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MINERAL ROYALTIES — PROBLEMS OF
USE FOR INTERRUPTION OF
LIBERATIVE PRESCRIPTION

The mineral law of Louisiana, aside from conservation legislation, has been developed almost entirely on a case by case basis. As a result of this piecemeal development, persons are uncertain of rights arising from mineral transactions until court review is completed. One area of mineral law still uncertain is that of interruption of liberative prescription running against a mineral royalty interest. A mineral royalty interest is the right to a portion of minerals actually produced, or their proceeds, the right not being limited to a specific lease.¹

Although the mineral royalty was first defined as a real right attached to the land and subject to ten-year liberative prescription,² the Louisiana Supreme Court, distinguishing it from a mineral servitude later characterized the royalty as "a conditional obligation, depending on an uncertain event, that prescribed in ten years if the event did not happen prior thereto."³ It has been suggested that this later characterization is inconsistent with the application of ten year liberative prescription as "the contract . . . would be suspended until the occurrence of the event upon which it is conditioned . . . ; and, hence, the applicable liberative prescription would commence to run only from that time."⁴ It has been further suggested⁵ that this inconsistency may be resolved by characterizing the royalty as an unconditional *right* which is subject to ten-year prescription for *non-use*,⁶ as are the traditional real rights, and that the *claims* arising from the royalty are subject to a suspensive condition. Upon the happening of the condition, liberative prescription of ten

1. This type mineral royalty was first established in *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939). It is to be distinguished from the sale by a lessor of his share of production in a specific mineral lease as in *Calcasieu Oil Co. v. Yount-Lee Oil Co.*, 174 La. 547, 141 So. 55 (1932) and from the sale of a fraction of the lessee's operating interest in a lease, the so-called "overriding" royalty, as in *Wier v. Glassell*, 216 La. 828, 44 So. 2d 882 (1950), and in *Arkansas Fuel Oil Co. v. Gary*, 70 So. 2d 144 (La. App. 1954).

2. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

3. *St. Martin Land Co. v. Pinckney*, 212 La. 605, 619, 33 So. 2d 169, 172 (1947).

4. Concurring opinion by Hamiter, J., in *St. Martin Land Co. v. Pinckney*, 212 La. 605, 622, 33 So. 2d 169, 174 (1947).

5. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161, 204-05 (1963).

6. LA. CIVIL CODE art. 3546 (1870).

years, applicable to the enforcement of personal actions,⁷ begins to run against the enforcement of those *claims*.

Whichever conceptual basis is applied to the mineral royalty, it is clear that the existence of the mineral royalty is dependent on either production⁸ or a clear acknowledgment of the royalty owner's interest⁹ before the end of the prescriptive period. That the acknowledgment must be in formal terms, as is necessary to acknowledge a mineral servitude, is fairly clear,¹⁰ but the question of what constitutes *production* has not been satisfactorily answered. It is established, however, that the mineral royalty owner has no rights or obligations concerning the actual mineral development of the property.¹¹ The existence of the mineral royalty thus depends upon achievement of production by one who has the development rights, either as mineral owner or lessee. Cast in this light, it would appear that the mineral royalty may be subject to a purely potestative condition, especially since it has been held that the mineral owner and the lessee are under no obligation to seek production in order to preserve the mineral royalty owner's interest.¹² The mineral royalty however, has not been held void because subject to a purely potestative condition since the landowner would suffer a real detriment if he failed to develop his land.¹³ The result is that the mineral royalty is a passive right which neither gives the royalty owner rights to develop nor makes him a necessary party to a mineral lease.¹⁴ He is limited to the mere right to share in the production of oil, gas, and minerals, if and when they are produced.¹⁵

Since production is required, the commencement of drilling before the expiration of ten years which results in a dry hole¹⁶

7. *Id.* art. 3544.

8. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

9. *Union Sulphur v. Lognon*, 212 La. 632, 644, 33 So. 2d 178, 182 (1947).

10. See *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So. 2d 575 (1960); *Union Oil Co. of California v. Touchet*, 229 La. 316, 86 So. 2d 50 (1956); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

11. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

12. *Uzee v. Bollinger*, 178 So. 2d 508 (La. App. 1st Cir. 1965).

