Private Law: Mineral Rights

George W. Hardy III
motorist statute and the policy endorsement issued thereunder is to afford protection to the insured when they become the innocent victims of the negligence of uninsured motorists" give a clear description of the legal relationships in this fact situation. The decision is sound and well grounded, and it does away with the uncertainty and confusion of differences previously expressed by the courts of appeal.

MINERAL RIGHTS

George W. Hardy, III*

MINERAL SERVITURES

Prescription—Effect of Unit Operations

In Barnwell, Inc. v. Carter the question whether a mineral servitude owner's rights remained alive turned on whether unit drilling operations conducted within ten years of the creation of the subject servitude interrupted prescription. The servitude had been created in 1954. A compulsory drilling unit was formed in 1962, and operations were conducted thereon but at a location off the servitude tract. A second well was drilled on the servitude tract and completed as a producer in 1966. The Second Circuit Court of Appeal affirmed a lower court judgment holding that prescription accruing against the servitude had been interrupted by the unit operations.

Although the decision rendered by the Louisiana Supreme Court in Boddie v. Drewett had not been overruled at the time the unit drilling operations in question were conducted, the court chose to abide by and apply the decision later rendered in Mire v. Hawkins. The latter decision expressly overruled Boddie as to the effect of dry hole drilling operations on a unit but at a location off a tract burdened by a mineral servitude included in the unit. Boddie had held that the operations were not effective as an interruption of prescription. Mire reversed that position.

21. See cases cited 4d. at 525 n.4, 218 So.2d at 582 n.4.
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1. 220 So.2d 741 (La. App. 2d Cir. 1969).
2. 229 La. 1017, 87 So.2d 516 (1956).
3. 249 La. 278, 186 So.2d 591 (1966).
The supreme court has since denied writs in the *Barnwell* case. Thus, it appears to furnish an answer to one of the questions raised by *Mire*: that is, the retrospective effect of that decision. It is a reasonable inference that if a mineral servitude owner is to be given credit for unit drilling operations conducted during the period when *Boddie* was effective, he will not be given credit for suspensions of prescription which might have occurred during that period of time. The *Boddie* decision had held that although unit drilling operations, as distinguished from production, did not interrupt prescription, the creation of a unit including the entirety of a mineral servitude tract and excluding that tract from the drilling area constituted an obstacle to the use of the servitude suspending the running of prescription. *Mire* reversed the *Boddie* decision both on the matter of suspension and the matter of the effect of unit drilling operations as an interruption of prescription. It is on this basis that the title examiner seems warranted in concluding that if credit is to be given for drilling operations, no credit should be given for suspensions resulting from the formation of drilling units prior to the *Mire* decision. It appears then, that *Mire* is retroactive in effect and that a title examiner must consider that it represents the law as it always has been.

Giving *Mire v. Hawkins* retroactivity does simplify the title system. It avoids the complexity, as well as the inequity, which would result from the application of one rule prior to 1966 and another subsequent to that date.

**Imprescriptible Mineral Servitudes**

In *Humble Oil & Refining Co. v. Freeland*, plaintiff instituted a concursus proceeding to determine ownership of certain mineral rights claimed by defendant Freeland and Louisiana State University. Within ten years from creation of a mineral interest by defendant Freeland on land sold to Louisiana State University, Act 278 of 1958, now La. R.S. 9:5806B, was enacted. This statute provides that when land is acquired by certain agencies, including a “school district, school board, or other board,” or by any commission, heretofore or hereafter created by the State of Louisiana from any person . . . and by the act of acquisition, order or judgment, oil, gas or other mineral or

4. Id.
5. 216 So.2d 689 (La. App. 3d Cir. 1968).
royalties are reserved, the rights so reserved shall be impre-
scriptible. . . ." The issue was whether that act is applicable to 
the Board of Supervisors of Louisiana State University. The 
court noted that in the enumeration of agencies covered by 
the statute, the phrase "other board created by the State of 
Louisiana" is used. This general phrase was held to make the 
statute applicable to the board in question. Thus, defendant's 
machine servitude interest had not prescribed.

MINERAL ROYALTIES

Dependency on Mineral Servitude

Implicit in the ruling in Barnwell, Inc. v. Carter\(^6\) was the 
concept that a mineral royalty carved out of a mineral servitude 
is dependent for its continued existence on the servitude out 
of which it was created. There, defendant mineral servitude 
owner had created a royalty in 1959 out of his mineral servitude 
created in 1954. There were certain operations conducted in 
1962, and production was ultimately obtained in 1966. If the 
operations of 1962 were insufficient to interrupt prescription 
accruing against the servitude, both the servitude and the 
royalty carved from it would have been extinguished. The 1962 
operations were deemed sufficient to preserve the mineral serv-
tude. Therefore, although the drilling operations in question 
had no effect on prescription running against the royalty, 
the underlying servitude was preserved, and both interests 
remained in existence in 1966 when production was obtained. 
Upon the occurrence of production, prescription accruing in 
favor of the servitude owner and against the royalty was inter-
rupted, and the prescription accruing in favor of the landowner 
against the servitude was also interrupted.

