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Private Law: Mineral Rights

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converted to cash by the debtor. This is perfectly sound because the basis of the interruption is the acknowledgment by the debtor and not the receipt of cash by the creditor.

In *Klotz v. Nola Cabs*,[41] a taxi struck a parked police car, injuring the policeman and damaging the vehicle. A suit was timely filed for the personal injuries; and on the date set for trial, more than one year later, the City of New Orleans intervened to claim recovery for the damages to their car. The court held that the city's claim had been prescribed by one year, and the policeman's suit for personal injury did not constitute an interruption in favor of the city's claim because this was a totally different cause of action for property damage.

Informality in Auction Sale

It should be noted that the jurisprudence has added a condition to Civil Code Article 3543, which provides the two-year prescription to cure defects in judicial sales, in limiting the benefit of this plea to purchasers in good faith.[42]

MINERAL RIGHTS

*George W. Hardy, III**

MINERAL SERVITUDES

Use

Pan American Petroleum Corp. v. O'Bier[1] is an addition to the rules of use applicable to mineral servitudes. Production of gas was obtained from the servitude tract in question and was continued for a period of sixteen years, at which time the pipeline connections were removed and the well capped. Two events were relied upon by the servitude owners as constituting interruptions of prescription. First, the landowner, who also had an interest in the minerals, continued to use gas to supply his residence even after the well was shut in because it was no longer capable of production in paying quantities. Second, for a number of years, the lessee of the tract paid or offered to pay shut-in royalties to those entitled to share in them, including both the servitude owners and the landowner.

41. 209 So.2d 158 (La. App. 4th Cir. 1968).

42. Middle Tennessee Council, Boy Scouts of Am. v. Ford, 205 So.2d 867, 877 (La. App. 1st Cir. 1967), *citing* Bordelon v. Bordelon, 180 So.2d 855 (La. App. 4th Cir. 1965).

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1. 201 So.2d 280 (La. App. 2d Cir. 1967).

Dealing first with the question of the effect of use of gas for residential purposes by the landowner, the court adverted to Articles 793 and 794 of the Civil Code, noting that the latter requires that the servitude be used "as appertaining to the estate." Analogizing this to the situation of a mineral servitude, the court held that the use of gas by the landowner was not "by or on behalf or in the interest of the owner" of the servitude, an element required by the public policy inherent in the rules of use applied to mineral servitudes. Buttressing this conclusion, the court cites the opinion of the Supreme Court in *Union Oil Co. of California v. Touchet,* in which it was held that "it is a firmly entrenched principle of Louisiana mineral law that no act on the part of a landowner will have the effect of extending the life of a mineral interest unless it is shown that there was a clear intention on the part of the landowner to achieve that very result."[2]

There is but one questionable note in the discussion of this particular issue in the subject opinion. Citing *Mays v. Hansbro,*[3] which had held that production in paying quantities is not necessary to maintain a mineral servitude, the court stated that "to hold that the use of a small amount of gas for the service of one dwelling constituted production from a well which had been capped and from which all pipeline connections had been removed, would require such a strained and unreasonable interpretation as would not only violate the rules of reason and common sense but also the intent and purpose of considerations of public policy."[4]

In this writer's opinion, the determinative factor in this case is that the production for residential consumption was by the landowner, not the servitude owner. Had it been the mineral servitude owner's dwelling and gas consumption, a literal reading of *Mays v. Hansbro*[5] would require a holding that prescription had been interrupted. There the court stated only that it "is unimportant whether this production was in paying quantities so long as there was some production or use of the servitude."[6] Since the residential consumption of gas is a beneficial economic use of the minerals, it seems that had the production been by or on behalf of the servitude owner, a different result

2. 229 La. 316, 331, 86 So.2d 50, 55 (1956).
3. 222 La. 957, 64 So.2d 232 (1953).
4. Pan American Petroleum Corp. v. O'Bier, 201 So.2d 280, 285 (La. App. 2d Cir. 1967).
5. 222 La. 957, 64 So.2d 232 (1953).
6. *Id.* at 961, 64 So.2d at 234.

might have been reached in the instant case. A different rule would place the courts in the difficult position of having to draw lines as to how many barrels of oil or cubic feet of gas would be necessary to constitute use, a task involving the drawing of highly arbitrary lines.

