
George W. Hardy III
HIGHLIGHTS OF THE MINERAL CODE RECOMMENDATIONS: A GUIDE TO THE MORE IMPORTANT SUGGESTED CHANGES AND ELABORATIONS

George W. Hardy, III*

INTRODUCTION

With the recent publication of its Exposé des Motifs entitled "Suggested Principles of Louisiana Mineral Law—A Basis for Reform" the Louisiana State Law Institute's project looking toward codification of the state's mineral law has reached an important stage. The published recommendations are not in the form of final legislation. Rather, they are set out much in the style of the American Law Institute's restatements. There are several purposes and motivations for publishing materials in this form prior to the preparation of legislation. As is commonly known, the mineral property system in Louisiana has emerged through a case by case consideration of individual problems, with our courts making analogies to articles of the Civil Code which were clearly not structured to cope with broad scale mineral development. The extensive bending of Civil Code concepts, the application of articles from varying parts of the Code in sometimes awkward circumstances, and the flimsiness of some of the analogies which have been made inhibit, if not prohibit, intelligent, organized consideration of Louisiana mineral law in the conceptualism of the Civil Code. There is, therefore, no existing legislative model for a mineral code. Additionally, the articulation of mineral decisions through analogy to concepts contained in the Civil Code has often clouded the functional realities and imperatives which have motivated many of the decisions forming the mineral property system. For these reasons, it appeared wise initially to secure discussion before the Council of the Law Institute on the basis of non-statutory materials which raise questions of policy as to what the law is, or in some instances ought to be, free of the semantic disputes that arise in consideration of legislation.

Another reason for this manner of initial presentation is that some of the materials in the recommendations may, when final legislation is prepared, be scattered through other portions of our statutory law. Some may be inserted in the Civil Code, some in the Code of Civil Procedure, some in the Civil Code

* Professor of Mineral Law, Louisiana State University. Reporter for the project to codify Louisiana mineral law undertaken by the Louisiana State Law Institute.
Ancillaries, and others perhaps, elsewhere in the Revised Statutes. To assure a complete and ordered consideration of the principles underlying the system of mineral law, it was deemed desirable to prepare materials of the kind which have been published.

These motivations, which were the basis upon which materials were first prepared and presented to the Council of the Law Institute, have also served to support the decision to publish and obtain public reaction to the recommendations in their present form rather than awaiting the preparation of final legislation. Present plans contemplate a series of regional meetings throughout the state during the summer of 1972 at which, it is hoped, reactions can be obtained from members of the Bar, the mineral industries, landowners, and other interested persons and groups. Looking toward these meetings and to the fact that some basic guide to the recommendations may be useful to those who do not have an opportunity to read it intensively and fully, this Article is intended to provide a reasonably short guide book to the more important suggested changes in the law and to some of the significant elaborations and clarifications of current and potential problem areas.

**The Landowner's Interest in Minerals**

There has been a great deal written, said, and litigated about the rights of a mineral servitude owner and the nature of the mineral servitude in Louisiana, but, except as it may have been necessary to define the nature of the mineral servitude, there has been little discussion of the rights of the landowner in minerals. Thus, as a foundation for articulating the mineral property structure, the recommendations begin with statements concerning the nature of the landowner's interest in minerals.

**Ownership Versus Nonownership**

The starting point, of course, is the ancient controversy over ownership versus nonownership of minerals. The fountainhead of our mineral law, *Frost-Johnson Lumber Co. v. Salling's Heirs*,\(^1\) tells us that oil and gas cannot be alienated by the landowner separately from the land itself. This conclusion is rationalized

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1. 150 La. 756, 91 So. 207 (1922).
principally on the basis that oil and gas, like water, the court said, are fugitive substances and thus cannot be viewed as owned in place. This would be all well and good if it were not for the fact that the Louisiana Supreme Court has extended the servitude analogy to solid minerals as well as the so-called fugacious minerals. Thus, the concept of the mineral servitude is not really related to the physical characteristics of the mineral substances involved. Rather, the raison d'être for the servitude concept is the system of prescription, which assures that if mineral rights, either mineral servitudes or mineral royalties, are created by the landowner, they will not remain outstanding for longer than ten years without some exercise of those rights.