Prescription

In Lavergne v. Savoie,\(^7\) plaintiff had sold land to defendant 
in 1947, reserving a mineral royalty. Production was obtained 
from a well serving a unit including the royalty tract between 
1949 and 1951. In 1959 a unit was established by the Com-
mmissioner of Conservation including the land in question, and 
production commenced and was continuing at the time of 
suit. Plaintiff alleged that the effect of the production between

\(6\) 220 So.2d 741 (La. App. 2d Cir. 1969).
\(7\) 221 So.2d 71 (La. App. 3d Cir. 1969).
1949 and 1951 was to suspend prescription, whereas defendant asserted that the effect of the production during that period was to interrupt the running of prescription. If plaintiff's argument prevailed, the royalty had prescribed. If, however, defendant's view was accepted, the interest was alive in 1959 at the time the production from the compulsory unit commenced. The court of appeal affirmed the judgment of the district court, observing that in numerous cases it had been held that the effect of production attributable to a mineral royalty is to interrupt rather than suspend the running of prescription. There is no question about the correctness of this decision.

MINERAL LEASES

Formalities—Parol Evidence

The parol evidence rule and the absence of the concept of the constructive trust in Louisiana combine to make it necessary that participants in oil and gas deals be careful to reduce their agreements to writing and observe all appropriate formalities as to execution. This fact is underscored by the decision in Webb v. Duke.8 Webb had acquired certain leases. Duke claimed an interest in the leases by virtue of a copy of an instrument styled a counter letter. At the end of the copy of the letter was a blank for Webb's signature. Following that there was a regular acknowledgment form to be signed by Webb. Webb had signed in the appropriate blank of the acknowledgment, but had not signed where the blank for his signature appeared at the end of the agreement. There were no witnesses; the instrument was undated; and the acknowledgment was not notarized.

Webb claimed that the instrument relied on had not been "executed" by him. He admitted that the signature appearing in the acknowledgment was his, but stated he had no recollection of having signed his name. Adverting to article 2275 of the Civil Code, the court observed that as Webb was unwilling to admit the existence of any oral agreement with Duke, Duke had to prove his title in writing. Admitting that a private act could be proved to establish title by proving the signature, the court nevertheless held that the signature as proven was insufficient. It was stated that where "the signature on an instrument is affixed in

8. 211 So.2d 722 (La. App. 2d Cir. 1968).
some unusual manner, causing doubt to arise as to whether the person affixing same intended to execute the agreement, sufficient proof must be adduced to prove the intent to execute and deliver the instrument.\textsuperscript{9} Plaintiff Webb was still in possession of the unsigned original, and the copy was not signed in the proper place. Under all the circumstances the court felt that there was no intent to execute and deliver the instrument.

While on the facts of this particular case one might argue forcefully for either side, and while the result of this particular case might have been the same in another jurisdiction where the concept of constructive trust is utilized, the decision is important because of the emphasis it places on meeting formal requirements in Louisiana. In this respect, Louisiana is more stringent than other states.\textsuperscript{10} While benefit accrues in the protection of the title system and persons dealing on the faith of the public records, injustice can still result from the creation of opportunities for sharp, if not outright fraudulent, dealing. There is a need to protect persons in the petroleum industry who make informal agreements. It seems that where the rights of third parties who have dealt on the faith of the public records are not endangered, obligations of the kind alleged in this case could be enforced. Considering the firmness with which the Louisiana courts have enforced the parol evidence rule in these areas, it is obvious that any action to correct this situation would have to be directed toward the legislature.

\textit{Express Lease Clauses}

\textbf{Default Clause}

In \textit{House v. Tidewater Oil Co.},\textsuperscript{11} plaintiff contended that a lease had expired after the primary term because of cessation of production for more than ninety days without restoration or resumption of production or commencement of drilling or reworking operations. One of defendant's arguments was that under the default clause, plaintiff-lessor was required to give notice that operations were not being conducted in accordance with the lease

\textsuperscript{9} Id. at 725.
\textsuperscript{10} For a review of the entire problem of informal agreements in other jurisdictions see Fitzpatrick, \textit{Informal Oil \& Gas Deals—Unjust Enrichment}, 14th \textit{Inst. On Oil \& Gas Law \& Taxation} 257 (1963). Mr. Fitzpatrick levels some criticism at the use of the constructive trust, a specification of the principle of unjust enrichment, on the ground that, as applied, it has created an undesirable degree of uncertainty and instability of titles.
\textsuperscript{11} 219 So.2d 616 (La. App. 3d Cir. 1969).
and allow time for performance before filing suit for cancellation. The court held that it is settled by the jurisprudence that the default clause is applicable only during the primary term. Thus, no default was required.

While the jurisprudence relied on\textsuperscript{12} can be read literally to mean what the court said, the court reached the proper result for the wrong reason. The distinction of significance in cases of this kind is between express resolutory conditions\textsuperscript{13} and the occurrence of the implied resolutory condition for nonperformance of the contract.\textsuperscript{14} The Code\textsuperscript{15} and the jurisprudence\textsuperscript{16} require a putting in default in the latter case, even in the absence of a default clause. There are, however, numerous express resolutory conditions in the standard mineral lease. True, most of these are applicable to conditions after the primary term has run, but not exclusively; and it is important to distinguish the two classes of cases.

For example, if the lessee fails to make timely payment of delay rentals, the standard mineral lease provides that “this

\textsuperscript{12} Taylor v. Kimbell, 219 La. 731, 54 So.2d 1 (1951); Sittig v. Dalton, 195 La. 765, 197 So. 423 (1940); Producers Oil & Gas Co. v. Continental Securities Corp., 188 La. 564, 177 So. 668 (1937); Taylor v. Buttram, 111 So.2d 576 (La. App. 2d Cir. 1959); Logan v. Blaxton, 71 So.2d 675 (La. App. 2d Cir. 1954). All of these cases involved situations in which a resolutory condition had occurred, or was alleged to have occurred, and the refusal of the courts to apply the default clause was proper. However, the broad statement that the default clause is applicable only to operations during the term of the lease should be viewed as dictum. As noted, there are situations during the primary term of the lease in which automatic termination occurs and no default is required. Also, there are situations both during and after the primary term in which the default clause would be applicable.