13. *Humble Oil & Refining Co. v. Guillory*, 212 La. 646, 33 So. 2d 182 (1947).

In other words, it is felt that the landowner, although he could refrain from leasing in order to defeat the mineral royalty, would not be entirely free as he stands to suffer economic loss by refusing to develop. The distinction is that though the existence of the royalty interest depends on the landowner's (obligor's) will, a potestative condition under LA. CIVIL CODE art. 2034 (1870), it is not such a potestative condition (purely potestative) as will make the contract void under art. 2035.

14. *Humble Oil & Refining Co. v. Guillory*, 212 La. 646, 33 So. 2d 182 (1947).

15. *Ibid.*

16. *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So. 2d 169 (1947).

or which results in production after the expiration of ten years¹⁷ will not interrupt the running of prescription. Even if a well is drilled and it shows traces of oil and gas when tested before the end of ten years, prescription is not interrupted if actual production is not achieved until after the expiration of the prescription period.¹⁸

Thus only production will interrupt the running of prescription; but must that production be from the property subject to the mineral royalty? It has been determined that when a mineral royalty is sold under a single deed covering several non-contiguous tracts, production on one tract within ten years will not interrupt prescription accruing against the other tracts.¹⁹ But where the royalty tract is wholly included within a drilling unit,²⁰ prescription may be interrupted by production off the royalty tract if within the unit. There exists a great deal of confusion, however, if the royalty tract is only partially included in a drilling unit. If the unit is voluntarily formed and no division of the use requirements is implied in the contract, interruption by production is applicable to the whole royalty tract.²¹ If it is a compulsory unit, however, production on the unit but off the royalty tract interrupts prescription only as to the portion included in the unit.²²

Just as unitization has had an impact on production applicable to the interruption of prescription, so has the so-called "shut-in" well. A well is "shut-in" (this is particularly applicable to gas wells) when minerals are not drawn off because no market or pipeline is available to receive production, or some governmental quota restrictions are in force. *Union Oil Co. of California v. Touchet*,²³ the first case presented to the Supreme Court for a determination of the effect of a shut-in well on prescription, involved a unitized well located off the royalty tract, ca-

17. *Union Sulphur Co. v. Lognon*, 212 La. 632, 33 So. 2d 178 (1947).

18. *Union Sulphur Co. v. Andrau*, 217 La. 662, 47 So. 2d 38 (1950).

19. *Continental Oil Co. v. Landry*, 215 La. 518, 41 So. 2d 73 (1949).

20. Within the meaning of LA. R.S. 30:9B (1950) ("the maximum area which may be efficiently and economically drained by one well"). This unit may be either formed voluntarily under LA. R.S. 30:10A (1950), or formed under 30:9B.

21. *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So. 2d 575 (1960); *Montie v. Sabine Royalty Co.*, 161 So. 2d 118 (La. App. 3d Cir. 1964).

22. *Frey v. Miller*, 165 So. 2d 43 (La. App. 3d Cir. 1964). Further discussion of these conflicts is beyond the scope of this Note, but for an excellent discussion of the effects of forced and voluntary pooling orders, see Hardy, *Ruminations on the Effect of Conservation Laws and Practices on the Louisiana Mineral Servitude and Royalty*, 25 LA. L. REV. 824 (1965).

23. 229 La. 316, 86 So. 2d 50 (1956).

pable of producing, but shut-in for lack of market. The court indicated that the royalty owner's right to share in production would not be lost, in accord with the Louisiana Conservation Act provision that: "This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities."²⁴ The royalty owner's claim was ultimately rejected in *Touchet* on the ground that the drilling unit had not been validly formed before the running of prescription,²⁵ thus the statements on the effect of the shut-in were dicta. However, the same court, relying on the *Touchet* dicta, held in *LeBlanc v. Haynesville Mercantile Co.*,²⁶ that the royalty interest was preserved when the royalty tract was validly included within a unit on which a shut-in well was completed prior to the running of liberative prescription.