This being true, the rule that a landowner may not sell minerals, whether hard, liquid, or gaseous, separately from the land itself is really a restraint on alienation for reasons of public policy. On the basis of these considerations, a strong argument could be made that the Louisiana mineral property system could be operated essentially as it is today simply by saying that the landowner actually owns minerals of all kinds as a consequence of his ownership of the land, but is prohibited from alienating them from the land for reasons of public policy unrelated to the physical character of any particular substance. Nevertheless, the Council, though agreeing with the strength and realistic basis for the argument in support of articulating the landowner's interest in minerals in this manner, felt that it would be unsettling to do so. Therefore, Recommendation 1 articulates the nature of the landowner's rights as reflected in the jurisprudence. It is there stated that ownership of land does not include ownership of "oil, gas, and other minerals occurring naturally in liquid or gaseous forms, or of any elements or compounds produced in solution, emulsion, or association with such minerals." The landowner's exclusive rights of exploration and development are confirmed, but it is provided that he may not convey or reserve title to such minerals in place; he is limited, as under present law, to the right to convey, reserve, or lease his exploration and development rights according to his wishes.


3. For a discussion of policy considerations in the Louisiana mineral property system, see Hardy, Public Policy and Terminability of Mineral Rights, 26 La. L. Rev. 731 (1966).
In dealing with the solid minerals, it is postulated that ownership of land includes such substances. However, the landowner is restrained from alienating such minerals separately from title to the land unless they have been reduced to possession. As in the case of liquid and gaseous minerals, the landowner may convey, reserve, or lease the right to explore and develop his property for the extraction of solid minerals.

**Definition of “Minerals”**

To determine the applicability of the property principles envisioned by the recommendations, some definition of the term “minerals” was deemed necessary. That which is suggested is extremely broad, including,

“[A]ny naturally occurring solid, liquid, or gaseous substance existing in or as a part of geological structures, in or as a part of the soil, or dissolved, emulsified, or in association with any such substances. It does not include ground or surface water, but does include solid, liquid, or gaseous substances found dissolved, emulsified, or in association with water.”

This broad definition will make the recommended principles applicable to such substances as sand, clay, and gravel, some of which might not be considered as minerals in the geologic sense. The definition also appears broad enough to cover shells naturally occurring in the soil. The reason for making the definition of “minerals” so broadly inclusive is that the same policy considerations which make the system of prescription desirable as to oil and gas apply to the solid minerals, including such substances as sand, clay, and gravel. If it is undesirable to have ancient rights to remove oil and gas outstanding against property for the reason that such rights may prove an undesirable burden to changing economic utilization of land, it is equally undesirable to have outstanding rights to remove sand, clay, and gravel burdening economic utilization of land. In fact, in the case of the solid minerals, the reason may be even more compelling because techniques of removal, such as strip mining,

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are often not only damaging to, but totally destructive of ongoing or changing surface utilization.

As noted in the comment following Recommendation 2, which defines "minerals," ground and surface water have been excluded from the ambit of the recommendations because the considerations governing water use and water rights are quite different from those governing mineral law proper. Current efforts are underway on other fronts to secure legislation concerning water in Louisiana.\(^5\) The exclusion of water from coverage by the proposed mineral code would not, however, harm the present provisions of the Civil Code dealing with rights to surface water,\(^6\) or the jurisprudence applying the nonownership concept to ground water.\(^7\)

**Severance and Reduction to Possession**

Recommendation 3 suggests an identification of the physical point, and thus the moment in the extractive process, at which minerals are reduced to possession. For the fugitive minerals, possession is achieved at the moment minerals are raised to the surface of the earth or water. For solid minerals, if extracted through wells, such as in the mining of sulphur, the same rule is applicable. In the case of other mining techniques, such as shaft or strip mining, possession is taken when the minerals or ore containing them is severed from the natural formation of which it is a part.