\textsuperscript{13} LA. Civ. Code art. 2021 provides that “if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.” In the context of an oil and gas lease, the obligation of the lessor is to deliver the premises for use by the lessee. This obligation can be defeated by the occurrence of any of the express resolutory conditions in the lease. See also LA. Civ. Code art. 2026 concerning express and implied conditions.

\textsuperscript{14} LA. Civ. Code art. 1933. Reading articles 2046 and 2047 of the Civil Code, it does not appear that a putting in default is necessary if there is a breach of an implied resolutory condition by nonperformance when the obligee seeks a cancellation of the contract. Article 1933 appears to require a putting in default, except in certain specific types of cases, only if the obligee seeks moratory, or delay, damages. However, article 1933 has been broadly construed by the courts to require a putting in default whether the demand is for cancellation or damages, or both. For a discussion of the entire concept of default see Smith, \textit{The Cloudy Concept of Default}, 12TH INST. ON MINERAL LAW 8 (1965).

lease shall expire" on the rental date unless rentals are paid. This is an express resolutory condition. Either it occurs, or it does not. If it occurs, the lessor’s suit is not for cancellation for nonperformance, but to have the lease declared terminated because an express resolutory condition has occurred. Obviously no default demanding performance can be required when the lessor contends that the lease has automatically terminated by the occurrence of an express resolutory condition. The same is true if in the standard lease the lessee fails to produce, or to conduct reworking operations, or to commence drilling operations for a period of more than ninety days. These are all resolutory conditions. Either the lease has expired automatically by its own terms, or it has not. It is alive or it is extinguished. A demand for performance is irrelevant, and requiring it would be an absurdity.\textsuperscript{17}

Even during the primary term, if rentals are not paid, or if production ceases, or drilling operations cease, or no reworking operations are conducted, automatic termination would result under many standard forms. For example, in the Bath’s South Louisiana Revised Five (5)—Pooling, it is provided that if “after discovery and production of oil, gas or any other mineral in paying quantities, . . . the production thereof should cease from any cause, and lessee is not then engaged in drilling or reworking operations, this lease shall terminate unless lessee resumes or restores such production, or commences additional drilling, or reworking or mining operations within ninety (90) days thereafter and continues such operation without lapse of more than ninety (90) days between abandonment of work on one well and commencement of reworking operations or operations for the drilling of another, in an effort to restore production of oil, gas or other minerals, or (if during the primary term) commences or resumes the payment of rentals in the manner hereinabove provided for in connection with the abandonment of wells drilled.” (Emphasis added.) The italicized wording reveals that the clause in question creates an express resolutory condition. If production ceases at any time, the lease shall terminate unless the lessee takes specified action. A suit under this clause is a suit to enforce the express resolutory condition, and no demand for performance is required.

\textsuperscript{17} For cases in which no default was required because the question was the occurrence of resolutory conditions provided in the habendum clause, see the cases cited at note 12 \textit{supra}.
Contrasted with actions for enforcement of express resolutory conditions are those for cancellation based on nonperformance of certain obligations. For example, the lessee's express obligation in the above-quoted lease form is to commence an offset well upon occurrence of certain conditions. There is no express resolutory condition in that clause of the lease, and if the lessor is not satisfied, he must make a demand for commencement of the offset well. The same is true of alleged breaches of implied obligations. A notice of default would be required in these situations as a prelude to suit for cancellation regardless whether the alleged breach occurred during or after the primary term.

Thus, the court's holding that the default clause is applicable to operations during but not after the primary term is a meaningless distinction. The question to be answered in determining applicability of the clause is whether the suit is one for enforcement of an express resolutory condition, the occurrence of which automatically terminates the lease, or is one for cancellation based upon nonperformance of obligations under the contract while it remains in force, thus causing an occurrence of the implied resolutory condition inherent in all contracts.

**Reworking Operations**

A second question raised in *House v. Tidewater Oil Co.* turned on a determination of whether certain operations conducted by defendant lessee were sufficient to constitute reworking operations within the meaning of the clause calling for resumption or restoration of production or commencement of additional drilling, reworking, or mining operations within ninety days after cessation of production. It was undisputed that production from the lease had ceased. On the sixtieth day thereafter lessee commenced repair of a road and placed some heavy steel matting around the well site in the event it should become necessary to move in heavy equipment. On the eighty-fifth day, the lessee moved in a wire line service unit to clean out the well by removing paraffin. After eight and one-half hours, the well was cleaned out and began to flow gas and condensate, which was periodically flared to keep the well clean until installation of new
flow lines and a tank battery. Production in paying quantities was recommenced one hundred and eleven days after cessation.

In the course of reaching the question whether the operations in question constituted reworking operations, the court held that the minimal production which was obtained and flared to keep the well clean did not constitute a resumption of production within ninety days as required by the lease. Thus, determination of the controversy depended on a decision whether the other operations constituted a commencement of reworking operations within the meaning of the lease.

The lessee put two experts on the stand who testified that based on their experience and knowledge the use of the wire line and scraper to clean the well out would constitute reworking operations. Plaintiff lessor put on three experts who testified to the contrary. The court of appeal, with one judge dissenting, determined that the operations were reworking operations. On application for rehearing, two members of the court, sitting en banc, dissented from the refusal to grant a rehearing.

