been extinguished by prescription. The nullity of the judgment appeared clearly to

13. La. R.S. 48:491 (1950): “All roads . . . in this state that are opened, laid out or appointed by virtue of any act of the Legislature or by virtue of an order of any parish governing authority in any parish, . . . or which have been or are hereafter kept up, maintained or worked for a period of three years by authority of any parish governing authority in its parish, . . . shall be public roads. . . . Also all roads . . . made on the front of their respective tracts of land by individuals when the lands have their front on any of the rivers or bayous within this state shall be public roads.”
16. 170 So. 2d 259 (La. App. 2d Cir. 1965).
18. 165 So. 2d 54 (La. App. 2d Cir. 1964).
the court,\textsuperscript{19} and it was also apparent that the mineral rights had been used continuously from 1940 to the date of the suit. The only noteworthy point in the decision is the court's reference to the production maintaining the mineral rights as being "production in paying quantities." If seriously intended as stating a legal requirement, it should be observed that this language is squarely contrary to the holding of the Supreme Court in \textit{Mays v. Hansbro},\textsuperscript{20} in which it was stated that whether production is in paying quantities is of no import as long as there is \textit{some} production or use of the servitude.

\textbf{Mineral Leases}

\textit{Conceptual Nature}

The decision rendered by the Fourth Circuit Court of Appeal in \textit{Succession of Simms}\textsuperscript{21} may become one of the more significant in Louisiana's mineral jurisprudence. However, as it is still pending before the Supreme Court of Louisiana, no extended comment on the merits of the case is appropriate. The pertinence of this case to the mineral law field lies particularly in the appellate court's resolution of the issue whether certain overriding royalty interests involved in the litigation were to be characterized as movable or immovable for purposes of descent and distribution and, therefore, choice of law as between Texas and Louisiana. Taking note of the existing confusion of statutes and jurisprudence, the court observed a very strong legislative policy favoring characterization of mineral leases as real rights. It further recognized that "the State of Louisiana, in order to maintain the integrity of its public records system, should not be forced to look, in either its sovereign or proprietary capacity, to the laws, decisions, or proceedings of another state in order to determine the ownership or possession of its own mineral rights."\textsuperscript{22} Thus motivated, the court concluded "that for the purpose of characterizing succession property . . . in the area of conflicts of law, overriding royalties and other interests in mineral leases are incorporeal immovables, so that the validity

\footnotesize{19. Plaintiffs were the heirs of a former owner of the mineral servitude who had resided and died in Texas. The judgment in favor of defendants was granted subsequent to the death of the former owner. Plaintiffs were never given any notice of the action in any fashion.}

\footnotesize{20. 222 La. 957, 64 So.2d 232 (1953).}

\footnotesize{21. Succession of Simms, 175 So.2d 113 (La. App. 4th Cir. 1965), \textit{writ granted}, 247 La. 878, 175 So.2d 111 (1965).}

\footnotesize{22. Id. at 126.
of foreign testamentary dispositions of such property located in this state definitely must be determined by the law of the state of Louisiana."  

On original hearing before the Supreme Court, the case was disposed of on an exception filed in that court. However, a re-hearing has been granted and the matter is still under consideration.

**Damages**

In *Jones v. Whittington* 24 it appeared that plaintiff and defendant entered into a letter agreement looking toward a transaction involving partial assignment of an interest which plaintiff was to obtain under a prospective "farm-out" agreement. In the letter agreement between plaintiff and defendant, the latter expressly agreed to comply with the drilling requirements of the farm-out to be obtained by plaintiff. Under the provisions of the farm-out plaintiff was required to drill a well on each of two tracts subject to the agreement. Defendant drilled the first of the two wells, which was plugged and abandoned as a dry hole, but refused to commence the second. Plaintiff filed suit seeking damages measured by the cost of drilling the second well.

Under the farm-out agreement plaintiff could not sublease or assign his interest without written consent of his assignor (or sublessor). Defendant filed an exception of no cause or right of action based on the contention that plaintiff had not obtained the required written consent and thus had neither right nor capacity to contract with defendant respecting an obligation to assign the leases on the properties involved. The court of appeal reversed the lower court, which had sustained the exception, for numerous reasons. It was observed that defendant was not a party to the farm-out agreement, that defendant clearly accepted the drilling requirements in question, that defendant and his attorney were fully informed of the drilling requirements before operations were commenced, that defendant had never demanded an assignment under the letter agreement, that there was no evidence indicating that plaintiff's assignor (or sublessor) would have refused to grant its consent, and that plaintiff was not seeking specific performance but only damages.
The court further noted that it would be "most inequitable to permit one who has breached a contract to assert his own violation as a defense on the ground that the other party might be unable to perform his obligation which would become due at some future time."  