Reduction to possession is a concept of considerable importance. In the case of the fugitive minerals subject to the nonownership concept, reduction to possession will mark reduction to ownership as well. In the case of solid minerals extracted by the landowner this consequence does not occur. However, extraction of solid minerals by the owner of a mineral servitude would result in the vesting of ownership at the time possession is taken. In all cases, reduction to possession has the important consequence of mobilization. When severance occurs and posses-

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5. The Louisiana Water Resources Study Commission, originally established by La. Acts 1964, No. 188, is presently engaged in studying problems regarding water resources. Proposed legislation concerning ground water management may be presented at the 1972 session of the Louisiana Legislature.
sion is taken, the law of immovables generally would no longer apply. Currently, the jurisprudence is unclear concerning the point at which possession is taken. The comment to Recommendation 3 refers to decisions interpreting the severance tax laws and others of possible vague relevance. However, the legal significance of reduction to possession requires a clear definition such as that suggested in Recommendation 3.

**The Right to Operate and the Rule of Capture**

Recommendation 4 expresses the principle now inherent in the concept of ownership that the landowner is free to use his own property as he wishes, in this case for the purpose of exploring for and extracting minerals, subject to limitations resulting from exercise of the police power and to the possibility that he may incur liability to others for personal injury or property damage resulting from mineral operations. Recommendation 4 also expresses the rule of capture currently applicable to the fugitive minerals.

In its statement of the general principle that mineral operations may result in liability, the recommendation avoids venturing into the thicket of rules of liability in tort or under property theories. The comment following the recommendation observes the use of several theories to cope with questions of liability for mineral operations and notes that, in keeping with the national trend, there is a strong tendency to impose liability on an operator for damage to persons or to adjacent or neighboring property resulting from the conduct of otherwise lawful operations when they are inherently dangerous regardless of the

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8. Recommendations at 12.
9. La. Civ. Code art. 491 provides: “Perfect ownership gives the right to use, to enjoy and to dispose of one’s property in the most unlimited manner, provided it is not used in any way prohibited by laws or ordinances.” This principle is clearly applicable to the right of the landowner to conduct mining operations of any kind. See also La. Civ. Code art. 492, which provides that if ownership is imperfect, the owner has the right of enjoyment and disposition only when it can be done without injuring the rights of others having real or other rights to exercise upon the same property.
particular theory utilized. In explaining the handling of the
prospect of liability for mineral operations by this form of
general statement, the comment expresses the view that detailed
definition of rules governing such liability is unnecessary as prob-
lems in this area are now handled under the general law. It is
also deemed unwise for the reason that the rules of liability
should not be different for mining activities as compared with
other entrepreneurial activities unless distinctions are clearly
warranted. No such necessity for distinguishing mining activities
from other activities was discerned.

Protection of the Landowner's Rights

Recommendations 5 through 7 treat the subject of protec-
tion of the landowner's interest in minerals as a part of his
ownership of the land and his rights to recover for unauthorized
removal of minerals from his land. Recommendation 5 makes
the general statement that the landowner may protect his inter-
est in minerals against all forms of damage or interference
"by all means available for the protection of ownership."
Recommendation 6 expresses what is apprehended to be the
present law in stating that the landowner may recover for the
unauthorized removal of solid minerals in all cases, whether
by operations on or off his property. Recommendation 7 pre-
serves the present law applicable to removal of the fugitive
minerals in stating that recovery for removal of such minerals
may not be had where they pass from beneath the landowner's
property naturally or by artifically induced movement so long
as that movement results from the exercise of exploration and
development rights on neighboring lands. Essentially, this rec-
ommendation is merely a restatement of the rule of capture
in the context of the question of liability for unauthorized pro-
duction.

14. The landowner can protect himself in numerous ways, including:
assertion of the real actions, La. Code Civ. P. arts. 3651-3654; actions in tres-
pass, e.g., Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So.2d 20
(1946) and State v. Jefferson Island Salt Mining Co., 183 La. 304, 163 So.
145 (1935); actions in quasi contract against one who has produced minerals
without authorization, e.g., Liles v. Producers Oil Co., 155 La. 385, 99 So.2d
339 (1924) and Liles v. Barnhart, 152 La. 419, 93 So. 490 (1922) and Martin
v. Texas Co., 150 La. 556, 90 So. 922 (1921); actions for an accounting from
owners of other fractional interests, e.g., Huckabay v. Texas Co., 277 La. 191,
78 So.2d 829 (1955) and Wetherbee v. Railroad Lands Co., 153 La. 1059, 97
So. 40 (1923).
Correlative Rights