The second significant issue in the case was whether the making of shut-in payments on a well no longer capable of production in paying quantities would constitute an interruption, or perhaps preferably a suspension, of prescription. The servitude owners relied on certain prior decisions indicating that the presence of a shut-in well capable of producing in paying quantities on a mineral royalty tract will have an effect on prescription. In those decisions, however, the facts that the leases in question had included provision for shut-in royalties and such royalties that had been paid lent plausibility to the argument by the servitude owners.

After noting that the case before the court involved a servitude rather than a royalty, a distinction which should not be deemed meaningful in this context, the court went on to state that it was "not aware of any authority to the effect that the payment of a shut-in royalty, of and by itself, constitutes the exercise of a mineral servitude. The determinant factor appears to relate to the cause which influences the shutting in of the well. If the cause is attributable to circumstances beyond the control of the owner of the servitude, for example, the want of a market, or the lack of pipeline transportation facilities, our courts have held that the running of prescription is suspended, although the period of time during which such a cause would be considered as justifying this conclusion has not been determined, possibly because no fixed rule in this respect would be available."[7]

Applying this principle to the facts of the case at bar, the court noted that the well was not one capable of production in paying quantities and was not shut-in for lack of a market or marketing facilities, but that it was shut-in because it could no longer produce in paying quantities. Thus, its presence on the premises could have no effect on prescription.

This writer has previously observed that the making of shut-in payments should not be the determining factor in deciding whether a shut-in well should have an impact on prescription.

7. Pan American Petroleum Corp. v. O'Bier, 201 So.2d 280, 285 (La. App. 2d Cir. 1967).

It is the *presence* of a *shut-in well* shown by surface production to be capable of producing in paying quantities which is determinative. Whether a particular lease includes provisions for shut-in royalties and whether such payments are made is irrelevant.

One further note should be taken of this decision. The court interprets the prior decisions in this area[8] as holding that the presence of a shut-in well "suspends" prescription. This is not correct, as the courts have in fact labeled the effect an "interruption." However, no case to date has squarely presented the issue, requiring characterization of the effect on prescription wrought by a shut-in well. To be sure, the characterization of this effect as a suspension is preferable to calling it an interruption because the effect stems from existence of a condition which does not permit an interruption of prescription by use. There is no production, thus no use. Still there is an effect on prescription which should be termed a suspension. The existence of a shut-in clause and the making of payments under it might in some instances permit courts to say that there is constructive production as contemplated by the lease, but not all leases are structured so that shut-in payments constitute constructive production. Moreover, as noted, it is the presence of a well capable of production in paying quantities, not the making of shut-in payments, which is the vital condition.

Contractual Variation of Rules of Prescription

Lebleu v. Lebleu[9] raised questions concerning the extent to which parties are free to vary the rules of prescription by contract. Plaintiffs were owners of a mineral servitude burdening defendant's land. During the fifth year in the life of the servitude, plaintiffs executed instruments with defendant under the terms of which they: (1) appointed defendant as their agent, granting full executive rights over their mineral servitude; (2) conveyed or released a portion of their mineral rights to defendant; and (3) received from defendant a promise that if

8. Delatte v. Woods, 232 La. 341, 94 So.2d 281 (1957); LeBlanc v. Haynesville Mercantile Co., 230 La. 289, 88 So.2d 377 (1956); Union Oil Co. of California v. Touchet, 229 La. 316, 86 So.2d 50 (1956); Sohio Petroleum Co. v. V.S.&P. R.R., 222 La. 383, 62 So.2d 615 (1952); Lee v. Goodwin, 174 So.2d 651 (La. App. 2d Cir. 1965), *writs denied*, 248 La. 149, 177 So.2d 118. Of these prior cases only the *LeBlanc* and *Lee* decisions were actually cited by the court of appeal in the opinion under discussion. However, the remainder are relevant. For a discussion of these cases, and specifically the question of whether the impact on prescription is one of interruption or suspension, *see The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Mineral Rights*, 26 LA. L. REV. 542, 556 (1966).