It was suggested in *Odom v. Union Producing Co.*²⁷ that *LeBlanc* was based on a stipulation in the lease agreement that "in lieu" royalty payments would be made to the lessor if a well was shut-in. But that suggestion failed to consider *Delatte v. Woods*,²⁸ in which the Supreme Court cited *Touchet* and *LeBlanc* as holding that, "the completion and 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 interest and preserve same from extinction by prescription."²⁹ Further, a close reading of *LeBlanc* supports the statement made in *Delatte*, which seems to be the better view since it would not be reasonable to make the royalty owner's rights depend on a stipulation in a lease contract to which he is not even a necessary party.³⁰

The most recent case dealing with a shut-in well on acreage unitized with the royalty tract is *Lee v. Goodwin*,³¹ in which the Second Circuit Court of Appeal held the mineral royalty was preserved beyond the ten-year prescriptive period. Although the Supreme Court refused writs, stating there was no error of law in the lower court's judgment, Justice Summers wrote a strong dissent contending that actual or constructive production (payment

24. LA. R.S. 30:9B (1950).

25. 229 La. 316, 86 So. 2d 50 (1956).

26. 230 La. 299, 88 So. 2d 377 (1956).

27. 243 La. 48, 141 So. 2d 649 (1962).

28. 232 La. 341, 94 So. 2d 281 (1957).

29. *Id.* at 358, 94 So. 2d at 287.

30. See note 15 *supra*, and accompanying text.

31. 174 So. 2d 651 (La. App. 2d Cir. 1965).

of shut-in royalties) and not a mere shut-in well is required to interrupt prescription.³² Concededly, the cases Justice Summers cites³³ require production for the interruption of liberative prescription, but the question is whether a shut-in well constitutes production, and the answer apparently given by the appellate court is that a shut-in well does constitute *production* for prescriptive purposes.³⁴ Justice Summers questions the appellate court's reliance on *LeBlanc*³⁵ in *Lee v. Goodwin*³⁶ in the face of the *Odom*³⁷ decision which characterized the *LeBlanc* result as based on the presence of the "in lieu" royalties as constructive production.³⁸ This argument lacks validity, however, as is suggested above. Further, he questions the appellate court's reliance on *Touchet*³⁹ as he believes the statement that a shut-in well constitutes production was dictum.

Whether or not Justice Summers was correct in his criticism of *Lee v. Goodwin*,⁴⁰ his dissent illustrates the lack of certainty in the area, and the Supreme Court seems to have passed an opportunity to define exactly what constitutes production to preserve the existence of the mineral royalty.

Denial of writs in *Lee v. Goodwin* seems to indicate that the Supreme Court considers that a shut-in well preserves the mineral royalty beyond the ten-year prescriptive period. This raises the question, however, whether the shut-in well constitutes an *interruption* of the ten-year prescription or merely *suspends* it until the well is actually produced. The better view is that the shut-in well merely suspends prescription, for then, if the well should be abandoned without actual production, the time that elapsed before suspension will be added to the time that accrues after suspension ends. If, on the other hand, the shut-in well interrupts prescription, the time that elapsed before the inter-

32. *Lee v. Goodwin*, 248 La. 149, 177 So. 2d 118 (1965).

33. Cases cited by Justice Summers include: *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So. 2d 575 (1960); *Union Oil & Gas Corp. of La. v. Broussard*, 237 La. 660, 112 So. 2d 96 (1959); *Union Sulphur Co. v. Andrau*, 217 La. 662, 47 So. 2d 38 (1950); *Continental Oil Co. v. Landry*, 215 La. 518, 41 So. 2d 73 (1949); *Humble Oil & Refining Co. v. Guillory*, 212 La. 646, 33 So. 2d 182 (1947); *Union Sulphur Co. v. Lognion*, 212 La. 632, 33 So. 2d 178 (1947); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 35 So. 2d 169 (1947); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

34. *Lee v. Goodwin*, 174 So. 2d 651 (La. App. 2d Cir. 1965).

35. 230 La. 299, 88 So. 2d 377 (1956).

36. 174 So. 2d 651 (La. App. 2d Cir. 1965).

37. 243 La. 48, 141 So. 2d 649 (1962).

38. See note 29 *supra*, and text accompanying.

39. 229 La. 316, 86 So. 2d 50 (1956).

40. 248 La. 149, 177 So. 2d 118 (1965).

ruption is cancelled and prescription must start to run again from the time the well is abandoned. In fairness to the land or mineral owner, it would be best to say the presence of a shut-in well suspends prescription in order to protect him from a renewed royalty charge if the well is never actually produced.