The testimony of experts in an instance such as this is, of course, significant, but the question raised was one of contractual interpretation. The issue was whether the operations were reworking operations within the contemplation of the lease in question, not just whether the industry in general terms would accept the operations as reworking operations. The lease provided that after cessation of production, it would terminate unless lessee “resumes or restores such production, or commences additional drilling, reworking or mining operations within ninety (90) days thereafter....” Dissenting from the refusal to grant a rehearing, Judge Tate analyzed the clause in question. He observed that the lease requires that the lessee “resume or restore production or commence additional drilling, reworking, or mining operations”20 (emphasis added) within the ninety-day period. Judge Tate then

20. Id. at 627. Judge Tate also distinguished certain prior decisions relied on by the majority: Johnson v. Houston Oil Co. of Texas, 229 La. 446, 86 So.2d 97 (1956); Texas Co. v. Leach, 219 La. 613, 53 So.2d 786 (1951); Harry Bourg Corp. v. Union Producing Co., 197 So.2d 172 (La. App. 1st Cir. 1967). He pointed out that only in the last cited case was the issue before the court in the instant case decided. The operations there in question resulted in plugging back and recompletion of a previously producing well at a higher level. It is, as Judge Tate observed, undeniable that such operations constitute reworking operations. In the other two cases there was no issue as to whether the operations in question were reworking operations. The only question was whether operations admitted to be reworking operations had commenced within the time periods specified in the leases being interpreted.
urged that the parties contemplated that there might be attempts to restore production falling short of reworking operations. This, he stated, was emphasized by the fact that the term "additional" modified all three words in the series—"drilling," "reworking," and "mining." Further, he asserted, the usage "resume or restore" should be given significance. The term "resume," used alternatively with "restore," should be interpreted as signifying that there might be situations in which it is within the will of the lessee to resume production which has ceased for reasons other than the ability of the well to produce. The term "restore," in context, should be taken as contemplating situations in which some operation is necessary for restoration of production and in which restoration of production may or may not be possible for technical reasons. He concluded that the use of a wire line and scraper is a routine maintenance operation which should be viewed as an attempt to restore production short of reworking operations.

Judge Tate also felt that the lease was ambiguous and that in keeping with the accepted rule applicable to mineral leases the ambiguity should be resolved in favor of the lessor to whom the printed form had been presented by the original lessee.

In the particular circumstances of this case, it appears that the obvious sincerity and good faith of the lessee, coupled with his expenditure of $65,000, added considerable equitable appeal to his case. Judge Tate acknowledged this, but asserted that despite these appealing features, the lessee had simply failed to do what the contract required.

In a sense, substantial justice may have been done in this particular case, but insofar as the question of contractual interpretation is concerned, Judge Tate's view of the matter is preferable. Cleaning out a well in the fashion here involved is a routine operation. Many wells require periodic cleaning as a part of standard operating maintenance. Such operating maintenance should be placed within the classification of attempts to restore production within the contemplation of this lease. As pointed out by Judge Tate, such heavier operations as reperforation, acidizing, squeeze cementing, sand consolidation, "fracing," and other similar operations affecting the ability of the formation to feed into the well bore are of the kind which should be classed as reworking operations within the meaning of this lease. He also observed that if in the future lessees wish to contract so as
to achieve a different result, drafting solutions could be provided. This last observation might be a word to the wise. Even though the decision of the court upholds the position of the lessee, it was by a divided court and is not a decision of the supreme court.

**Pooling Clause**

In *McDonald v. Grande Corp.*\(^{21}\) there was a consideration of the controversy previously presented on motion for summary judgment. As this case is to be the focus of a student Note to be published in a later issue of this *Review*,\(^ {22}\) the author's comments will be limited. Briefly, the case involved allegations that the lessee had breached a duty of fair dealing in exercising the pooling power and, alternatively, that the drilling of a dry hole on the unit formed by declaration terminated it. The court's opinion is questionable in several respects. First, it uses language in some instances which might be construed as meaning that the test of whether the lessee has breached his duty of fair dealing is subjective rather than objective. The wording of article 2710 of the Civil Code, the source of the lessee's general duty to act as a good administrator, clearly indicates an objective standard for judgment.

Second, the court rejects out of hand the contention that the drilling of a dry hole constitutes the occurrence of a resolutory condition dissolving a declared unit. This holding is the principal topic of the mentioned student note. It is sufficient here to say that it is questionable to reject outright the idea that events other than a subsequent compulsory unitization order establishing a different unit can dissolve a declared unit.

Third, the court places emphasis on the decision in *Southwest Gas Prod. Co. v. Creslenn Oil Co.*\(^ {23}\) as precedent for its decision that the parties in some way "froze" their agreement so that the drilling of a dry hole would be of no effect on the continued life of the unit. That decision is inappropriate to cases of the kind in question. Formation of a declared unit by exercise of a pooling power is measurably different from entry by a group of experienced oil and gas operators into an operating agreement. Additionally, the decision in *Creslenn* was based on express

\(^{21}\) 214 So.2d 795 (La. App. 3d Cir. 1968). The prior decision on motion for summary judgment in this case is at 145 So.2d 441 (La. App. 3d Cir. 1962), cert. denied, 244 La. 128, 150 So.2d 588 (1963).

\(^{22}\) Note, 30 LA. LAW REV. . . . . . . (1969).