Turning to the question of damages, it was argued that plaintiff had no right to recover as he had failed to place defendant in default as required by the Civil Code. The court termed defendant's failure and refusal to perform an active breach of contract and held as a consequence that no putting in default was necessary. While this holding may be subject to some question, the result is sound as the breach of contract in question was not a mere failure to perform an obligation of which defendant was unaware but was a deliberate refusal to perform, which would have made any default notice a vain act. Plaintiff would thus have been relieved of any necessity for default.

Defendant further argued that the drilling of the second well would have been a useless undertaking inasmuch as the possibility of production had been geologically condemned by the drilling of two dry holes in the immediate vicinity of the property. The court stated that even if the validity of this contention were conceded, it would be of no significance as defendant's obligation was unconditional. Further, benefit to plaintiff was found in the fact that performance of the drilling obligation assumed by the defendant would have served plaintiff to the extent of establishing his good faith performance of the condition imposed by the farm-out agreement, even if the well had been unproductive.

Defendant's last contention was that the cost of drilling the second well was not a proper measure of damages. The propriety of this measure of damages was, however, upheld. This holding is consonant with prior jurisprudence. However, in reaching its decision the appellate court found it necessary to distinguish cases, such as Fogle v. Feazel, involving failure by a mineral

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25. *Id.* at 766.
30. 201 La. 899, 10 So. 2d 695 (1942). Defendant also cited and relied on Godfrey v. Lowery, 223 La. 163, 65 So. 2d 124 (1953) and Clement v. Sneed Bros., 240 La. 48, 121 So. 2d 235 (1960).
lessee to drill a well under penalty of forfeiture of the lease. The latter cases were distinguished on the ground that the parties had provided forfeiture as the penalty for failure to drill a well, whereas in the case at bar and similar prior cases they there was an unconditional obligation to drill a well. This distinction is sound and is firmly based in the jurisprudence.

_East v. Pan-American Petroleum Corp._32 involved interpretation of the provisions of a mineral lease relating to incidental uses of the lease premises. The lease in question gave lessee the right to "construct, maintain, and use roads, pipelines and/or canals thereon for operations hereunder or in connection with similar operations on adjoining lands." Defendant lessee had removed dirt from the leased premises to use in construction of a road in connection with operations on an adjoining lease. Plaintiff contended that he was entitled to damages for removal of the dirt in question as the lease did not authorize removal of the dirt for construction of a road on adjoining property. It was held that surface use, to be authorized, must be ordinary, customary, reasonable, and necessary in connection with operations on the leased premises.33 Further, the court did not consider it within the intent of the parties that dirt could be removed from the leased premises to construct a road in connection with operations on adjoining property.

Finally, the appropriate measure of damages was hotly disputed. Plaintiff contended that damages should be gauged by either the cost of restoring the property to its original condition or the value of the fill dirt which was removed from the leased premises.34 Defendant urged that it was responsible to plaintiffs only for: (1) the value of the right taken;35 or (2) the value of that part of the surface of the land which was utilized;36 or (3) 31. See the authorities cited in note 29 supra.
32. 168 So. 2d 426 (La. App. 3d Cir. 1964).
33. See Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. App. 1st Cir. 1958).
34. Plaintiffs relied on the following cases: Shell Petroleum Corp. v. Scully, 71 F. 2d 772 (5th Cir. 1934); Aleman v. Sewerage & Water Board of N. O., 196 La. 428, 199 So. 380 (1940); Juncker v. T. L. James Co., 148 So. 2d 795 (La. App. 4th Cir. 1963); Hobert v. T. L. James & Co., 72 So. 2d 754 (La. App. 1st Cir. 1954); Kotteman Furniture Co. v. McClellan, 2 So. 2d 485 (La. App. Orl. Cir. 1941).
the value in place of the materials excavated; 37 or (4) the difference between the market value of the plaintiffs' land before the road fill was excavated and its value after completion of the construction work. 38 The court adhered to the principle that no rigid rule can be made for the measurement of damages in cases of this kind; rather the measure best suited to determination of the loss in each case should be adopted. 39 Further, it was observed that much discretion must be left to the trial judge or jury in matters of this kind. Therefore, in view of the circumstances presented, the court felt unable to say that the trial judge erred in concluding that the measure of damages should be the value of the dirt removed. Expenses incurred in removing the dirt were held properly considered in determining the true market value of the soil which was removed. Judgment was affirmed awarding the value of the dirt less the expenses which would have been incurred in making it available to a prospective purchaser.

