Private Law: Mineral Rights

George W. Hardy III
One comes away from a reading of other recent article 852 boundary prescription cases, which do not merit discussion for lack of new or important legal questions, with the feeling that if there is conflicting testimony it can be very difficult to convince a court that a long-standing fence has not been in place more than thirty years.

**Liberative**

In *Freestate Industrial Development Co. v. T. & H., Inc.* it was held that a cause of action for damages based upon an alleged interference with natural drainage by altering its flow is a cause of action resulting from an abuse of a servitude owed by the plaintiff's estate to the defendant's estate, under article 660. Therefore, it was held that the ten-year prescriptive period applied and not the one-year period for offenses or quasi-offenses. The court's reasoning is logical, but if this result is compelled by the Code, one might question the wisdom of the wise redactors of the Code. The problem of ascertaining facts and causation of damages ten years after the act might often pose terrific evidence and proof problems. Although one year may be too short a period, something less than ten years seems in order, which raises the question of a need for Code revision.

**MINERAL RIGHTS**

*George W. Hardy, III*

**MINERAL SERVITUDES**

*Prescription—Effect of Operations under Community Lease*

The case of *Hall v. LeMay* involved one of those increasingly troublesome situations in which co-owners of property entered into a partition and attempted to reserve mineral rights in indivision. During the life of the mineral rights so reserved, the various land and mineral owners entered into a lease under which production was achieved. The well site, however, was not on that portion of the partitioned estate involved in the litigation. Thus, it was contended by the owner of the tract in question that the act of partition had created separate mineral servitudes on each of the lots resulting from the partition, that there had

---

38. 188 So.2d 746 (La. App. 2d Cir. 1966)
* Professor of Law, Louisiana State University.
1. 191 So.2d 720 (La. App. 2d Cir. 1966).
been no operations on the tract in question, and, thus, that the mineral rights reserved in the act of partition had expired as to that particular tract. It was the contention of the mineral owners that the act of partition had not created separate servitudes on each of the lots resulting from the partition. However, even assuming that separate servitudes had been created, it was further urged that the lease in question was a community lease under which the parties had all agreed that production from any portion of the leased area would be shared proportionately by all those joining in the lease.

The lower court determined that the act of partition had indeed created separate servitudes. However, it further concluded that the lease was a community lease and that the drilling and production which had taken place was sufficient to interrupt prescription even though the operations took place at a site not on the tract immediately in question. The court of appeal eschewed decision on the first issue, and, assuming but not admitting that the act of partition created separate servitudes, proceeded to dispose of the case by holding that the lease was a community lease with the result that production on any portion of the area under lease interrupted the running of prescription against the outstanding mineral rights on the tract in question.

This case raises the question of what bilateral or multilateral acts of a landowner and a mineral servitude owner will have the effect of liberalizing the ordinary rules of prescription so that operations on a tract other than that burdened by the servitude but nevertheless attributable to the servitude tract in some manner would have the effect of interrupting the prescription of nonuse accruing against the mineral servitude rights. In deciding the case the court of appeal cited two earlier decisions as authority for the proposition that when a community lease is executed “the drilling of a single producing well anywhere on the leased premises will maintain the entire lease in effect, and will also interrupt prescription on all mineral servitudes subject thereto.” The cases relied upon are of extremely doubtful authority insofar as the question of prescription is concerned in that they deal only with the question whether operations on one tract in a community lease will maintain the

entirety of the lease as between the lessee and the lessors. The writer finds no clear authority in the jurisprudence for the proposition stated by the court in this case. In the earlier decision by the Louisiana Supreme Court in Robinson v. Horton, the following language is found:

"Thus it may be seen that the plaintiff and defendants, by entering into the joint lease contract of January 4, 1935, in clear and unambiguous terms unitized or integrated their mineral interests by creating one whole lease in favor of the lessee in order to have the lands developed and they are, in turn, to receive royalties from the oil produced from the land in the proportion that their mineral rights bear to the whole, which the lessee obligated itself to pay as long as oil or gas is produced therefrom in paying quantities. They have contracted; they are bound by their contract; and the question of whether the servitudes, owned by the defendants in these two cases at the time of the confection of the contract, were actually used by drilling is immaterial." (Emphasis added.)