\(^{23}\) 181 So.2d 63 (La. App. 2d Cir. 1965).
wording in the contract, whereas there was no comparable express wording in the pooling clause in question in the McDonald case. Courts should recognize that there is significant difference in the structure of the two types of agreements involved in these decisions and considerable difference in the positions of the parties in terms of experience, bargaining power, and technical knowledge of the parties involved. This case places lessors at a substantial disadvantage which they will have difficulty overcoming in that, in the vast majority of cases, the detailed provisions of the pooling clause are not negotiable.

**Pugh Clause**

In *Fremaux v. Buie*\(^2\) plaintiff lessor was urging that a unit had been formed by his lessee, thus making the Pugh clause\(^2\) operative and requiring payment of delay rentals on the acreage outside the alleged unit. The instrument relied on by plaintiff as establishing the unit was attached to his petition and disclosed an overriding royalty transaction between defendant and a third party. In passing, the instrument referred to a plat of a forty-acre area around the well in question as "the proration or conservation unit for the first test well drilled on land covered" by the leases in question. Nevertheless, the instrument expressly stated that the purpose and intent of the assignment in question was to effect a reduction in an overriding royalty.

On an exception of no cause of action, the court considered the instrument relied on by plaintiff as part of the petition and concluded that no unit had been formed within the meaning of the Pugh clause. Thus, defendant's exception was sustained and judgment rendered accordingly. There is no question as to the correctness of this decision. There was never any reduction in lessor's sharing arrangement concerning production. What took place was unquestionably a working interest transaction on the part of the lessee regarding a well on plaintiff's lease. Any other decision than that rendered would have unreasonably limited the lessee's freedom to deal as he wishes with his own rights in the lease, subject always to the obligation to act as a good administrator.

\(^{24}\) 212 So.2d 148 (La. App. 3d Cir. 1968).

\(^{25}\) The Pugh Clause is inserted for the lessor's benefit and generally provides that if a portion of the lease premises is included within a unit, unit operations, either drilling or production, will maintain only that portion of the lease included within the unit. The portion lying outside the unit must be maintained in existence by payment of delay rentals or any form of payment or operations which can maintain the lease.
Royalties

In addition to the other arguments made by the lessor in *House v. Tidewater Oil Co.*,\(^{26}\) it was claimed that defendant had failed to pay royalties for an appreciable length of time without justification, thus warranting cancellation of the lease. The well in question was restored to production on November 25, 1961. On March 9, 1962, the unit which the well served was revised by order of the Commissioner of Conservation. No royalties were paid to plaintiff until October 1, 1962. The defendant justified the delay on the ground that revision of the unit caused delays to secure surveys, title work, division orders, and other administrative requisites.

The court chose to follow the precedent in its prior decision of *Fawvor v. United States Oil of La., Inc.*,\(^{27}\) viewing the delay as justified. The development of the rule that failure to pay royalties for an appreciable length of time without justification constitutes an active breach of contract permitting cancellation without a putting in default has been viewed as a device for compelling lessees to be prompt in paying royalties and prohibiting them from coercing desired action by their lessors or using money without interest for significant periods of time.\(^{28}\) The normal remedy of damages in the form of interest\(^{29}\) is ineffectual. Recent cases reveal a much more lenient attitude toward the excuses presented by lessees.\(^{30}\) This relaxation in attitude may be a response to the popularity of the game of "lease snatching" avidly played by many lessors and their attorneys subsequent to the articulation of the rule in question. While this counter-reaction is laudable, the *House* case is a good illustration of the fact that this sort of judicial rule-making sometimes creates problems and results in an ultimate state of confusion as severe as it seeks to correct.

\(^{26}\) 219 So.2d 616 (La. App. 3d Cir. 1969).
\(^{27}\) 162 So.2d 602 (La. App. 3d Cir. 1964).
\(^{30}\) E.g., Harris v. J. C. Trahan Drilling Contractor, Inc., 168 So.2d 881 (La. App. 2d Cir. 1964); Broadhead v. Pan American Petroleum Corp., 168 So.2d 239 (La. App. 3d Cir. 1964); Fawvor v. United States Oil of La., Inc., 162 So.2d 602 (La. App. 3d Cir. 1964). Even in those cases in which the delay was found to be appreciable and without justification, recent decisions indicate an inclination on the part of the courts to ameliorate the remedy of cancellation by awarding judgment for partial cancellation. See Fontenot v. Sunray Mid-Continent Oil Co., 197 So.2d 715 (La. App. 3d Cir. 1967); Sellers v. Continental Oil Co., 168 So.2d 435 (La. App. 3d Cir. 1964).
as that existing originally.\textsuperscript{31} It is observable in this case that the revision of the conservation unit did not take place until three and one-half months after the well was restored to production. One wonders why there was a delay of almost a year in paying royalties due under the old unit. Certainly no additional surveys, title opinions, or division orders were required for payment of these royalties. Yet the court chose to overlook this fact.

Considering the entire picture presented by the jurisprudence in this area, it can only be concluded that a lessor does not know when he can be successful in obtaining cancellation, and a lessee does not have the security of investment which he deserves. This state of affairs lends strong support to the suggestion made by an able student several years ago that enactment of legislation denying the lessor the right to cancellation for failure to pay royalties but granting a right to double or treble the amount due, plus interest, for unreasonable delay would solve the problem presented.\textsuperscript{32} The lessee would be encouraged to pay promptly, and the lessor would be discouraged from sitting back and waiting avariciously for the lessee to make a mistake, thus giving greater and deserved security of investment to the lessee.