Parol Evidence

McRoberts v. Hayes, 40 decided by the Fourth Circuit Court of Appeal, reaffirms the rule of Hayes v. Mueller 41 prohibiting parol proof of partnerships for the acquisition of mineral leases or other mineral interests. Of particular note in this case is that the petition alleged that stock in a corporation formed by one of the alleged partners to hold a particular lease was a partnership asset subject to an accounting as prayed for by plaintiff. Plaintiff contended that his petition did not allege or seek to prove ownership of immovables by parol evidence but merely sought an accounting, including the stock, which was an incorporeal movable. An exception of no cause of action was sus-

37. Relying on DeHart v. Continental Land & Fur Co., 205 La. 569, 17 So. 2d 827 (1944), a case involving removal of shells in which damages were measured by the value of the shells in their natural state.
38. Relying on McCoy v. Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936), which held that a landowner might have a cause of action for wasteful dissipation of gas by defendant's negligence, damages to be measured by impairment to the market value of land.
39. In stating this principle the court relied on 15 Am. Jur. Damages, § 107 (1938). The court further stated that in the assessment of damages in cases involving offenses and quasi offenses much discretion must be left to the trial judge or jury, citing LA. CIVIL CODE art. 1934 (1870), Angelloz v. Humble Oil & Ref. Co., 196 La. 604, 199 So. 656 (1941), and Holcombe v. Superior Oil Co., 213 La. 684, 35 So. 2d 457 (1948).
40. 173 So. 2d 27 (La. App. 4th Cir. 1955), writs granted, 247 La. 1023, 175 So. 2d 305. Since the original writing of this piece the Supreme Court has sustained the judgment of the Court of Appeal, 181 So. 2d 390 (La. 1966).
41. 245 La. 356, 158 So. 2d 191 (1963).
tained on the ground that the fundamental purpose of the partnership was to engage in the promotion of various endeavors in connection with production of minerals, including acquisition of mineral leases, and therefore parol evidence was inadmissible. As the petition disclosed that the partnership was verbal, it was insufficient. The rule of *Hayes v. Mueller* is subject to criticism, but this decision seems in harmony with it, though applied to a new factual situation and a new alleged asset, corporate stock.

**Royalties**

Three cases decided during the past term shed light on the problem of when a failure to commence payment of royalties will be deemed cause for cancellation of a lease. Prior decisions of the Louisiana Supreme Court and courts of appeal have established the principle that a lessee is guilty of an active breach of contract warranting cancellation of a mineral lease without default notice if lessee has delayed commencement of royalty payments for an appreciable length of time without justification. Two of the recent decisions refused cancellation, while the third granted cancellation.

In *Broadhead v. Pan-American Petroleum Corp.* there was a lapse of some eight months between discovery of oil on plaintiff's property and the date on which plaintiff filed suit seeking cancellation. Shortly before plaintiff commenced the suit division orders were circulated by defendant preparatory to beginning payment of royalties. Two facts appear to have been of crucial significance to the court. First, the discovery well was in wildcat territory, and there was necessarily some delay in securing a market and constructing marketing facilities — i.e., a pipeline to the nearest outlet. Second, there were some forty royalty owners entitled to participate in production royalties, and in the court's judgment there was a substantial amount of curative work to be done preparatory to commencing payment of royalties. In this regard it also appeared that plaintiff had

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42. *Ibid.*
47. 166 So. 2d 329 (La. App. 3d Cir. 1964).
been requested to cooperate in the curative work, had indicated willingness to be of help, but had not furnished the promised aid.

Under the prior cases, it does seem that eight months might be termed an appreciable length of time.\(^4^8\) However, the circumstances of the case were sufficient to support the argument that the delay, though appreciable, was justified. Having reached this conclusion, the court characterized the failure to pay as a passive breach of the lease contract. Thus, as no notice of default was given by plaintiff prior to the demand for cancellation, it was held that plaintiff was not entitled to the remedy demanded.

The facts of *Harris v. Trahan Drilling Contractor, Inc.*\(^4^9\) are difficult to unravel. They are, nevertheless, a source of some amusement, as the two parties appear to have fallen into dispute from entrenched positions, attempted simultaneous flanking maneuvers, and wound up in a pitched court battle with each firing from the other's original fortifications. For reasons unimportant to this discussion plaintiffs initially contended that defendant's lease had terminated for failure to conduct operations within sixty days after the drilling of a dry hole. Defendants took the contrary position. After an extended exchange of correspondence covering a period of almost a year, defendants executed a release forwarded to plaintiffs with a letter explaining that, notwithstanding execution of the release, plaintiffs would be held for their pro rata share of the cost of drilling the one productive unit well serving a portion of plaintiffs' property. This release was treated by plaintiffs as conditional and therefore unacceptable. At this point, plaintiffs apparently changed their position and decided to deposit checks for production royalties which had been previously tendered by defendants. However, defendants stopped payment on the production royalty checks.

Ultimately, plaintiffs filed suit seeking cancellation for failure to pay royalties. Defendants answered, denying the breach alleged and reconvened seeking to have the tendered release recognized and enforced and to obtain from plaintiffs an accounting for drilling and operating costs, arguing that

\(^{48}\) For example, in *Pierce v. Atlantic Refining Co.*, 140 So. 2d 19 (La. App. 3d Cir. 1962), the delay involved was 7 months. *Compare Fawvor v. United States Oil of La., Inc.*, 162 So. 2d 602 (La. App. 3d Cir. 1964) in which though the delay was apparently appreciable (eight months), the court found it justified under the circumstances.