9. 206 So.2d 551 (La. App. 3d Cir. 1967).

their outstanding mineral interest expired at the end of the prescriptive period then accruing, defendant would convey to them a one-fourth mineral interest, a larger mineral interest than they then held. Plaintiffs' interest did in fact expire. Upon defendant's refusal to perform, plaintiffs sued for specific performance of the contract obligating defendant to convey the one-fourth mineral interest. Alternatively, plaintiffs sought an accounting for the bonuses and rentals attributable to the minerals which they had conveyed or released to defendant. In the further alternative, plaintiffs sought judgment decreeing that the instruments executed by them and by defendant had wrought an interruption of prescription by acknowledgment.

There was no basis for sustaining the second alternative argument that the instruments in question constituted an acknowledgment. The lower court granted the accounting sought in the first alternative demand and defendants did not appeal from that judgment. Thus, on denial of the primary demand for specific performance, the Third Circuit Court of Appeal affirmed the judgment of the lower court.

The primary demand for specific performance was denied on the ground that the court thought "the parties to this suit, in entering into the agreement which is evidenced by the three written documents hereinabove described, intended to vest plaintiffs with a mineral servitude extending over a period of at least 15 years from and after the date on which the contracts were entered into."[10] This result was reached in reliance on *Ober v. McGinty*[11] and other authorities[12] and on the principle of the Civil Code that one cannot renounce the benefit of prescription not yet accrued.[13] Although the court purported to distinguish the decision rendered in *Chicago Mill & Lumber Co. v. Ayer Timber Co.*,[14] the distinction drawn is not satisfactory, and the decision is erroneous.

The obvious key to the court's attitude, which is understandable, lies in the firmly established policy that mineral servitudes cannot be created without being subject to the ten-year pre-

10. *Id.* at 557.

11. 66 So.2d 385 (La. App. 2d Cir. 1953).

12. Hicks v. Clark, 225 La. 133, 72 So.2d 322 (1954); Roy O. Martin Lumber Co. v. Hodge-Hunt Lumber Co., 190 La. 84, 181 So. 865 (1938); Childs v. Porter-Wadley Lumber Co., 190 La. 308, 182 So. 516 (1938); Patton's Heirs v. Moseley, 186 La. 1088, 173 So. 772 (1937); Ober v. McGinty, 66 So.2d 385 (La. App. 2d Cir. 1953).

13. LA. CIV. CODE art. 3460.

14. 131 So.2d 635 (La. App. 2d Cir. 1961). The court also distinguished the Supreme Court decision in Ober v. Williams, 213 La. 568, 35 So.2d 219 (1948).

scription of nonuse and the corollary principle that parties may not deal in reversionary rights to mineral servitudes or mineral royalties. Analysis of the *Lebleu* decision is facilitated by holding it up for examination in the light of these two principles.

Treating the question of whether this was an attempt to create a servitude for a period greater than ten years, several criticisms of the decision can be made. First, the decision rendered in *Ober v. McGinty*,[15] upon which the court placed major reliance, is distinguishable. In that instance the parties at the time of creation of a mineral servitude attempted to give the servitude owner the right to renew *that particular servitude* if ten years should pass without interruption of prescription by use. The contract was clearly violative of the prohibition against renunciation of unaccrued prescription. But the basic reason for that prohibition insofar as mineral law is concerned is that it is deemed undesirable to permit one owner of land to burden future owners of the land with mineral interests not subject to the rules of prescription. The court need not have struck down the *Lebleu* contract, for it presented no such danger. In return for a present benefit—a larger share of the mineral rights and executive rights over plaintiffs' remaining share of the minerals—defendant made a promise to convey a *different, larger* mineral servitude to plaintiffs if a certain condition occurred, that is, if their then outstanding rights expired. No real right was created by the contract. The life of the existing mineral servitude was not in any way affected, and the accrual of prescription against it continued in the manner contemplated by law. No future owner of the land in question could have been held to defendant's personal promise to convey mineral rights on occurrence of a future condition as the contract did not create any real right which could have bound a subsequent owner of the estate. Presumably the court would have had little difficulty enforcing a contract by which defendant promised to convey mineral rights to plaintiffs if on a date certain the value of certain stocks reached a particular figure. There is no essential difference between that contract and the one in question. The problem is that the consideration given by plaintiffs and the promise given by defendant centered on a condition involving the life of an existing mineral servitude. The situation punched an emotional key producing a reaction in terms of public policy which hard analysis should have avoided.