Thus, no decision was reached on the issue of prescription. Other cases similar to that at bar have touched upon the issue, but as in the Robinson decision, have not clearly disposed of the issue of whether operations on one portion of the lease interrupt prescription as to mineral rights outstanding on another portion. Thus, the decision of the Second Circuit in Hall v. LeMay is the first clear statement that community lease operations interrupt the running of prescription accruing against a mineral servitude though conducted from a site not on the tract burdened by the servitude.

Certainly parties are free to contract so as to achieve the result reached in the Hall case. Prior decisions regarding the effect of voluntary unitization suggest this principle clearly.

4. 197 La. 919, 2 So.2d 647 (1941).
5. Id. at 930, 2 So.2d at 650.
7. 191 So.2d 720 (La. App. 2d Cir. 1966).
8. Crown Central Petroleum Corp. v. Barousse, 238 La. 1015, 117 So.2d 575 (1960); Elson v. Mathewes, 224 La. 417, 69 So.2d 734 (1953). These two cases involve the effect of voluntary unitization of a portion of a servitude tract. Though they are principally concerned with the effect of such partial unitization and whether, absent express language in the contract, such unitization effects some sort of division of the servitude, it is implicit in their holdings that had the parties contracted in such manner as to include
Thus, the only question to be raised about this decision is whether it is wise to infer from the entry of parties into a community lease that they intended to liberalize the rules of prescription in the manner suggested by the Hall decision. The court indicated that the mutual benefits of sharing in production from the entirety of a communitized area are sufficient reason for the inference of liberalization of rules of use. If the facts are sufficient to disclose that the lease in question is truly a community lease, this inference is warranted. However, caution should be exercised in examining lease contracts to determine whether a community lease has been executed.

Imprescriptible Mineral Servitudes

A novel question regarding mineral servitudes was considered in Franks Petroleum v. Hobbs. In 1945 W. L. Coyle conveyed a certain 80-acre tract of land to McClellan, reserving to himself a mineral servitude with rights to one-half of the minerals. Shortly thereafter, McClellan conveyed the land to Hobbs. By judgment of 1951, the United States took title to 74.6 acres of the 80-acre tract by expropriation. The judgment purportedly reserved to Hobbs the mineral rights in the land taken. Plaintiff operator acquired leases from both contesting groups of claimants, those claiming under Coyle and those under Hobbs. A producing well was brought in, and royalties were deposited in court in a concursus proceeding.

Those claiming under Coyle, the mineral servitude owner as a result of the original conveyance of the land to McClellan, asserted that the provisions of R.S. 9:5806A were applicable and that their rights under the 74.6 acres taken by the United States were imprescriptible. Further, calling upon the concept of indivisibility, they claimed that the imprescriptibility attaching to the expropriated portion of the tract extended also to the remaining 5.4 acres. The Hobbs claimants asserted that the rights outstanding in the Coyle group as of the date of acquisition by the United States Government should be deemed to have prescribed and, under the terms of the judgment by which the

the entirety of the servitude tracts in the units formed, production anywhere on the unit, though not on the servitude tracts in question, would have interrupted prescription as to the entirety of the included tracts. It might also be noted that these two decisions are not in all respects consistent as to the effect of silence of the parties in a unitization agreement regarding the effect of inclusion of only a part of a servitude tract.

9. 200 So.2d 708 (La. App. 2d Cir. 1967).
United States acquired the 74.6 acres these rights, should be deemed to be vested in them. The thrust of the argument on behalf of the Hobbs group was that the provision in R.S. 9:5806A for imprescriptibility of minerals on land acquired by the United States by expropriation should be applied only in favor of the landowner and not to the owner of an outstanding mineral servitude at the time of acquisition by the United States. However, the court turned to the wording of the statute and found it to be free of ambiguity and directly applicable in favor of the Coyle group. It stressed the wording of the statute, which in pertinent part provides that when land is acquired by the United States and “is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas, or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible.” Thus, the court held that the land was acquired subject to the prior mineral reservation by Mr. Coyle and that the rights “so reserved” in the prior transaction were, under the unmistakable terms of the statute, imprescriptible.