\(^{49}\) 168 So. 2d 881 (La. App. 2d Cir. 1964).
plaintiffs were estopped to deny the validity of the release as they had contended that the lease expired for failure to conduct operations or obtain production within sixty days of cessation of operations.

The reconventional demand was denied on the ground that the release was not one which plaintiffs were bound to accept as it was conditional. On consideration of the plaintiffs' main demand for cancellation for failure to pay royalties and defendants' argument that they were not guilty of the alleged breach, the court held that there was no failure to pay on the part of defendants for any appreciable length of time without justification. They had actually attempted to fulfill their obligations respecting payment of royalties by tendering the checks refused and later deposited by plaintiffs. It was, in fact, plaintiffs' refusal to accept the royalties which caused the delay involved. Thus, plaintiffs were in no position to complain that the lease should be cancelled, as it was their initial contention that the lease had terminated and their refusal of royalties which occasioned the delay.

The third case in this area is Sellers v. Continental Oil Co. Plaintiffs originally granted a lease on a tract of approximately 121 acres. As a result of releases, the area under lease was reduced to two noncontiguous tracts, each of which was included in a separate conservation unit. Plaintiffs were paid all royalties to which they were entitled as a result of production from one of the two tracts. However, they received no production royalties as to production from the unit well serving the other tract. Production commenced in October of 1957, but no tender of royalties on the latter unit was made until July 1960. Shortly prior to the tender of royalties plaintiffs had demanded cancellation of the lease, and the tendered royalties were thus refused. It appeared that the royalty due one co-lessee had been fully and timely paid. It was further apparent that plaintiffs at no time made formal or informal demand for payment of the royalties due them. Division orders were mailed to plaintiffs in 1958 and again in 1960 but were neither signed nor returned by them. The court held that the delay was not only appreciable but was without justification. The fact that defendant lessee knew royalties were due plaintiffs seemed "beyond question in view of the fact that they were paying royalties to . . . one of the co-lesseors."
Under the circumstances, the court of appeal saw no justification for the delay and granted cancellation of the lease as to plaintiffs but not as to the co-lessor who had been properly paid and professed satisfaction with the lease.

The principal difficulty with all of the cases in this area is that what would ordinarily be a passive breach of contract, failure to commence payment of production royalties, becomes, by lapse of time and absence of justification, an active breach of contract. This striving to characterize the breach as active is apparently a judicial device to avoid requiring a putting in default as a prerequisite to cancellation of mineral leases. In a recent, incisive analysis of the concept of default, Professor J. Denson Smith has suggested that the idea of default as a prerequisite to suit for resolution of contracts is erroneous. The author subscribes to this view and to Professor Smith's assertion that a demand for performance should be regarded as merely one of the circumstances to be considered by a court in determining the merit of a suit for resolution of a mineral lease for nonperformance — in this specific context, for failure to commence payment of production royalties. It does not make sense to say that a party to a contract must make a demand for performance when what he desires is not performance but resolution of the contract. In evaluating a demand for resolution, the nature of the obligation, the manner of breach, the time at which performance should reasonably have been rendered, the obligor's knowledge of his default (whether stemming from a demand by his obligee or some other source), and the obligor's present willingness to perform, are all among the factors to be considered in determining whether resolution should be granted.

In effect, the courts seem to be doing what Professor Smith has suggested, considering all of the circumstances and awarding or denying cancellation of mineral leases for nonpayment of royalties as warranted by the circumstances of each case. But the judiciary is obviously hampered by the established requirement of a demand for performance as a prerequisite to suit for cancellation of a lease because of a passive breach. The device of changing a passive to an active breach by judicial sleight of

52. Smith, The Cloudy Concept of Default, 12TH INST. ON MINERAL LAW 3 (1965).
53. Id. at 9-13.
54. Ibid.
55. E.g., Temple v. Lindsay, 182 La. 22, 161 So. 8 (1935).
hand allows the courts to do justice as they see it, but it does not advance the cause of logic and consistency in the law.

Taking the law as it exists, however, it seems that the three cases discussed above afford some insight into what will be viewed as "justification" for failure to commence royalties for an appreciable length of time. The Broadhead decision indicates that difficulties in obtaining a market or marketing facilities are proper considerations and that curative work necessary to clear title and permit accurate payment of royalties constitutes legitimate cause for delay. Broadhead and Trahan make it apparent that a lessor's failure to render reasonable help or refusal to accept timely tendered payments are also factors which will be viewed as potential justification. However, it would be a mistake to assume that the presence of any one of these factors would, of itself, warrant a lessee's reckless reliance on it as justification, for each case appears to be considered on a whole set of circumstances and not a single factor as being definitive.

One other case affecting the general area of royalties was decided. In Union Prod. Co. v. Browne the lease in question contained a drilling requirement of a certain number of wells and a type of minimum royalty provision. Lessee contended that the minimum royalty clause applied only to the wells contemplated in the drilling requirement and not to other wells drilled above the minimum. The Second Circuit Court of Appeal held, however, that the minimum royalty was applicable to all wells drilled on the lease.