15. 66 So.2d 385 (La. App. 2d Cir. 1953).

To shore up this analysis, examination of the decision disregarded by the court, *Chicago Mill & Lumber Co. v. Ayer Timber Co.*,[16] lends support. There, the parties entered into a lease of land by which the lessee received the right to make all surface uses of the premises together with an option to purchase five years from the date of the contract and to apply the rental payments to the purchase price. The stated terms according to which the sale could take place included reservation of mineral rights by the lessor-vendor. The Second Circuit Court of Appeal denied an exception of no cause of action in the face of an express allegation that the parties entered into the agreement with the intent of circumventing the public policy against creation of mineral servitudes without having them subject to the rules of prescription. The court rested its decision on the principle that the lease contract did not create any mineral servitude, but merely granted an option. As there was no mineral servitude created, it could not be said that prescription began to run, and the public policy was not avoided.

In the *Lebleu* case, no mineral interest was created. The accrual of prescription against the then existing interest was not affected. There was a clear exchange of equivalents in the granting of the executive rights and the mineral rights by plaintiffs in return for defendant's personal promise to convey a new and different interest if the then existing rights expired. And, most importantly, no future owner of the land could have been bound by defendant's promise as no real rights were created as a result of his giving it.

The second problem in this case is found in the possibility that it might be a prohibited circumvention of the rule of *Hicks v. Clark*[17] against dealing in reversionary interests. Here again, however, the significant distinction lies in the fact that the landowner, defendant, did not attempt to create any real right which could burden any subsequent owner of the property. All that was given was a personal promise to convey. To require performance of that promise two conditions had to exist. Defendant would have to be owner of the land and the outstanding interest would have to expire. If any other person became owner of the land, plaintiffs could not have enforced defendant's promise. That such personal contracts are not reprobated by the public policy underlying the rules of prescription is suggested

16. 131 So.2d 635 (La. App. 2d Cir. 1961).
17. 225 La. 133, 72 So.2d 322 (1954).

by the decision in *McDonald v. Richard*[18] and other cases in which the court indicates that the after-acquired title doctrine is applicable to mineral rights. Two observations draw a close parallel to the instant case. First, for the after-acquired title doctrine to become operative the over-seller must be owner of the land at the time the previously outstanding mineral rights expire. Second, the after-acquired title doctrine is essentially an enforcement of the vendor's implied warranty of title by operation of law.[19] In the *Lebleu* case, the defendant would have had to remain owner of the land and the promise given was personal, not creative of real rights. As a further indication that the Lebleu contract was valid, the record in *McDonald v. Richard*[20] reveals that both vendor and vendee knew at the time of the over-sale that all of the mineral rights were outstanding. Still, the court indicated that but for the fact that the vendor did not remain owner of the land at the time of reversion of the previously outstanding mineral rights, the after-acquired title doctrine would have been applicable. Thus, it appears that if the parties could have effected the intended, or at least a similar, result of the contracts involved in the *Lebleu* case by an oversale and reliance on the after-acquired title doctrine, there is no reason to invalidate the contract into which they entered.

All things considered, then, the *Lebleu* decision is in error for the basic reason that the agreement did not violate the public policy against burdening land with mineral interests with a prescriptive period greater than ten years.

Partition

In *Barnes v. Perkins*[21] plaintiff instituted suit seeking partition of a tract of land. Partition by licitation was ordered, and following the sale a notary was appointed to disburse the proceeds. Plaintiff filed an opposition to the proposed distribution, but the trial court refused to sustain plaintiff's opposition. Plaintiff owned an undivided one-fourth interest in the land. However, the minerals attributable to this interest in the land were owned by the State of Louisiana. The remaining mineral

18. 203 La. 155, 13 So.2d 712 (1943). *See also* Bates v. Monzingo, 221 La. 479, 59 So.2d 693 (1952); White v. Hodges, 201 La. 1, 9 So.2d 433 (1942). The doctrinal base for the decision in *White v. Hodges* is unclear in view of the later decision in *McDonald v. Richard*. However, the indications that the after-acquired title doctrine is applicable to mineral rights are substantial and clear.