The court went on to observe that in the absence of the statute the Hobbs group would have been in no position to claim ownership of the minerals as the attempted reservation by Mr. Hobbs in the act of acquisition by the United States was invalid as to the outstanding mineral rights in the Coyles since at the time of the acquisition by the United States Mr. Hobbs did not own those outstanding mineral rights and could not validly reserve them in favor of himself. Thus, under ordinary rules of property, absent the statute upon running of prescription of nonuse accruing against the Coyle servitude, it would have reverted to the United States Government. However, by reason of the statute and because the acquisition was subject to the prior reservation, the mineral rights previously reserved by Mr. Coyle were imprescriptible.

Lurking in the background of this decision is the later enacted legislation appearing in the statutes as R.S. 9:5806B which is applicable to acquisitions by certain named state agencies and certain general categories of state agencies. The later statute provides that if the land acquired by a covered state agency is conveyed subject to a prior sale or reservation still in force, the rights so reserved or previously sold remain prescriptible for nonuse. However, upon termination of the outstanding rights
rather than reverting to the landowner, the state agency, they are to revert to the person from whom the agency acquired the lands. It was apparently the argument of those representing the Hobbs group that R.S. 9:5806A should be construed in pari materia with R.S. 9:5806B. On a technical basis perhaps there is no room for construction of the two provisions in pari materia as they were not contemporaneously enacted. Nevertheless, there is a serious question in that there is an obvious difference in the effect of the two statutes respecting mineral rights outstanding at the time of acquisition by a government or government agency. The court in the Hobbs case was correct in holding that the statute by its clear and unambiguous wording was applicable to the Coyle mineral servitude and preserved it insofar as the 74.6 acres acquired by the United States was concerned. But there are possible due process and equal protection questions raised by the difference between the two statutes. The writer is not aware of any legislatively stated policy reasons for the distinction between the United States Government and state agencies insofar as this problem is concerned and is unable to think of any sound policy reason for such a distinction. The distinction may be purely arbitrary and thus unconstitutional.

Exactly how to resolve this conflict is a perplexing problem. Perhaps it might be said that as R.S. 9:5806B is the later expression of the legislative will, the earlier statute is unconstitutional. However, much might depend on the context in which the issue of denial of equal protection or due process is raised. Under the statute applicable to acquisitions by the United States it is the landowner at the time of acquisition who is most likely to be complaining that there is an arbitrary distinction between his case and that of an acquisition by a state agency under R.S. 9:5806B. However, if the acquisition in question is one under R.S. 9:5806B, it will be the owner of the minerals at the time of acquisition by the state agency who would be most likely to claim that there is arbitrary discrimination. The existence of this dilemma is sufficient reason to enact legislation to attempt to eliminate these discrepancies.

**MINERAL LEASES**

**After-acquired Title Clause**

*Williams v. Arkansas Louisiana Gas Co.*\(^{10}\) put at issue the validity of an after-acquired title clause in a mineral lease as

\(^{10}\) 193 So.2d 78 (La. App. 2d Cir. 1966).
against a landowner who acquired title subsequent to execution of the lease by his vendor. In reliance on *Calhoun v. Gulf Refining Co.*, the Second Circuit Court of Appeal held that the obligation embodied in the after-acquired title clause was merely personal in nature and that the landowner was not bound by the obligation contracted by his vendor. The course of following the prior decision by the Supreme Court in the *Calhoun* case is certainly defensible. However, a brief examination of the basic question entailed in the *Williams* case is warranted.

The essential problem in this case is similar to that raised in the reversionary interest cases dealing with mineral servitudes. It has been held that the doctrine of after-acquired title is, under proper circumstances, applicable to mineral servitudes. Thus, if a landowner purports to sell a mineral servitude at a time when the mineral rights are actually outstanding, operation of the doctrine of after-acquired title can result in the vesting of title if the vendor-landowner is owner of the property at the time the previously outstanding mineral rights revert to the land. The role of good faith in the operation of the after-acquired title doctrine in these instances is not definitely determined. Whether knowledge on the part of one or both parties to the sale of a mineral servitude under those circumstances would invalidate the transaction under the rule of *Hicks v. Clark* is unclear. Nevertheless, it is clear that the doctrine is not operative if one other than the original landowner is the owner of the property at the time the outstanding mineral rights vest.