Habendum Clause

In \textit{Crane v. Sun Oil Co.},\textsuperscript{33} plaintiff executed a mineral lease, ultimately assigned to defendant, including a particular quarter-section of land. Attached to the lease was a plat showing the quarter-section as a regular subdivision with an external boundary on one side of forty chains, or 2,640 feet. By order of the Commissioner of Conservation, a plan of unitization was established according to a plat made by defendant's surveyor, with units established on the basis of quarter-sections. However, the external boundaries on the plat submitted by defendants, on the basis of which the units were established, showed a slightly shorter external boundary for the quarter-section in question. Defendant, also lessee of the quarter-section lying immediately

\textsuperscript{31} This comment should certainly not be taken as expressing any view on the part of the author that judicial rule-making is an unusual or objectionable phenomenon. Certainly the entire framework of Louisiana mineral law would be nonexistent had the courts refused to undertake a quasi-legislative task in carving out a system of mineral property law from a code which was not intended to accommodate the problem of the nature of property rights in minerals. Rather, the remark is simply an observation that on occasion, the rule-making or quasi-legislative function goes awry.

\textsuperscript{32} Comment, 24 \textit{La. L. Rev.} 618 (1964).

\textsuperscript{33} 223 So.2d 14 (La. App. 1st Cir. 1969).
to the south, drilled the unit well for that quarter-section. During
the time that well was being drilled, the primary term of the
lease on the first quarter-section expired. Plaintiff made a de-
mand for an acknowledged instrument directing cancellation of
the lease from the records of the parish in which the tract was
located.\textsuperscript{84} Defendant refused, and plaintiff sued to have the lease
cancelled from the public records on the ground that the lease
had expired automatically because the primary term had run
without drilling or production.

Defendant's main argument against cancellation was that
because of the overlap in the boundaries shown on the two plats,
plaintiff's title on the northernmost tract extended a few feet
into the southernmost unit, thus including .65 of an acre of the
land in the lease on the north tract in the unit lying immediately
to the south.

The court refused to accept this argument. It was found
that the commissioner's order intended to and did divide six
sections of land into four drilling units each with the boundaries
corresponding to the quarter-section lines of each section. Ap-
parently feeling that plaintiff intended to lease only the quarter-
section in question, and adding to that the fact that the commis-
sioner's order unitized by quarter-sections, the court held that
no portion of plaintiff's property fell within the southernmost
unit, and thus the lease on the quarter-section to the north ex-
pired according to its terms.

Having concluded that the lease concerning which the suit
was brought had expired, the court awarded damages and attor-
ney's fees. It appeared that plaintiff had received a responsible
offer to lease the north quarter-section with a drilling commit-
ment on the part of the prospective lessee. The court awarded
damages measured by the cost of the well which would have
been drilled under that commitment. The supreme court has since
granted writs on the issue of damages.\textsuperscript{38} There is apparently
some question in the court's mind as to the correctness of the
measure of damages utilized by the court of appeal.

Working Interest Transactions

Operating Agreements

Two decisions dealt with disputes arising out of operating

\textsuperscript{34} The demand was made under \textit{La. R.S. 30:102} (1950).
\textsuperscript{35} 226 So.2d 520 (1969).
agreements. Crow Drilling & Prod. Co. v. Hunt\textsuperscript{36} required construction of an operating agreement and two letter agreements looking toward the drilling of two wells and execution of the operating agreement which included both wells. The question was whether partial failure of title to leases of one party on one of the two tracts involved and complete failure of title on the other would alter the sharing arrangement originally agreed upon. The court relied on prior jurisprudence taking a hard line in the construction of operating agreements on the question of alteration of such sharing arrangements by subsequent formation of compulsory units with different geographical outlines\textsuperscript{37} to undergird its decision that no alteration in the sharing arrangement occurred. The most significant evidentiary factor was the provision in the letter agreements that participations would remain the same unless there was "failure of individual titles to leases." This was interpreted as meaning that there would be no adjustment unless there was a complete failure of title. As the court found there was no complete failure, no adjustment was made. This decision may cause some concern, but there is no problem which cannot be met by careful draftsmanship of such agreements in the future.

\textit{Prentice v. Amax Petroleum Corp.}\textsuperscript{38} contains a good object lesson. Plaintiffs in this case procured a top lease on a certain tract of land on which defendant had a prior lease. Defendant's lease was later declared to have terminated.\textsuperscript{39} There was some evidence that plaintiffs had a hand in the litigation resulting in cancellation of defendant's lease. At a time when defendant's lease was still in effect and when plaintiffs had already secured a top lease on the property in question, compulsory units were formed including portions of the subject property. Plaintiff and defendants both held interests in the units and were parties to operating agreements entered into by the lessees affected by the two units. Plaintiffs claimed sole ownership of the lease in question by virtue of their top lease. Defendant asserted that by virtue of the operating agreements entered into, a joint venture was formed and a mutual fiduciary relationship resulted.