19. For a discussion of the entire doctrine of after-acquired title as applicable to mineral interests in Louisiana *see* Comment, *The After-Acquired Title Doctrine in Louisiana Mineral Law*, 27 LA. L. REV. 576 (1967).

20. 203 La. 155, 13 So.2d 712 (1943).

21. 201 So.2d 324 (La. App. 3d Cir. 1967).

rights were owned by the other two co-owners. The appraisal of the property had been made on the basis of $400 per acre for the property including the mineral rights and $75.00 per acre as a separate value of the mineral rights. In the judgment ordering the sale, the lower court specifically recognized that the state owned one-fourth of the mineral rights and decreed that the sale would not include that interest. At the sale, the property was bid in by the defendant co-owners, who deposited one-fourth of the amount of the bid with the sheriff and retained the remaining three-fourths. The deposit was made with the specific reservation that "all rights are reserved relative allocation of the adjudication price to surface and mineral interest ownership." The notary appointed to disburse the funds proposed to disburse the funds on a proportionate basis using the relative values between the parties' interests in the property and the appraisal figures. Thus, plaintiff's share was computed by finding the percentage of the total appraised value represented by his one-fourth interest, or ten acres, valued at $325.00. That percentage figure was used to find his share of the purchase price, which was slightly more than the total appraised value of the land and the three-fourths of the mineral rights available for sale. The remainder of the deposit was returned to defendants less their proportionate share of costs.

Plaintiff objected and demanded that judgment be rendered nullifying the sale and ordering a new sale. The principal ground for the objection was that the purchasers had not submitted a separate bid for minerals and that there was no evidence as to the amount bid for land and that bid for minerals. On appeal, plaintiff contended that he should be entitled to the full one-fourth of the net proceeds of the sale or alternatively that the sale should be annulled and a new sale had.

The demand for annullment of the sale was denied. The court held that the judgment directing the partition by licitation was a final judgment and that the delays for taking either a suspensive or devolutive appeal had elapsed. The objection by plaintiff insofar as it objected to the sale itself, was regarded as "in part an attempt to collaterally attack the original judgment which has become final."

The demand that plaintiff be given the full one-fourth interest in the net proceeds less costs, was also denied. Responding to specific arguments by the plaintiff, the court held that: (a) the appraisers had been requested to value the minerals separate-

ly from the land; (b) that the appraisers were qualified to value the mineral rights; (c) that the fact that separate bids were not submitted for the mineral rights and the land was of no significance in view of the fact that the minerals were in fact separately valued as required by the Civil Code; and (d) under the circumstances defendants were not required to show that a specific portion of the purchase price was paid for mineral rights as distinguished from the land.

Two points deserve brief notation. The first is the holding that under Article 741 it is not necessary that separate bids be submitted for land as opposed for mineral rights so long as separate appraisals have been made. The result reached by the court may represent substantial justice and certainly avoided repetition of the sale procedure in this particular case. However, the procedure of requiring separate bids or at least assignment of relative values would be preferable to that utilized and upheld in this particular case as bidders might assign values to land and minerals respectively different from the proportionate values fixed by an appraiser.

The second observation concerns the holding that defendants were not required to show that a specific portion of the purchase price was paid for the mineral rights as distinguished from the land. In view of the court's holding that separate bids were not necessary and that distribution could be made on the basis of proportionate values according to the appraisal values of the land and minerals, this is a necessary consequential holding. Nevertheless, the same defect is inherent in this holding as in the holding that disbursement of the proceeds could be made on the basis of the proportionate values found by the appraisers. That is, a bidder might not in fact be assigning the same relative values to land and minerals as did the appraisers. If the defendant in a case of this kind does not bear the burden of proving the values assigned to land and minerals, then this leaves room for inference that it is the plaintiff's burden. How a plaintiff can look into the mind of a bidder at a sale of this kind and find the relative values fixed for land and minerals in a lump sum bid without any likelihood of circumstantial evidence disclosing such values is difficult to discern.