Essentially, the court of appeal reaches a similar result insofar as mineral leases are concerned. In its reliance on the *Calhoun* case, there is some mention of the notion that a mineral

11. 235 La. 494, 104 So.2d 547 (1958).
12. Bates v. Monzingo, 221 La. 479, 59 So.2d 693 (1952); McDonald v. Richard, 203 La. 155, 13 So.2d 712 (1943). See also White v. Hodges, 201 La. 1, 9 So.2d 433 (1942). The theoretical basis for the decision in *White v. Hodges* is unclear as the court there spoke of both an obstacle theory under article 792 of the Civil Code and of the after-acquired title doctrine.
13. In *White v. Hodges*, 201 La. 1, 9 So.2d 433 (1942), it appeared clearly that the purchaser was in good faith. In *McDonald v. Richard*, 203 La. 155, 13 So.2d 712 (1943), the record reveals that both parties to the oversale transaction were apparently aware that at the time of the transaction the landowner did not own the minerals purportedly sold. Exactly what the effect of good or bad faith on the part of one or both parties to the transaction will be in the future is uncertain.
lease is a purely personal contract. Certainly, the running battle between the legislature and the courts on this issue has gone on for a long time and appears to be unending as of this date. However, it seems that it is not really necessary to base the result reached by the court in this case on the notion that the mineral lease is a purely personal contract. It is enough to say that the obligation imported by the after-acquired title clause is purely personal and is not enforceable against subsequent owners of the leased property unless expressly assumed by them.

The possibility that an obligation of the kind in question might be expressly assumed by a purchaser of the property was the basis for contentions by the original lessee in the Williams case that its lease remained valid. It was urged first that the purchaser of the land had taken title under a deed which expressly subjected his ownership to the outstanding mineral lease. However, the court held that the insertion of the clause in the deed subjecting the title to the outstanding mineral lease was purely for the purpose of protecting the vendor in warranty and did not constitute an express assumption of any of the obligations of the lease which were purely personal in nature by the vendee.

Another basis upon which assumption of the obligation was urged was that in a change of a depository bank form executed by the purchaser of the land after his acquisition of the property and reversion of the mineral rights previously outstanding, there was a clause stipulating that in executing the form the terms, conditions and stipulations of the lease were ratified, confirmed, and adopted. The court refused to accept the execution of this form as an assumption of the obligation under the after-acquired title clause on the ground that it was unreasonable to assume that the landowner, in whom title to the previously outstanding mineral rights had vested at the time he executed the change of depository form, would have renounced his valuable rights in favor of the defendant merely to achieve the desired change in depository banks. Under the precise circumstances of the case, this is sound. If the obligation in question is considered to be personal in nature and is not assumed as a result of purchase of the property, then the execution of the change of depository form after reversion of the minerals in question could not operate to vest title in the lessee as there would be no cause or consideration for such a transaction. The court, however, leaves
open the question whether there would be a different result if the change of depository form had been executed prior to the reversion of the mineral rights in favor of the purchaser of the land. One suspects that the result would have been the same.

**Late Payment of Royalties**

The decision in *Fontenot v. Sunray Mid-Continent Oil Co.* adds another piece to the puzzle of the effect of late payment or nonpayment of production royalties. The opinion discloses that defendant lessee had properly paid royalties on production from one large unit including almost all of the leased premises. However, for some thirty months it had failed to pay royalties due for production from two small units including a lesser portion of the leased acreage. Under the prior jurisprudence establishing the principle that failure to pay production royalties for an appreciable length of time without justification amounts to an active breach of the lease contract, the court had held that the plaintiff was entitled to relief. However, the remedy of cancellation was limited to a partial cancellation of the lease. The question of the propriety of this holding is discussed in the immediately following section.

**Partial Cancellation**

As indicated in the preceding discussion, the decision in *Fontenot v. Sunray Mid-Continent Oil Co.* results in a partial cancellation of a mineral lease in a case in which the lessor had prayed for full cancellation and had proven an active breach of the lease contract. The court, however, limited the cancellation by preserving to the lessee its rights in the unit on which production royalties had been paid. The concept of partial cancellation is rooted in *Carter v. Arkansas-Louisiana Gas Co.* in which the lessor received only partial cancellation as a result of his failure to appeal from a lower court judgment erroneously awarding a partial cancellation. The Supreme Court expressly acknowledged that the lessor would have been entitled to complete cancellation as the result of the lessee's failure diligently

---

16. 197 So.2d 715 (La. App. 3d Cir. 1967).
18. 197 So.2d 715 (La. App. 3d Cir. 1967).
19. 213 La. 1028, 36 So.2d 26 (1948).
to develop the premises, but did not grant that relief as the lessor had failed to prosecute an appeal from the erroneous judgment of the district court. Partial cancellation has been awarded in other cases involving failure diligently to develop the premises and to explore untested acreage. However, in these cases, the lessor asked only for a partial cancellation. The concept of the indivisibility of the mineral lease certainly sustains the position taken by the lessor in the instant case. Nevertheless, the Third Circuit refused to award the relief of total cancellation. In so doing, the court relied on its own prior decision in *Sellers v. Continental Oil Co.* in which it had also granted a partial cancellation.