MINERAL ROYALTIES

The most important decision affecting mineral royalties last term was rendered in Frey v. Miller, determining that when production is achieved through a well serving a unit including part of a royalty tract, prescription is interrupted only as to that portion of the tract lying within the unit. The author's opinion of this decision has been fully recorded in last year's symposium and in a recent article; it would therefore be

56. 165 So. 2d 506 (La. App. 2d Cir. 1964).
57. 165 So. 2d 43 (La. App. 3d Cir. 1964), writs denied, 167 So. 2d 669.
bootless to repeat the prior analysis. Suffice it to say that there is no adequate basis for distinguishing the case from Montie v. Sabine Royalty Co., which reached a contrary result, and that the problems concerning the effect of unitization on mineral servitudes and royalties are presently fraught with great confusion.

Another important decision was handed down by the Second Circuit Court of Appeal in Lee v. Goodwin. A well was drilled on land adjoining a royalty tract and was determined to be capable of producing oil from one sand and gas and condensate from another. Dual completion was not allowed. However, a unit for the gas sand was formed to include the entirety of the royalty tract. As the gas reserves at that time were insufficient to attract a market, a packer was inserted between the two sands, and production was achieved through the nonunitized oil sand. During this period the prescriptive date on the royalty passed, and the question arose whether it remained in existence. A market was obtained and production was ultimately achieved from the gas unit, but only after the prescriptive date. It appeared that gas production lasted for a period of only five years and that production did not repay investment costs for drilling and building a pipeline to attract a market.

The court found the well to be capable of producing in paying quantities at the time it was shut in and held in reliance on LeBlanc v. Haynesville Mercantile Co., Union Oil Co. of California v. Touchet, and Sohio Petroleum Co. v. V.S. & P.R.R., that the presence of the potentially productive well on the unit preserved the royalty interest during the interval between the prescriptive date and actual production. This decision is in harmony with the author’s understanding of the cases on which the court relied. However, one Justice of the Supreme Court later disagreed with this interpretation in a dissenting opinion to that court’s denial of writs. The presence of this opinion leads the author to elaborate on the reasons why he believes the Second Circuit’s decision was correct.

60. 161 So. 2d 118 (La. App. 3d Cir. 1964), writs denied, 246 La. 84, 163 So. 2d 359.
61. 174 So. 2d 651 (La. App. 2d Cir. 1965), writs denied, 248 La. 149, 177 So. 2d 118.
63. 229 La. 316, 86 So. 2d 50 (1956).
64. 222 La. 383, 62 So. 2d 615 (1952).
In *LeBlanc v. Haynesville Mercantile Co.* the royalty tract was included in a unit on which there was a well capable of commercial production. The landowner whose interest was burdened by the royalty obligation had granted a lease containing a shut-in royalty clause, and it appeared that shut-in royalties were paid. On the facts of the case one might say that the holding of the court represents the principle that when the landowner grants a lease with a shut-in royalty clause and such royalties are paid, there is constructive production and prescription on the royalty interest is therefore interrupted. This is, in fact, the construction given that decision by the dissent to the denial of writs in *Lee v. Goodwin.* It was, indeed, an argument made by counsel for the royalty owner and repeated in the Supreme Court's opinion in *LeBlanc.* However, the rule stated by the court in deciding the *LeBlanc* case makes no mention of the presence of the shut-in royalty clause as a basis for the opinion, and there are demonstrable reasons why it is undesirable to key the effect on prescription to the lease executed by the landowner or servitude owner whose interest is burdened by a royalty.

The rule ultimately stated by the Supreme Court is found in the following quotation:

"The well . . . was capable of producing gas and gas condensate in paying quantities, and was on land included within the unit which was formed within ten years from the date of the royalty sale; consequently, the defendant was entitled to 1/64th royalty. The fact that the well was shut in for want of a market and that no gas was sold from it until after expiration of ten years from the date of the royalty sale cannot defeat the rights of defendant to share in production, once begun."

The rule was even more clearly stated in *Delatte v. Woods,* which relied on *Touchet* and *LeBlanc*:

"The completion and the existence of a shut-in gas well on a validly created unit are equivalent to production on all tracts in order to interrupt the prescription accruing against..."
royalty interests and preserve same from extinction by pres-
cription.” 70

The *Touchet* case enunciates the principle in similar fashion. 71 In the *Sohio* case the court relied on R.S. 30:9B, providing that a unit will constitute “a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities,” to preserve a mineral lease. Thus, it appears that the concept of the conservation statute has influenced the court to hold that presence of a shut-in well capable of producing in paying quantities will preserve a royalty interest until production is achieved. Why should this result be reached, and what is the technical effect of the presence of the shut-in well?