These two elements of the court's decision point up the questionable character of the rules of law evolved and applied by the court. Certainly, if the decision is allowed to stand, it still re-

mains evident that a procedure of assigning relative values in bidding will permit more accurate distribution of proceeds.

MINERAL ROYALTIES

The only noteworthy decision involving royalties was rendered in *Gardner v. Boagni*,[22] which raises the whole question of the relationship between owners of land and mineral rights or the owners of mineral servitudes and the owners of mineral royalties, or non-participating royalty interests as they are referred to in other jurisdictions. This decision is the touchstone of a student comment presently being written, and for that reason extended discussion will be foregone. Still, the writer wishes to express the view that the trend of jurisprudence established by this case and the earlier decision of the First Circuit Court of Appeal in *Uzee v. Bollinger*[23] is demonstrably wrong and makes Louisiana virtually unique among oil and gas jurisdictions.[24]

The specific situation involved a partition agreement under which those owning the mineral rights were expressly stated to have the right to all bonuses, rentals, and other considerations (except royalties) from execution of mineral leases on the subject property and the royalty owners had the right to a stated fraction of all royalties. In negotiating a lease, the mineral owners received an overriding royalty interest which all parties admitted was in lieu of an offer of a substantial cash bonus. There can be no doubt, of course, that the cash bonus would have been entirely the property of the mineral owners had it been accepted. However, the override was taken and the mineral owners refused to share it on the ground that it was "bonus." In this writer's opinion it is unconscionable for the law to present opportunities for unfair dealing by such subtle and functionally meaningless manipulation of words. It is true that there are decisions stating that the royalty owner has no right to expect the mineral owner to act in his behalf in order to preserve his interest against prescription.[25] The logic of this principle is irrefutable and the concept sound. But to say that under no circumstances does the mineral owner owe a duty of fair dealing puts the law in the position of condoning sharp practices. In the

22. 252 La. 30, 209 So.2d 11 (1968).
23. 178 So.2d 508 (La. App. 1st Cir. 1965).
24. For a discussion of the subject *see generally* Williams, *The Fiduciary Principle in the Law of Oil and Gas*, in 13TH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION (Southwestern Legal Foundation 1962).
25. *See, e.g.*, Humble Oil & Refining Co. v. Guillory, 212 La. 646, 33 So.2d 182 (1946).

instant case there was no question of fraud, and fraud is not usually the problem in cases of this kind. However, there are opportunities for unfair dealing falling well short of fraud which the law should restrict. This is one of them.

Similar problems arise in the case of mineral servitude interests over which a landowner has executive rights. Here the legal basis for protection of the servitude owner is stronger because he has relinquished a power over his interest to another, establishing a relationship of trust in which he has a right to expect fair dealing by the holder of the power. It is important in this context to note that the relationship established need not be regarded as importing the full fiduciary relationship of principal and agent, but it imports a duty of fairness much akin to that already established as owed by a mineral lessee in exercising a power to pool his lessor's interest with other lands.[26]

MINERAL LEASES

Joint Lease

In *Fontenot v. Humble Oil & Refining Co.*,[27] plaintiff sought cancellation of a mineral lease. The facts were that plaintiff had entered into a lease of a tract which she owned with the owners of two other tracts in which she had no interest. Lessee completed a shut-in gas well. Production was achieved in the process of testing the well, and as the lease did not disclose the manner in which royalties were to be divided, lessee obtained a letter from plaintiff stating that she had no interest in the tract on which the well was situated and did not intend, by joining in the lease, to communitize or pool her share of the royalties payable with the other lessors.

Cancellation was sought on the ground that the lease was not a joint or community lease and production from the well located on one of the tracts in which she had no interest did not maintain the lease as to her tract. Examining the lease, a standard printed form, the court found that on its face it appeared to be a joint or community lease and held that although it might be severable as between the lessors, so that the sharing of royalties was not on a community basis, it was nevertheless a joint lease as to the lessee, and thus the drilling of the well and subsequent production from it were sufficient to maintain the lease as to all three tracts involved. In reaching this result, the court refused to hear

26. McDonald v. Grande Corp., 148 So.2d 441 (La. App. 3d Cir. 1962).
27. 210 So.2d 340 (La. App. 3d Cir. 1968).

extrinsic evidence purportedly showing the intent of the parties even though plaintiff pleaded error as to the nature of the contract.