In the writer's opinion, there is no authority for these two decisions. Further, they are contrary to the conceptualism which has been applied to the Louisiana mineral lease. Nevertheless, this rather clear departure from prior jurisprudence and existing conceptualism is sound. Though the concept is distinctly judge-made law, it is not therefore bad law. The soundness of this newly announced principle lies in its obvious and reasonable consideration of the economic position of the industry. In the *Fontenot* case the investment of defendant-lessee obviously involved millions of dollars. The only real damage to the plaintiff lessor lies in the fact that he is late receiving money to which he is undeniably entitled. Deprivation of the entire lease and the opportunity to profit from the immense investment required to discover and produce oil and gas under modern conditions seems a harsh remedy indeed under the circumstances. Even the remedy of partial cancellation is substantial, and in the eyes of some might be questioned. The situation presented in the *Fontenot* case differs from that in *Melancon v. Texas Co.*, in which the court found a deliberate use of economic coercion by the withholding of royalty payments to force the lessor to execute certain unitization agreements desired by the lessee. In such a

21. See, e.g., Hunter Co. v. Shell Oil Co., 211 La. 893, 31 So.2d 10 (1947). This decision involved application of the concept of indivisibility to a situation in which a portion of a lease was included in a unit and operations were conducted on the unit but off the lease premises. The court held that as the lease was indivisible in nature, the operations in question maintained the lease in its entirety.
22. 168 So.2d 435 (La. App. 3d Cir. 1964).
case of coercion and bad faith, the remedy of full cancellation is warranted, and the court in the Fontenot case expressly affirmed its adherence to that idea. Although the existence of such a deliberate course of conduct was urged by counsel for plaintiff in the Fontenot case, the court found no such fact and on the basis of what appeared to be the strong natural equities of the situation refused to grant a total cancellation.

It can thus be said that a new principle has emerged in Louisiana mineral law in Sellers and Fontenot. It is one which adds considerable flexibility to the position of the courts in administering the remedy of cancellation and which permits the doing of substantial justice in individual cases rather than the harsh injustice which might result from conceptual rigidity.

A subsidiary point but one of considerable interest in the Fontenot case is its consideration of the problem of the exact date on which cancellation should be granted. The lower court had granted cancellation as of the date of production from the sands on which no royalties had been paid. Painstaking scholarship is evidenced by the court's recitation of the fact that in prior cases the date of cancellation varied considerably, ranging from the date of the trial court judgment to the date of production to the date of judicial demand for cancellation. Exercising its discretion in effectuating the remedy of cancellation, the court awarded the remedy as of the date of formal demand by the plaintiff for dissolution of the lease. It wisely observed that delay of dissolution until the date of trial court judgment might place a premium on dilatory tactics by defaulting lessees.

MINERAL ROYALTIES

Relationship of Executive to Nonexecutive Rights

The case of Whitehall Oil Co. v. Eckart24 presents another facet of the question of the relationship between executive and nonexecutive mineral interests. In the case in question, landowners executed mineral leases reserving a $\frac{1}{4}$ royalty. By separate agreement they obtained an additional overriding royalty. The issue presented was whether under the terms of the agreement in question or any general principle of law the mineral royalty owners were entitled to share in the overriding royalty. A similar problem was raised in the earlier case of Uzee v. Bol-

24. 197 So.2d 664 (La. App. 3d Cir. 1966).
linger.25 As the Eckart case has been taken up on writs by the Supreme Court of Louisiana and has not been finally disposed of as of the date of this writing, the writer feels that comment would be improper. However, it is sufficient to say that this problem of relationship between executive and nonexecutive interests is a growing one and that to date Louisiana's treatment of the area shows evidence of being out of step with the remainder of the oil and gas jurisdictions in the country. By the time the next symposium on appellate jurisprudence is published the Eckart decision will be final and the writer will have full opportunity to expose his views on this general question.