To begin with, one can envision that the presence of a commercial well during the last days of existence of a royalty interest might tempt a land or mineral owner to collude with his lessee to shut a well in for a sufficient period to allow the outstanding royalty to lapse. Opportunities for such back-scratching should be minimized. Further, it does not appear wise to pin rules of property to the kind of lease contract executed by the land or mineral owner whose interest is burdened by a royalty. Suppose that instead of a typical north Louisiana form the landowner in the instant case had executed a standard south Louisiana form providing that shutting in of a well capable of producing gas or gaseous substances in paying quantities shall be the same as termination of operations in a dry hole, thus permitting commencement or resumption of rental payments rather than providing for payments contractually equated to royalties. Would the result of the cases involving royalties be changed because the landowner has not executed a lease with a shut-in “royalty” clause? It seems unwise to vest the landowner with power to alter the rights of the royalty owner by such unilateral action.

For these reasons, the author feels that the court of appeal has correctly interpreted the prior jurisprudence of the Supreme Court and that this interpretation should be adhered to in dealing with future cases involving similar facts. The Supreme Court gave some evidence of approving the interpretations, as in

70. *Id.* at 358, 94 So. 2d at 287.
denying writs it stated that on the facts as found by the appellate court there was no error of law.\textsuperscript{72}

Two other facets of the decision bear elaboration. First, what is the technical nature of the effect on prescription? Is it a suspension or an interruption? It seems somewhat illogical to term the effect an interruption as the condition interrupting prescription, production in which the royalty owner is entitled to share, has not occurred. Yet the Supreme Court in \textit{Delatte v. Woods}\textsuperscript{73} equates presence of the well to production and designates the effect as an interruption of prescription. Possibly this aspect of the decision should be viewed as dictum, since a distinction between interruption and suspension was unnecessary to the case. To the author it seems that the presence of the shut-in well judged capable of producing in paying quantities at a time prior to the prescriptive date should be regarded as suspending the running of prescription until production is achieved. This gives rise to the question of how long the suspension should be deemed to last. The answer is indefinite but it is the only one which can logically be given: as long as the well continues to classify as one capable of producing in paying quantities. If at any time circumstances change and the well no longer meets the required standard, the suspension should cease and prescription should commence to run as before. Of course, if the courts should clearly hold the effect to be an interruption, presence of the well would, presumably, constitute a continuing interruption as long as the well remains capable of producing in paying quantities.

It should be emphasized that the requirement regarding the well is that it be \textit{capable} of producing in paying quantities. This consideration presents the second additional item for discussion. One might infer from the opinion of the Second Circuit in the \textit{Goodwin} case that it was judging the effect of the shut-in well on prescription by the subsequent actual performance of the well as a producer in paying quantities. This seems inaccurate. As suggested, the time to determine whether prescription is suspended (or interrupted if that is not a correct characterization of the effect) is the date it was tested and shut in as a well capable of producing in paying quantities. This determination should be made on the basis of test data accumulated at a time

\textsuperscript{72} Lee v. Goodwin, 238 La. 149, 177 So. 2d 118 (1965).
\textsuperscript{73} 232 La. 341, 94 So. 2d 281 (1957).
prior to the prescriptive date. It should not matter that by hind-
sight the reasonable determination of the productivity of the
well based on adequate test data proves to be erroneous.

One might further infer from the opinion on original hear-
ing that the court felt that production interrupting prescription
accruing against a mineral royalty must necessarily be in “pay-
ing quantities.” This impression was carefully corrected by a
per curiam opinion subsequent to application for rehearing.\textsuperscript{74}
The court stated that production interrupting prescription need
only be production in which the royalty owner is entitled to
share. Whether it is in “paying quantities” as that expression is
understood for purposes of lease administration should be of no
moment. The writer hastens to agree. If the royalty owner par-
ticipates in production, either in kind or by payment of any
amount of royalties, this fact alone should fulfill the require-
ment of production to interrupt prescription. The right to par-
ticipate in production is what is conveyed or reserved in a roy-
alty transaction, and participation in production, regardless of
quantity, should preserve the royalty right. This, as observed
by the court, is consonant with a prior ruling of the Supreme Court
regarding preservation of a mineral servitude by production.\textsuperscript{75}
The same rules should be applicable to both interests insofar as
production is concerned.

\textbf{CONSERVATION}

\textit{Administrative Rulings}

\textit{Guarisco v. J. C. Trahan, Inc.}\textsuperscript{76} is a decision which appears
to have reached an acceptable result by somewhat questionable
means. Plaintiffs sought an order requiring defendant to make
a directional survey of an oil well completed and operated by
the defendant. It was alleged that the well permit was origi-
nally issued to another operator, that defendant had taken over
and completed the well under an amended drilling permit, and
that no directional survey was made as required by section
XVIII of Statewide Order 29-B of the Commissioner of Conserva-
tion despite the fact that the well had a surface location less than
300 feet from the property line of a portion of ground owned
by plaintiffs and was drilled to a depth greater than 4000 feet.