The question then arises whether suspension may be applied to the mineral royalty. Article 792 of the Louisiana Civil Code provides, "If the owner of the estate to whom the servitude is due is prevented from using it by any obstacle which he can neither prevent nor remove, the prescription of non-usage does not run against him as long as this obstacle remains." This article might be deemed applicable to the mineral royalty since the Supreme Court held in *Vincent v. Bullock*⁴¹ that the liberative prescription applicable to servitudes⁴² is applicable also to royalties. The court held in that case, however, that the suspension provided in art. 792 was inapplicabile as the royalty is not a servitude; and since the royalty owner had no rights "to explore and develop the minerals" there could be no obstacle to use rights he did not have. It is submitted, however, that such a holding is not broad enough to preclude the possibility of suspension when there is an obstacle to the only use a mineral royalty owner may make of the property, *i.e.*, his right to share in production.

It might be suggested that, since the royalty owner has no rights or duties to develop the property⁴³ and is not even a necessary party to a mineral lease involving the royalty tract,⁴⁴ a holding that a shut-in well will preserve the royalty interest is desirable. If it were otherwise, the royalty owner would be at the mercy of the mineral owner and his lessee, who might be tempted to shut a well in to await the prescription of any royalty interest then outstanding. Since it appears that the mineral owner and the lessee owe no fiduciary duty to the royalty owner,⁴⁵ this possibility is not remote.

Holding that a shut-in well will preserve a mineral royalty is also justified since modern petroleum engineering techniques make it possible to ascertain with reasonable certainty the capabilities of a completed well. Because of this ability, the land-

41. 192 La. 1, 187 So. 35 (1939).

42. LA. CIVIL CODE art. 789 (1870).

43. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

44. *Continental Oil Co. v. Landry*, 215 La. 518, 41 So. 2d 73 (1949).

45. *Uzee v. Bollinger*, 178 So. 2d 508 (La. App. 1st Cir. 1965).

owner or mineral owner could, on a proper showing, have the mineral royalty declared extinguished if the shut-in well was in fact not capable of production. The problem is in developing testing standards high enough to be acceptable to the courts.

It may be concluded that there is a need for clarification of what is required to preserve the mineral royalty. At present the law seems to be that a well capable of producing, but shut-in for some reason, will prevent the running of liberative prescription. This seems to be true whether the shut-in well is located on the royalty tract or on acreage unitized with the royalty tract. But, more clarification is needed to stabilize royalty transactions.

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**PERSONAL OBLIGATIONS — RIGHT OF OBLIGEE TO RECOVER THE
UNEARNED PORTION OF THE CONTRACT PRICE WHEN HIS
DISABILITY MAKES PERFORMANCE IMPOSSIBLE**

Plaintiff, whose physical incapacity prevented her completion of dancing lessons purchased from defendant dancing studio, sued to recover the price paid for the uncompleted lessons. *Held*, plaintiff may recover the unearned portion of the purchase price. Article 2003 of the Civil Code, which states that heirs of an obligee of a personal obligation may recover from the obligor the equivalent he received in case of the death of the obligee, is applicable to the situation in which the obligee is physically incapable of performing his part of the contract. *Acosta v. Cole*, 178 So. 2d 456 (La. App. 1st Cir. 1965);¹ *writs refused*, 179 So. 2d 273, 179 So. 2d 274 (La. 1965).

The case presents two problems: the propriety of the court's interpretation of article 2003, and the propriety of the court's application of the article to the case.

Article 2003² first appeared in the *Projet* of the Civil Code of 1825 and has no counterpart in earlier Louisiana law³ or in the Code Napoleon. French doctrinal writing demonstrates that

1. See *Richardson v. Cole*, 173 So. 2d 336 (La. App. 2d Cir. 1965); *The Work of the Louisiana Appellate Courts for the 1964-1965 Term — Obligations*, 26 LA. L. REV. 494, 501 (1966).

2. LA. CIVIL CODE art. 2003 (1870): "In like manner, if the obligation be purely personal as to the obligee who dies before performance, his heirs may recover from the obligor the value of any equivalent he may have received."

3. *Projet of the Louisiana Civil Code of 1825 — Redactor's Comment 272*: "The whole of this section is an addition to the Code. . . . The principles on which it is founded have long been established in the civil law"