Effect of Partition of Land

In Whitehall Oil Co. v. Heard26 the problem of the effect of a partition of land and an attempted reservation of mineral royalty rights in indivision is presented. The court states the issue presented in the case as follows:

"Did they [the parties to the partition] intend each tract transferred to be subject to separate mineral royalty reservations which affected that tract alone? Or did they instead intend for each co-heir to have a single undivided mineral interest affecting the entire mass of the property partitioned by the agreements?"27

The court then goes on to interpret the particular agreement as reflecting an intention to create separate mineral royalty rights on each of the tracts into which the estate in question was partitioned. Though the judicial technique employed effectively disposes of the case, it also skillfully avoids the very troublesome question of whether, if the parties intended to create in each co-heir an undivided mineral interest affecting the entire mass of the property partitioned by the agreements, such an intention can be legally effected.

Assume the simplified case of A, B, and C who are co-owners of a tract of land consisting of 120 acres. They desire to partition the property. Certainly it is possible for A, B, and C individually to obtain distinct and separate mineral servitudes amounting to one-third mineral interests on each of the three 40-acre tracts which might result from a partition. Thus, A would own 40 acres

26. 197 So.2d 672 (La. App. 3d Cir. 1967).
27. Id. at 676.
and \( \frac{1}{3} \) of the minerals in his own tract and would have separate mineral servitudes with a right to one-third of any minerals produced on the 40 acre tracts falling to B and C. B and C would obtain similar interests. But it is questionable whether in entering into a partition A could effectively obtain a result which would give to him \( \frac{1}{3} \) of the mineral rights in his own land and a \( \frac{1}{3} \) mineral servitude covering the two 40-acre tracts falling to B and C as a result of the partition. Here the question lies in deciding whether B and C can create a single mineral servitude covering the two lots in question. However, article 745 of the Civil Code, providing that several estates may be burdened by a single servitude in favor of a single dominant estate strongly suggests that this result is permissible. It is even more highly questionable whether the parties can partition the land and create a single mineral servitude covering the entire 120 acres which would be owned in indivision by the three former co-owners. The increased difficulty of obtaining this result, if traditional concepts are followed, lies in the basic rule that a man may not fractionate his title in favor of himself. In support of permitting such a result, an analogy might be made to article 805 which provides that, although when the ownership of the servient and dominant estates is united a servitude is extinguished by confusion, the whole of the ownership of the two must be in the same hands. In the instant situation, it might be said that A, B, and C could validly create a single mineral servitude owned in indivision by the three of them as neither individually nor in indivision do they own all of the property subjected to the servitude.

The result reached by the court by interpretation of the agreement is clearly a legally achievable result. Thus the decision reached is beyond criticism. However, the questions as to the validity of conveyances attempting to reach the other suggested results remain unanswered. One may question why parties should not be allowed freedom to choose either of the two results which seem questionable. Certainly, the history of jurisprudence regarding mineral servitudes reflects a strong tendency on the part of the courts to fractionate mineral servitude holdings so as to encourage their return to the land. The writer has analyzed the policy concepts which may be seen as underlying this tendency elsewhere and has expressed the opinion that in terms of today's industry the major policy factors in the mineral law should be simplicity and stability of titles and conservation of
minerals, with a supporting role to be played by the concept that prescriptibility of minerals aids to some degree in preventing the centralization of mineral wealth in the hands of established commercial interests.\textsuperscript{28} Certainly any question of conservation as a motivating factor in this situation is irrelevant. As to the matter of simplicity of titles it does not seem that permitting parties to achieve either of the indicated questionable results measurably complicates the title system. If distributing mineral wealth is recognized as a valid policy factor, it could be said that fractionating the mineral holdings in a situation such as that under discussion at least minimally effectuates that policy.