\textsuperscript{74} Lee v. Goodwin, 174 So. 2d 651, 655 (La. App. 2d Cir. 1965).
\textsuperscript{75} Mays v. Hansbro, 222 La. 957, 64 So. 2d 232 (1953).
\textsuperscript{76} 173 So. 2d 304 (La. App. 1st Cir. 1965).
Plaintiffs further alleged that the Commissioner of Conservation had failed to bring suit to restrain the defendant from continuing to violate the provisions of the order in accordance with R.S. 30:14\textsuperscript{77} and that plaintiffs were availing themselves of the right granted by R.S. 30:16\textsuperscript{78} to bring suit to prevent further violation.

The cited provision of Statewide Order 29-B states that wells having a surface location 300 feet more or less from any property line or unit line and which reach a depth of 4000 feet or more shall have directional surveys made to the total depth of the hole before setting final string of casing. R.S. 30:14 provides that whenever it appears that a person is violating a conservation order, the Commissioner shall bring suit to restrain that person from continuing the violation. R.S. 30:16 provides that any person in interest adversely affected by the violation who has notified the Commissioner in writing of the violation and requested him to sue may bring suit to prevent further violation.

Defendant filed an exception of no right of action and a motion for summary judgment. Judgment was rendered in favor of defendant, and plaintiffs appealed. The First Circuit Court of Appeal sustained the judgment of the lower court. From reading the appellate opinion, it appears that the court disposed of the case by sustaining an exception of no right of action. To the author this seems erroneous. The exception of no right of action is intended to question the interest of the plaintiff in the subject matter of the suit.\textsuperscript{79} That this plaintiff, alleging that the well in question was bottomed under his land, had an interest in the subject matter appears beyond question. However, dis-

\textsuperscript{77} Insofar as it is pertinent to this discussion La. R.S. 30:14 (1950) provides: "Whenever it appears that a person is violating or is threatening to violate a law of this state with respect to the conservation of oil or gas, or both, or provision of this Chapter, or a rule, regulation, or order made thereunder, the commissioner shall bring suit to restrain that person from continuing the violation or from carrying out the threat."

\textsuperscript{78} La. R.S. 30:16 (1950) : "If the Commissioner fails to bring suit within ten days to restrain a violation as provided in R.S. 30:14, any person in interest adversely affected by the violation who has notified the Commissioner in writing of the violation or threat thereof and has requested the Commissioner to sue, may bring suit to prevent any or further violations, in a district court of any parish in which the Commissioner could have brought suit. If the Court holds that injunctive relief should be granted, the Commissioner shall be made a party and shall be substituted for the person who brought the suit and the injunction shall be issued as if the Commissioner had at all times been the complaining party."

\textsuperscript{79} La. Code of Civil Procedure arts. 681 and 927 and the comments following them (1960).
position of the case on the basis of the motion for summary judgment, though arguable, is certainly a supportable means for decision.

Defendant took over the well at a depth of 13,100 feet. A dipmeter survey had been conducted to that depth, but no directional survey had been made, and there was apparently no means of even approximating the direction in which the hole might have drifted below the depth of 13,100 feet. Plaintiffs made a demand upon the Commissioner of Conservation to have a directional survey conducted. In response, the Commissioner replied that on the basis of approximate computations which could be made from the dipmeter survey to the depth of 13,100 feet the hole at that depth was drifting away from plaintiff's property. Assuming a complete reversal of direction and a vertical deviation of 3°, the Commissioner eliminated any possibility that the well could be bottomed under plaintiffs’ premises.

Defendant apparently argued that the letter to plaintiffs constituted a ruling by the Commissioner that the evidence available to the Commissioner concerning the deviation of the hole and its approximate bottom eliminated the necessity for any directional survey. Among the exhibits submitted by defendant there was an opinion from counsel to the Commissioner advising that the Commissioner had discretionary authority to order the survey. It was urged, therefore, that plaintiffs’ proper remedy was to attack this “ruling” of the Commissioner directly under R.S. 30:12.80 This argument was apparently appealing to the courts.

If the holding of this case is correctly analyzed as being that the letter from the Commissioner to plaintiffs constituted a ruling which should have been attacked directly, the decision is supportable. In effect, it seems that the court is saying that the Commissioner’s letter is an adjudication on the applicability of the provision of Statewide Order 29-B requiring directional surveys. The adjudication was that within the meaning and intent of the order no survey was required in this particular case.

80. Insofar as it is pertinent to this discussion, La. R.S. 30:12 (1950) provides: “An interested person adversely affected by any law of this state with respect to conservation of oil or gas, or both, or by provision of this Chapter, or by rule, regulation, or order made by the Commissioner hereunder, or by an act done or threatened thereunder, and who has exhausted his administrative remedy, may obtain court review and seek relief by suit for an injunction against the Commissioner as defendant.”
Thus, because the order was ruled inapplicable, plaintiffs could not maintain their assertion that the Commissioner was failing to prevent a violation of the order and that they were rightfully suing to enjoin further violation.