\textsuperscript{36} 211 So.2d 128 (La. App. 3d Cir. 1968).
\textsuperscript{37} See Monsanto Chemical Co. v. Southern Natural Gas Co., 234 La. 939, 102 So.2d 223 (1958); Southwest Gas Prod. Co. v. Creslenn Oil Co., 181 So.2d 63 (La. App. 2d Cir. 1965).
\textsuperscript{38} 220 So.2d 783 (La. App. 1st Cir. 1969).
\textsuperscript{39} See Landry v. Flaitz, 245 La. 223, 157 So.2d 882 (1963).
Affirming the judgment of the lower court, the court of appeal held that the operating agreements expressly negated the existence of any joint venture or fiduciary relationship. Further, the court observed that the failure of title clause of the operating agreement contemplated that if the title to any party in the agreement failed, there would be a readjustment of participations accordingly. According to the court, “such a provision would not have been contemplated much less included in the agreements if it was intended that participating interests lost by title failure and acquired by another participant would inure to the benefit of the original owner.” The court also rejected the argument that plaintiffs were estopped from denying defendant’s ownership of the lease because the operating agreement expressly stated that at the time of entry into the agreement plaintiffs owned no lease on the subject property when, in fact, they had acquired a top lease on that property prior to that declaration. The court held that there was no proof of reliance on this declaration by defendant. Additionally, the top lease itself stated that it was not to be effective until defendant’s lease expired. Thus, plaintiffs did not at the time of the declaration in question own a lease on the subject property. The court also rejected defendant’s contention that it had entered into the agreement by error, and reformation was refused. Applying the terms of the unitization agreement, defendant was not required to account for production attributable to the property in question except from the date on which defendant’s lease was declared terminated.

Clauses of operating agreements defining the relationship between parties to such agreements traditionally contain a negation of the creation of a joint venture, association, trust, partnership, or corporation. This is partially a tax-motivated provision in that the parties ordinarily do not want to be taxable directly as a corporation, or as a partnership. The instant case, however, amply illustrates that these tax-motivated provisions have a substantive legal effect. In other jurisdictions the concept of the constructive trust often affords relief in situations similar to that presented in this case. However, in Louisiana, where immovables can only be acquired by title and cannot be established by parol evidence, such protection is unavailable. Drafting solutions could be provided, at least to a limited extent, without endangering the tax consequences of the transaction. It remains to be seen whether

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operating agreements will be generally revised to provide relief in this kind of situation.

Production Payments

The decision in Booksh v. Wiggins did not actually involve a "working interest" transaction, as the contract was made directly with the landowners; but it is of a type which more readily occurs as a working interest transaction and is thus discussed at this point. Plaintiff operator made a contract with defendant owners under which plaintiff was to complete a previously drilled well which had been abandoned because the casing partially collapsed at a point near the bottom of the hole. Subsequent operations by persons other than plaintiff indicated that the well was potentially productive.

The consideration offered plaintiff in return for his services in completing the well was a production payment in the amount of $27,500, to be paid out of the first 3/32 of the whole of production. It was provided, however, that if plaintiff was unsuccessful in completing the well as a producer in paying quantities, the contract would terminate. Discussions between plaintiff and defendants revealed that plaintiff recommended that the completion be made through a liner. Defendants, however, insisted that there be an open-hole completion. Well aware of the risk involved in an open-hole completion, plaintiff completed the well as requested by defendants. The well had produced at 70 to 80 barrels per day for a week (a total of approximately 490-560 barrels) when it sanded up. None of the production was treated or sold. An attempt to clean the well was made but equipment became lodged in the tubing. Plaintiff then offered to clean the well and recomplete it, using a liner, for a specified cost. The offer was refused. Defendants granted a mineral lease to others than the plaintiff; the well was cleaned out and completed with a liner; and production was obtained in paying quantities.

The court held that plaintiff willingly and knowingly undertook the open-hole completion. As his contract contained a clear resolutory condition—that it would terminate if plaintiff did not complete the well as a producer in paying quantities—the contract was terminated, thus putting an end to any right plaintiff had to participate in production.

41. 211 So.2d 429 (La. App. 1st Cir. 1968).
The court's construction of the contract in question is straightforward and correct. The only question which arises is whether the court dealt as directly as it might have with the central issue—whether the well was in fact completed as a producer in paying quantities. Suppose, for example, that the well had produced for three months at the initial rate before sanding up and that the production had been saved and sold. Would the result of the case have been different? Certainly production at the rate of 70 to 80 barrels per day is in paying quantities insofar as current operating costs are concerned. Would the result have differed if the 500 or so barrels produced had been saved and sold? Thus, it may be asked whether the key to this case really lies in the fact that plaintiff willingly undertook the open-hole completion, knowing that it might sand up; or whether it is found in the fact that the well never in fact produced in paying quantities because the production was not saved and sold or otherwise utilized. If the production had been saved and sold, it would almost certainly have met current operating costs for the short period it produced, and the terms of plaintiff's contract might have been viewed as being fulfilled. Any subsequent difficulty encountered would not, then, have destroyed plaintiff's right to his stated share of production. If the well sanded up because of the method of completion chosen by defendants, this would seem to be more their responsibility than plaintiff's. And if it had ever produced in paying quantities, no matter for how short a period of time, plaintiff should have been adjudged to have completed his contract. Any recompletion under those circumstances would not have terminated plaintiff's interest in production.

In view of these considerations, it appears that it is implicit in the court's opinion that the production achieved was simply not "in paying quantities" within the meaning of the contract. The plaintiff's knowledge of the risk of an open-hole completion would have been irrelevant if production in paying quantities had been achieved, regardless of the length of time for which it continued.

Conservation

Two cases raised questions as to whether particular suits constituted attacks on orders of the Commissioner of Conservation. In *Crane v. Sun Oil Co.*, the facts of which are discussed

42. 223 So.2d 14 (La. App. 1st Cir. 1969).
above, it was contended that since the plat by which the commissioner promulgated quarter-section units differed from the plat by which defendant leased from plaintiff, a portion of the land shown on plaintiff's plat as lying within one quarter-section in fact fell in the unit serving the quarter-section to the south. It was therefore asserted that operations on the southern unit maintained the lease on the northern tract as the southern unit included .65 of an acre of the northern tract. Plaintiff claimed that the lease on the northern tract had expired.