Some light is cast on this problem by examining whether there is another available and fully effective means for achieving the desired results. It does seem that prior to entry into an act of partition co-owners of land can validly vest mineral rights in or grant a ten-year mineral lease to a trust or a specially formed corporation. Subsequently, partition of the surface of the land itself can be achieved subject to the prior created mineral rights or mineral lease. In this manner the economic benefits stemming from utilization of the minerals will be shared as intended and the desired intent of creating a single servitude or single mineral lease preserved by operations anywhere on the estate in question will also be achieved. Viewing, then, the fact that the desired result can be achieved indirectly by the interposition of another legal personality, it might be argued forcefully that the courts should permit parties to contract directly for the desired result. Since the functional result in question can be achieved by other means, there appears to be little harm which could come to the system of mineral law from giving effect to the clear intention of parties who desire to achieve either of the indicated but questionable results. The availability of articles 745 and 805 strengthens this position.

The fact that mineral royalties, as distinguished from mineral servitudes, are involved should not require a different result for the two institutions. Certainly it would be unreasonable to reach differing results on the arbitrary ground that a royalty is not a servitude. The two types of interests should be subject to the same rule in this instance, no matter what course is taken.

CONSERVATION

The decision in *Mobil Oil Corp. v. Gill*\(^{29}\) touches upon what appears to be a rather sensitive point in the oil and gas industry. Plaintiff Mobil Oil Co. complained of certain unitization orders which established participation in unit production from the Cadeville Sand of the Calhoun Field by means of a formula giving 60% weight to volumetric computations and 40% weight to the productive surface area overlying the sand. The field in question is served by wells on a 320-acre spacing basis. In February 1962 the field was shut-in, and ultimately the Commissioner of Conservation ordered the installation of a recycling program to avoid retrograde condensation and loss of liquid phases below ground. Under R.S. 30:9(D) the Commissioner has authority to fix unit participation figures. However any order fixing such participations must assure to all parties insofar as practical a reasonable opportunity to receive their just and equitable share of recoverable hydrocarbons.\(^{30}\) The just and equitable share of each tract or producer participating in the unit is that portion “which is substantially in the proportion that the quantity of recoverable oil and gas in the developed area of his tract or tracts in the field bears to recoverable oil and gas in the total developed area of the field, insofar as these amounts can be practically ascertained.”\(^{31}\) In determining the just and equitable shares of those participating in the unit the Commissioner is “authorized to give due consideration to the productivity of the well or wells located thereon as determined by flow test, bottom hole pressure test, or any other practical method of testing wells and producing structures, and to consider other factors and geological and engineering tests and data as may be determined by the Commissioner to be pertinent or relevant to ascertaining each producer’s just and equitable share of the production and reservoir energy of the field or pool.”\(^{32}\)

Mobil took the position that in the situation in question the only formula which the Commissioner could legally use under R.S. 30:9(D) was a productive acre foot computation.

---

\(^{29}\) 194 So.2d 351 (La. App. 1st Cir. 1966).

\(^{30}\) LA. R.S. 30:9(D) and 11(B) (1950). The latter section relates to the allocation of allowable production. However, it clearly states the principle that the Commissioner must assure that each producer will have the opportunity to produce or receive his just and equitable share of recoverable hydrocarbons.

\(^{31}\) LA. R.S. 30:9(D) (1950).

\(^{32}\) Id.
In support of this it was argued that expert testimony disclosed that over 90% of the hydrocarbons in place could be recovered in a proper cycling program. Further, it was argued that the facts that such a high percentage of hydrocarbons could be recovered and that the hydrocarbons according to the isopachous map adopted by the Commissioner were evenly distributed throughout the formation meant that factors such as well productivity, porosity, permeability, and the presence of connate water in the formation were irrelevant in fixing participations in unit production. The Commissioner, however, maintained that the map was not fully accurate because of the wide spacing of the wells, and thus in determining recoverable hydrocarbons under each tract factors other than productive acre feet under the tracts had to be considered.

Two significant legal problems are dealt with in the decision by the First Circuit Court of Appeal. First is the scope and standard of review of orders by the Commissioner of Conservation. It was the Commissioner's position that a substantial evidence rule should be applied in reviewing his orders. However, the court pointed out that R.S. 30:12 provides that all pertinent evidence in respect to validity and reasonableness of the order of the Commissioner complained of is admissible in any contest of the validity of an order by the Commissioner. Thus, it was stated that the court could make a full review of the facts of each case. However, the court limits severely the basis for its review of the case by saying that the jurisprudence has firmly established the rule that courts will not substitute their discretion or judgment for that of the Commission in the absence of evidence showing such action to be arbitrary. Thus, in the final analysis, it appears that the standard of review set forth by the court is actually a more limited one than the substantial evidence rule contended for by the Commissioner.