This is certainly a logical analysis of the situation. The only questions which arise in the author's mind are how one exhausts administrative remedies in this type of case and whether, in view of the informality of the "ruling," there would be an adequate record on which to base a judicial review. Presumably, if an attack on the order were made, the record would consist of the plaintiff's demand that Order 29-B be applied, the Commissioner's reply, and the dipmeter survey on which the Commissioner relied as a basis for his calculations concerning the location of the bottom of the hole. It does not appear that there had been any opportunity to present evidence conflicting with the Commissioner's conclusions, and therefore it is at least arguable that there is not a sufficient record to permit judicial review.

Nevertheless, the holding of the case is, on the facts, defensible. Perhaps the lesson to be learned for those caught in plaintiffs' position in the future is that when any similar demand is made for the application of a statewide order or other rule or regulation or any request is made for a declaratory ruling by the Commissioner as to the applicability of a rule, order, or regulation, the party should be prepared to submit some form of evidence in support of his position along with the demand or request to assure that the maximum amount of information will be before a court in the event judicial review becomes desirable or necessary.

*Well Costs*

*Superior Oil Co. v. Humble Oil & Refining Co.* is certainly one of the most important decisions rendered during the past term. The case determines that a lessee provoking a unitization hearing and seeking to participate in a proposed unit can be forced by the operator of the well to pay a proportionate share of drilling costs in cash. The holding indicates that the remedy of withholding production to recoup drilling costs is not an exclusive remedy under the circumstances of the case. The court

81. 165 So. 2d 905 (La. App. 4th Cir. 1964).
carefully limited its holding to the situation of a nondrilling “owner”82 or lessee who demands unitization.

Two possible theories for this decision emerge from the opinion. One is that R.S. 30:10A(1)(c)83 by referring to costs of development and operation as being chargeable against other “owners”84 in a conservation unit, impliedly grants to the unit operator the right to recover. The other is a theory of unjust enrichment advanced in a per curiam opinion on application for rehearing.

R.S. 30:10A(1)(c) states that development and operating costs chargeable by the operator to other owners are limited to actual reasonable expenditures, including supervision, and in the event of dispute are to be fixed by the Commissioner of Conservation. There is no mention of how such costs are to be recovered, and there is no categorical statement that they are recoverable. However, it does not make good sense to refer to costs as being chargeable by an operator without at least implying that when charged they may be collected by some adequate means in the event of refusal to pay. Thus, it appears sound to infer that some right of recovery is implied in the statute.

In Hunter Co. v. McHugh85 the unit operator was recovering drilling and operating costs by withholding production from other owners. This procedure was attacked on the ground that the conservation statute grants no independent right to recover such costs. The position of the operator was, however, upheld. It was thought by many and, indeed, was strongly urged in the case under discussion that withholding production was the only means by which the operator might recover costs.

82. The court does not indicate whether it used the term “owner” in the technical sense of R.S. 30:3(8)—i.e., “the person who has the right to drill into and to produce from a pool and to appropriate the production either for himself or for others.” However, since it used the phrase “owner or lessee” it seems likely that it was referring to owners of unleased interests (who would classify as “owners” under the statute) and lessees (who would also be “owners” within the statute).
83. La. R.S. 30:10A(1)(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.”
84. The term “owner” is here used in the technical sense intended by R.S. 30:3(8). For a quotation of that definition see note 82 supra.
85. 202 La. 97, 11 So. 2d 495 (1942).
It seems reasonable enough to limit the operator to withholding production if the party owing costs is a nonconsenting participant in a unit. This means that the business judgment of the operator in drilling and operating the unit cannot be substituted for that of a party who has not consented at the latter's cost, except to the extent of his share of production. However, there are strong equities favoring the position of plaintiff in the Superior case. Plaintiff had allegedly incurred drilling costs of some $300,000. As a result of the unitization provoked by defendant, plaintiff saw more than 55% of the total production taken from it. The economic burden of having to pay out the total investment from less than half of the production, freeing the share of the party requesting the unit from any burden whatsoever, was simply one which the court was not willing to impose.

The meaning of the decision seems fairly clear. If an "owner," as defined by the conservation act, provokes a unitization and is not the operator of the unit well, the right of withholding that party's share of production as a means of recovering drilling and operating costs is not the only remedy available to the unit operator. Limiting the right of recovery in cash to those who seek to become part of the enterprise represented by the unit assures that nonconsenting parties will not become open game for those wishing to provoke unitization as a means of spreading their business risk under cover of compulsory process of law.

The Superior decision has been criticized, but to the author it appears sound to say that withholding of production is not an exclusive remedy. Admittedly, there are unsolved problems as to the further situations in which this decision may be followed or distinguished, such as that of Lessee A provoking a hearing to unitize with a portion of Lessee B's property prior to drilling; this raises the possibility of what A's liability would be if B drills the unit well and it turns out to be a dry hole. Yet, it seems that if administered with proper consideration of each type of case, the remedy established as a result of the Superior case can serve a beneficial purpose in the law.