Among its other contentions, defendant urged that the plaintiff's suit would have the effect of altering the unit formed by the commissioner if judgment were rendered for plaintiff. Thus, it was argued that the commissioner was an indispensable party. The court agreed with the statement of law that if the effect of judgment would be to change the unit, the commissioner would have to be joined. However, it was found that the result of the judgment would not have that effect as no part of the northern quarter-section leased by plaintiff to defendant was found to lie within the unit to the south as established by the commissioner.

Vincent v. Hunt48 is a novel case. Plaintiff executed a mineral lease to defendant on a tract of land later included in a compulsory unit. The unit was served by a well off the lease premises. The unitization order had provided that it would be effective for one year unless extended by order of the commissioner, which could be done without formal hearing. Upon termination of one year or any period of extension, the applicant was required to call another hearing for the establishment of permanent units.

More than one year from the effective date of the order, the commissioner issued a supplemental order extending it. At the end of the extension, a hearing was held and a permanent unit was established. It was plaintiff's contention that as the original order expired by its own terms one year from its effective date and as the commissioner could not issue a unitization order with retroactive effect (the supplemental order), there was no production attributable to her land for a period well in excess of ninety days. Therefore, the lease had expired.

Defendant filed a motion for summary judgment and an exception to the "jurisdiction" of the court, contending that the suit involved a direct attack on the order of the commissioner and

43. 221 So.2d 577 (La. App. 3d Cir. 1969).
thus had to be brought in East Baton Rouge Parish. The lower court granted both the motion and the exception. The court of appeal affirmed on the exception but held that the motion for summary judgment was inappropriate.

The court was correct in that plaintiff could not win her case without proving the invalidity of the supplemental order purporting to extend the original unitization order after its expiration date. The supplemental order, being entitled to prima facie validity, would have to be invalidated. Otherwise, the only judgment which the court could have rendered would have been one declaring that the lease was still in effect. Thus, success for plaintiff rested completely on having the court declare that the commissioner was powerless to issue the supplemental order and give it retroactive effect.

The court's logic is soundly undergirded by the practical policy consideration that the question of the authority of the commissioner to issue a particular order should not be resolved without having him before the court. It will be interesting to follow this case to its final determination.

**MISCELLANEOUS**

*Mandamus to Compel Payment by Production Purchaser*

Another chapter in the seemingly endless struggle by Mrs. Marie Baucum Scott to sustain her claim to mineral rights once owned by her father was written in *Scott v. Hunt Oil Co.* Mrs. Scott sued defendant to compel payment for sums allegedly due her for oil and gas production under the unleased portion of the mineral rights reserved by her father. The suit was brought under R.S. 30:105-07. The court held, however, that the remedy of mandamus made available by that statute was not available to compel payment of unliquidated sums. In fact, as Mrs. Scott had previously been adjudged not to be the owner of the mineral rights which she claimed, her claims were not only "unliquidated and uncertain but there are no "other sums due her" as

44. A part of the chronicle may be traced in the following decisions: *Ware v. Baucum*, 221 La. 259, 59 So.2d 182 (1952); *Scott v. Hunt Oil Co.*, 160 So.2d 433 (La. App. 2d Cir. 1964); *Scott v. Hunt Oil Co.*, 152 So.2d 599 (La. App. 2d Cir. 1963).
45. 219 So.2d 779 (La. App. 2d Cir. 1969).
47. See cases cited at note 49 *supra*.
required by the statute. One can only express wonder at Mrs. Scott's prodigious persistence.

**Security Devices**

Those furnishing labor, services, or supplies in connection with the drilling or operation of oil, gas, and water wells are granted a privilege on production, wells, leases, and equipment to secure their claims.\(^4\) A prescriptive period of one year is specified but is interrupted if suit is brought.\(^5\) It is further provided that a creditor whose claim is secured by the privilege “may” enforce it by writ of sequestration without bond.\(^6\)

Plaintiff in *Frank's Casing Crew & Rental Tools v. Carthay Land Co.*\(^7\) claimed that certain other lien holders had failed to protect their claims by filing suit within the prescriptive period as required by the statute. It appeared that the other claimants had proceeded by personal action against the debtor and had not utilized the writ of sequestration. Plaintiff urged that use of the writ was the only method by which a lienholder could proceed in accordance with the statute.

The court of appeal distinguished other cases in which it was held that the claimant could have only an *in rem* action because in those instances there was no personal jurisdiction over the debtor.\(^8\) In this case, however, personal jurisdiction had been obtained, and the other claimants were not required to proceed by writ of sequestration to preserve their claims.

**INSURANCE**

**J. Denson Smith**

Problems concerning the interpretation and application of insurance policies and the laws relating thereto continue to claim a considerable amount of judicial attention. They usually present only factual issues calling for resolution under established rules. The following comments cover a limited number of cases merit-

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\(^{5}\) LA. R.S. 9:4865 (1950).
\(^{6}\) LA. R.S. 9:4866 (1950).
\(^{7}\) 212 So.2d 161 (La. App. 4th Cir. 1968).
\(^{8}\) Rhodes v. Chrysanthou, 191 La. 774, 186 So. 333 (1939); Blankenship v. Stovall, 159 So. 477 (La. App. 2d Cir. 1935); Young v. Reed, 157 So. 809 (La. App. 2d Cir. 1934).

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