Alternatively, plaintiff argued that if the court considered the lease to be joint as to the lessee, there was no cause or consideration for her entry into the contract. There is some merit to this contention. It is difficult to see why a lessor would enter into a joint lease of his land with tracts belonging to others if he was not to receive a share of royalties from production from the other tracts. Since error is one of the bases upon which extrinsic evidence may be admitted to determine the intent of the parties,[28] it seems that the court could properly have considered the extrinsic evidence bearing on the intent of the parties. In the face of such a plea, it should not matter that the contract is unambiguous.

While the facts of the particular case make the result of the decision acceptable, the principles of law utilized are subject to some question. It is to be noted and admitted that there is a difference between the cases involving "jointness" of a lease as among lessors, particularly applicable to situations in which there is question whether by entry into a lease landowner has extended an outstanding mineral servitude, and those concerning "jointness" as between lessor and lessee, but in view of the plea of error and the fact that it is difficult to discern what cause a lessor would have for entering into a joint lease when there is to be no communitization of royalties, the decision is open to question.

Parol Evidence

In *Robichaux v. Pool*,[29] the court rejected an attempt to prove an agreement to transfer certain overriding royalty interests by parol, stating in the process that R.S. 9:1105, providing that mineral leases and other contracts affecting them are "classified as real rights" is substantive as well as procedural. The holding that an agreement of the kind in question cannot be proved by parol evidence is clearly in line with a number of prior decisions.[30] The unquestioning reliance on R.S. 9:1105 as being substantive as well as procedural must, however, be taken with the customary grain of salt in view of several of the decisions in the

28. *See, e.g.*, Overby v. Beach, 220 La. 77, 55 So.2d 873 (1951).
29. 209 So.2d 77 (La. App. 1st Cir. 1968).
30. Little v. Haik, 246 La. 121, 163 So.2d 558 (1964); Hayes v. Muller, 245 La. 356, 158 So.2d 191 (1963).

running fight between court and legislature over the meaning of that statute.[31]

In *Gulf Oil Corp. v. Adams*[32] an assignee of a working interest attempted to avoid responsibility for paying a production payment which his assignor had contracted for in acquiring the working interest from the original lessee. Defendant assignee contended he was not bound by the production payment as it was created by an unrecorded instrument. Additionally, objections were raised to the admission of certain letters which passed between the parties prior to the execution of the assignment. The court correctly held that the mere fact that that original agreement creating the production payment in question was unrecorded did not mean that defendant could not contract in such manner as to assume the payment. Turning then to the question of whether the obligation of making the payment had been assumed by defendant, the court held the letters in question were admissible, even though written prior to the execution of the contract, to show the intent of the parties to the assignment. Defendant objected to admission of the letters, citing Article 2276 of the Civil Code prohibiting admission of parol evidence "against or beyond what is contained in the acts, [or] on what may have been said before, or at the time of making them, or since." The court was well within the law in that it is firmly established that where a contract is ambiguous, extrinsic evidence is admissible for the purpose of determining the intent of the parties and not to alter its content.[33]

Warranty

Berwick Mud Co. v. Stansbury[34] affords an interesting comparison with *Gulf Oil Corp. v. Adams.*[35] In this instance, defendant leased property to plaintiff's assignor, purporting to lease the full mineral interest in the property when in fact there was an interest owned by her children by inheritance from defendant's husband. Under *Gueno v. Medlenka*[36] defendant could not execute a lease in her capacity as usufructuary, and she did not sign as tutrix of her children. Plaintiff, assignee of the original lessees, discovered the outstanding interest in the chil-

31. *See, e.g.*, Harwood Oil & Mining Co. v. Black, 240 La. 641, 124 So.2d 764 (1960); Reagan v. Murphy, 235 La. 529, 105 So.2d 210 (1958).
32. 209 So.2d 770 (La. App. 2d Cir. 1968).
33. *See, e.g.*, Bank of Napoleonville v. Knobloch & Rainold, 144 La. 100, 80 So. 214 (1918).
34. 205 So.2d 147 (La. App. 3d Cir. 1967).
35. 209 So.2d 770 (La. App. 2d Cir. 1968).
36. 238 La. 1081, 117 So.2d 817 (1960).

dren. A lease was taken to cover the children's interest, for which plaintiff paid. The instrument of assignment specifically subrogated plaintiff to all rights of the assignor in warranty. The original lease from defendant contained an express warranty of title. Plaintiff-assignee sued to recover damages in the amount of the bonus which it had to pay for the lease on the children's interest. The Third Circuit of Appeal reversed the lower court and rendered judgment in favor of plaintiff for the amount of the bonus.