The second question involved in Mobil's argument was that as a matter of law the Commissioner is required to compute unit participations on a volumetric basis. The court observed that R.S. 30:9(D) expressly permits the Commissioner to take into consideration such matters as well productivity and other factors and geological and engineering tests and data. The court's statement of Mobil's argument may have been some-

33. Monsanto Chemical Co. v. Hussey, 234 La. 1058, 102 So.2d 455 (1958); Hunter Co. v. McHugh, 202 La. 97, 11 So.2d 495 (1942); O'Meara v. Union Oil Co., 212 La. 745, 33 So.2d 506 (1947).
what oversimplified. It is the writer's understanding of the argument that in cases where other factors mentioned by the statute are irrelevant, or to state the proposition affirmatively, in cases where volumetric computations can be made, the Commissioner is under a duty to make such volumetric computations. It is difficult to argue with this position, for certainly the statute states that participation is to be on a volumetric basis and that other geological and engineering factors may be considered. Thus, it seems that where volumetric computation is possible, the Commissioner should be regarded as bound to fix participations on that basis.

The court observed that there was a conflict in the expert testimony on the computation of productive acre feet with Mobil's experts stating that a productive acre foot computation was possible and proper and the experts testifying on behalf of the Commissioner testifying that there were inherent inadequacies in the map of the formation because of the distance between wells, thus requiring the use of some factor other than acre feet alone to achieve just and equitable participation. Oddly, the court observes that none of the experts testifying for the Commissioner was able to furnish any scientific or mathematical basis for a 40% surface acreage factor but only expressed the feeling that this was "a reasonable solution to the problem." The court was apparently unwilling to say that the utilization of a surface acreage factor in fixing participations, albeit no scientific justification could be provided, was arbitrary so as to invalidate the order of the Commissioner.

This case, aside from the matter of judicial review of commission orders, deals with a rather widespread and difficult problem in Louisiana. The overwhelming majority of unit participation computations are based on surface acreage. It is the writer's opinion that although the Commissioner certainly is entitled to consider other and geological factors in fixing unit participations, when volumetric computations can be made, the statute requires such computations. Perhaps in the Mobil case the court was correct in saying that the Commissioner did not act arbitrarily in using a 40% surface acreage factor. There is at least some doubt as to the correctness of this holding. Nevertheless, the broader problem is related to the possibility that in a significant number of instances participation in unit production is currently being computed erroneously on a surface acre-
age basis. Perhaps it is an unsubstantiated hunch, but it is the
writer's feeling that because of the economic cost involved in
making computations and because "marginal" gains and losses
through surface acreage computation are distributed evenly in
the long run when the larger companies operate all over the
state, landowners are the neglected parties in this situation.
A landowner may have only one producing mineral interest
in the state. What to him would be a highly significant amount
of money might in terms of the overall economic picture of his
lessee-operator be inconsequential. The writer has no present
statistical data which can reveal the truth or falsity of this
"hunch." However, it appears that the matter is deserving of
intensive study.

INSURANCE

J. Denson Smith*

In the early case of Gay v. Blanchard, a question before
the court was whether the bringing of suit against a transferee
of property who had assumed payment of an indebtedness
secured by a mortgage covering the property interrupted the
running of prescription against the original debtor who was
the transferor. In support of this proposition it was argued
that, inasmuch as both the original debtor and the assumer were
bound for the payment of the debt, they were consequently
co-debtors in solido so that the institution of suit against one
interrupted prescription against the other. The court rejected
this contention and held that the mortgagor and the assumer
were not debtors in solido "in the sense of the Code." The opin-
ion recognized, however, that inasmuch as the parties were
bound for the same debt by their different acts at different
times, an imperfect solidarity existed in favor of the creditor.
The holding of the court was, therefore, that a suit against
one co-debtor of the same debt interrupts prescription against
the other only when the co-debtors are bound in solido "in the
sense of the Code," which seems clearly to mean, when by the
use of the term in solido or other equivalent expression they
"clearly show that they intend that each one shall be separately
bound to perform the whole of the obligation." In such event,
the Gay opinion explained, the co-debtors are mandataries of

* Professor of Law, Louisiana State University.
2. La. Civil Code art. 2082 (1870).