Although it is placed considerably later in the order of the recommendations, the expression of a theory of correlative rights in a common source of supply of minerals in Recommendation 67 is of considerable significance. Although Recommendation 67(a) is applicable to all of those having rights in a common source of supply, which would include mineral servitude owners, mineral lessees, and mineral royalty owners as well as landowners, the idea of correlative rights springs from the concept of ownership. The reader is referred to the rather extensive comments following Recommendation 67 for a more elaborate discussion of the doctrine of correlative rights. However, it is pertinent here to note that the doctrine is expressly recognized in the Louisiana Conservation Act in those sections which impose upon the Commissioner of Conservation the duty of assuring that allowable and unitization orders give to affected owners and producers an opportunity to recover their just and equitable share of oil and gas and an opportunity to utilize their just and equitable share of the natural reservoir energy. These sections of the Conservation Act are not regarded as expressing a new principle in our mineral law but as being based on the assumption that those with interests in a common source of supply have legally protected interests in the proper utilization of the common source of supply which extend beyond their particular property boundaries.

The vehicle suggested for use in expressing the concept of correlative rights is a paraphrasing of article 667 of the Louisiana Civil Code, which articulates the so-called sic utere doctrine. Article 667 is at least partially rooted in the idea that a landowner, though he may use his property freely, is under certain limitations or restrictions in the utilization of his own property by virtue of the interests which those around him have in the neighborhood as a community. If, then, there is a legally protected interest in those constituting the community utilizing the surface of land, it seems logical to express the analogous idea of a legally protected interest among those constituting the community with interests in a common source of supply of minerals by utilizing the principle inherent in article 667.

15. Recommendations at 100-105.
Interests Which the Landowner May Create

Recommendation 8 recognizes the three present basic interests which are the principal institutions of the mineral property system: the mineral servitude, the mineral royalty, and the mineral lease. There is, however, a matter of nomenclature which is important in analysis of other recommendations. That is the utilization of the phrase "mineral rights" as a generic term including the mineral servitude, mineral royalty, mineral lease, and other forms of mineral rights which might be created. It was felt that some generic term would be useful, and although it is recognized that when the term "mineral right" is used today one is usually referring to a mineral servitude, the phrase nevertheless seemed the best available term for the purpose.

The consequences of characterization as a mineral right are expressed in Recommendation 8(b), which states that "there can be no mineral right which is not a real right in the land burdened and is not subject either to the liberative prescription of nonuse or to special rules of law governing the term of its existence." In later recommendations, it is expressly provided that the mineral servitude and the mineral royalty are subject to prescription. It is also later provided that although the mineral lease is not subject to the prescription of nonuse, the primary term of a mineral lease may not exceed ten years. Thus, in accordance with the statement in Recommendation 8(b), the mineral lease is exempted from the rules of prescription, but there is an expressed special rule governing "the term of its existence." Another instance in which special rules are provided for the term of existence of mineral rights is Recommendation 121 concerning mineral rights in land acquired or expropriated by governments or governmental agencies. With these two exceptions, then, all forms of mineral rights are subjected to the regime of prescription. Included in the exception of mineral leases, of course, are rights carved out of the mineral lease. Thus, an interest such as an overriding royalty remains alive so long as the basic lease is alive, unless parties have contracted otherwise, and is not independently subject to prescription.

Although it is a rule broadly applicable to all mineral trans-

17. RECOMMENDATION No. 15.
18. Id. No. 74.
19. Id. No. 124.
20. Id. No. 134.
actions, Recommendation 8(c) provides that mineral transactions are not subject to rescission for lesion beyond moiety. This, as noted by the comment,\(^2\) is essentially a recognition of existing jurisprudence.

**The Mineral Servitude and Mineral Royalty**

The foregoing discussion of the landowner’s interest in minerals dealt in some detail with recommendations which confirm present law. As noted, this was deemed desirable because there has been so little discussion of the landowner’s interest as a set of related rights within the larger bundle of rights constituting ownership. Hereafter, however, discussion will be focused principally on those recommendations containing the more significant changes and elaborations or clarifications of present law. Insofar as the mineral servitude generally is concerned, the recommendations, if incorporated into final legislation, will have the effect of perpetuating the present jurisprudence. It is recognized that creation of a mineral servitude confers the right to explore and develop property for mineral extraction and to reduce minerals to possession and ownership.\(^2\) The present rule that a mineral servitude may be created only by a landowner who owns mineral rights at the time of execution of the act creating the servitude is preserved.\(^2\) Recommendation 12, however, sets forth certain special rules regarding the rights of conditional owners, usufructuaries, and trustees to create mineral servitudes. These rules are generally consistent with existing law.\(^2\) The provision as to trustees embodies the existing provision of the Trust Code on the subject.