The court held that under the terms of the assignment and under Article 2503 of the Civil Code plaintiff was subrogated to the rights in warranty conferred by the original lease. Extrinsic evidence purporting to show that the parties had only intended to lease the interest of the defendant in the property was admitted in the lower court. However, the court of appeal refused to consider it, stating that "it is not within the competence of this court to determine their [the parties'] intent extrinsically since no plea of mutual error or fraud was made and since the lease is not ambiguous."[37]

The court also notes in this case, as in *Robichaux v. Pool*,[38] that it "is well settled that the assignment of a lease is a sale of a real right," citing R.S. 9:1105. In context, the statement is proper, but as in the *Robichaux* case, one should beware of accepting the statement in its full, literal sense.

Surface Damages

Andrepont v. Acadia Drilling Co.[39] presented a rather unusual claim for surface damages. Defendant lessee took a mineral lease from the owner of certain land, which lease was properly recorded. The clause of the lease which customarily provides for payment by lessee for damages "to timber and growing crops of lessor" was amended by striking out the reference to "timber and growing crops." Prior to the execution of the mineral lease, the landowner had entered into an oral lease with plaintiff looking toward the use of the surface of the land for farming on a crop-sharing basis. Defendant's operations allegedly caused damage to the crops o plaintiff, the surface lessee. The court held that defendant could not be held liable to plaintiff for damage to crops because under the circumstances defendant was entitled

37. Berwick Mud Co. v. Stansbury, 205 So.2d 147, 150 (La. App. 3d Cir. 1968).
38. 209 So.2d 77 (La. App. 1st Cir. 1968).
39. 208 So.2d 737 (La. App. 3d Cir. 1968).

to assume that the growing crops were those of the landowner. Further, the lease exonerated defendant from such damages, and, finally, defendant had paid the landowner $125.00 and secured a release from damages to the surface. The court noted that plaintiff had abandoned all claims against the landowner for breach of the lessor's warranty of peaceful possession, and, therefore, it did not determine whether plaintiff would have been entitled to recover from his lessor.

INSURANCE

*J. Denson Smith**

Much of the litigation before the courts during the last term involved, as usual, claims against insurers.

The following comments deal with some of the cases which presented significant issues of law relating to the insurance contract.

In *Graves v. Traders & Gen. Ins. Co.*[1] the First Circuit Court of Appeal followed the view of the Third expressed in two earlier cases[2] and held mutually repugnant an escape clause in a garage liability policy and an excess clause in an automobile policy held by an individual. The vehicle involved in the accident was owned by an automobile sales agency but was being operated by a person to whom the agency had lent it for use while his own vehicle was being repaired. The policy carried by the sales agency, the garage liability policy, covered the car. In addition, the driver was covered under the provisions of a policy carried by him on the vehicle being repaired. The protection afforded by the garage policy applied "if no other valid and collectible insurance either primary or excess" was available. The protection provided for the driver under his own policy while operating a vehicle not owned by him was declared to be "excess insurance over any other valid and collectible insurance." The Supreme Court granted certiorari and "found no reason to depart from the solution" arrived at by the lower courts and followed their view that the excess and escape clauses in the two policies were "mutually repugnant and ineffective." Perhaps much could be said in favor of the consistency which is

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1. 200 So.2d 67 (La. App. 1st Cir. 1967).

2. Lincombe v. State Farm Mut. Auto Ins. Co., 166 So.2d 920 (La. App. 3d Cir. 1964), and State Farm Mut. Auto. Ins. Co. v. Travelers Ins. Co., 184 So.2d 750 (La. App. 3d Cir. 1966).