The recommendations concerning the fundamental characteristics of the mineral royalty are also reflective of present law. The royalty is recognized in Recommendation 68 as a “right to participate in production of minerals extracted from a described tract of land.” It is there stated that the royalty does not carry with it executive rights, development rights, or use rights characteristic of the mineral servitude. Further, unless the parties agree otherwise, the mineral royalty is a right to share in gross production free of drilling or production costs.

\(^{21}\) **Recommendations at 19.**
\(^{22}\) **Recommendation No. 9.**
\(^{23}\) **Id. No. 11.**
Certainly this is a recognition of present jurisprudence. However, it does not attempt to solve the frequently encountered problem of what deductions may be made from a mineral royalty right by the operator. Questions of this kind are sometimes solved by the provisions of a lease contract entered into by the land or servitude owner whose interest is burdened by a royalty and sometimes by division order provisions circulated to the royalty owner himself. However, there are many instances in which difficulties over deductions arise. It was felt that drafting a specific and detailed solution for the problems in this area would be a difficult, if not impossible task. Additionally, as a practical matter, it seems unlikely that a workable, specific, drafting solution could be arrived at which would be satisfactory to groups with opposing views. Thus, it was determined simply to leave this question in its present condition, stating only the basic principle that the royalty is a right to receive a share of gross production free of drilling or production costs.

The right to create royalties is recognized as being available to both the landowner who owns mineral rights and the mineral servitude owner. As with the mineral servitude, special rules are provided in Recommendation 71 concerning the possibility of creation of mineral royalties by conditional owners, usufructuaries, and trustees. The nature of the mineral royalty as a prescriptible interest is specifically recognized by Recommendation 74.

Beyond these basic provisions, there are certain changes and elaborations which can be noted. Most of them are common to both the servitude and the royalty, and simultaneous discussion is, therefore, appropriate. Additionally, there are some points at which discussion of corresponding or contrasting recommendations concerning mineral leases may be helpful.

Rules of Use

Drilling Operations

There are some relatively small changes and clarifications as to the effect of drilling operations as an interruption of


26. Recommendation No. 70.
prescription accruing against a mineral servitude. These, of course, do not relate to the mineral royalty since production is necessary to interrupt prescription as to that type of interest. Presently, the jurisprudence indicates that liberative prescription accruing against a mineral servitude is interrupted on the date on which operations for drilling are commenced.27 The present rule means that everything from building roads, to site clearing, to erection of the drilling rig could be included as marking the commencement of operations for drilling the well. Although this phraseology is commonly incorporated into mineral leases and is usually effective in administering them, it does not seem appropriate to a determination of when prescription is interrupted for a mineral servitude. In the case of leases, disputes as to whether the lease has been maintained by particular operations usually arise contemporaneously with the events in question, and eyewitness reports, informal business records, and more formal reporting afford a wide variety of sources for testimony and evidence making resolution of disputes possible. However, the task of the title examiner determining when prescription is interrupted and settling disputes concerning the date on which prescription is interrupted are different matters because flaws are often discovered and arguments often arise years after the occurrences in question. For this reason, it was felt that it would facilitate title examination and promote possible judicial resolution of disputes in this area if it were required that to interrupt prescription actual drilling or mining operations be commenced. Insofar as oil and gas operations are concerned, this would require that the well be “spudded in.” This date will ordinarily be more easily ascertained through resort to ordinary business records, such as driller’s logs, kept under unsuspicious circumstances than the date on which construction of roads or the hauling of materials may have begun. The suggested change would lend certainty to the law for the title examiner and reduce the possibility of unhappy swearing matches for the judge.

27. Keebler v. Seubert, 167 La. 901, 120 So. 591 (1929). See also Mire v. Hawkins, 177 So.2d 795 (La. App. 3d Cir.), writs granted, 248 La. 367, 178 So.2d 591 (1965), decided, 249 La. 278, 186 So.2d 591 (1966). The district court apparently sustained commencement of preparatory operations as marking the date of interruption. However, this holding was not appealed, and the question, though assumed as a basis for decision, was not at issue before the court of appeal or the supreme court.
Reworking Operations

A second noteworthy provision concerning the effect of operations short of production is found in Recommendation 20. There is presently no jurisprudence dealing with the effect of reworking operations conducted after abandonment of original, dry-hole operations. Recommendation 20 seeks to fill this hiatus by providing that reworking operations under these circumstances can constitute an interruption of prescription. However, as in the case of original operations, it is provided that to qualify as an interruption of prescription reworking operations would have to be conducted in good faith with a reasonable expectation of success. This decreases the possibility of attempts to justify sham operations as an interruption of prescription and at the same time recognizes that reworking operations can and indeed should qualify as an interruption of prescription under proper conditions.

A similar principle is found in Recommendation 26, which treats the effect of reworking operations after production constituting an interruption of prescription has ceased and prescription recommenced. It is there provided as in the case of reworking operations after original, dry hole efforts, reworking operations, if conducted in good faith and with reasonable expectation of success, will constitute an interruption of prescription. Neither Recommendation 20 nor Recommendation 26 defines the specific types of operations which might qualify. This was deemed inadvisable because several mining industries are involved and because of changing technology. However, the comments following these recommendations discuss the types of operations contemplated. Mere gathering of geological and geophysical information is not intended to suffice. However, such operations might, under proper circumstances, be viewed as part of an overall series of actions constituting an interruption. These provisions, too, are inapplicable to mineral royalties as they involve the effect of operations rather than production.

Effect of Shut-in Well

One of the rules in which a significant change will be wrought is that concerning the effect of the presence of a shut-in well on a tract subject to a mineral servitude or mineral royalty.

28. Recommendations at 39, 47.
The jurisprudence has evolved the principle that the presence of a well shown to be capable of producing in commercial quantities but which has been shut-in has an effect on prescription. Though the effect of the presence of such a well has been referred to as an interruption of prescription, no case has arisen in which the distinction between an interruption and a suspension of prescription was critical. Presumably, under the present rule, prescription would remain interrupted as long as the well is shut-in. No case has dealt with the possible effect of the well becoming incapable of production by occurrences within the reservoir or within the wellbore itself. Although, as noted, this rule has evolved in cases involving royalties, the general view has been that it would also be applicable to a mineral servitude, though generally of less significance to the owner of a mineral servitude as he would usually have received credit for an interruption of prescription as the result of the drilling operations culminating in the shutting in of the well.

Recommendations 21 and 79 deal with the effect of a shut-in well and attempt to give some particularity to the existing rule. It is there provided that if there is present a "well shown through testing by surface production to be capable of producing oil or gas in commercial quantities, prescription is interrupted on the date production was obtained by such testing and recommences on the date on which the well is shut-in after such testing." [Emphasis added.]

This recommendation would modify and elaborate the existing rule. First, it makes it clear that the commercial potential of the well must be proven by surface production tests. This is not expressly required by the present jurisprudence, but the existing cases apparently involve wells which have been so tested. Second, the date on which the interruption occurs is specified as the date on which production was obtained by the required testing. Again, this is not something which has been critical in any of the cases decided to date, but it is desirable to fix the date of the interruption with exactitude. Third, and perhaps most significant, the recommendation would result in a recommencement of prescription from the date on which the well is shut-in after testing. As indicated, the jurisprudence

apparently would now regard presence of the shut-in well as a continuing interruption of prescription. As also noted, however, this presents the problem of searching for facts outside the record concerning the continuing commercial potential of the well. Therefore, to provide certainty, it is recommended that prescription recommence after the shutting in of the well. This will allow a period of ten years within which to place the well in production and secure an interruption by production or, in the case of a mineral servitude, to engage in further operations. The instances in which marketing of production would require more than ten years will, in the light of current energy demands, be rare if not totally non-existent.

Legitimate question might be raised as to why this rule should be applicable to mineral servitudes at all because of the fact that prescription will normally have been interrupted by the drilling operations. However, it is a rule which could be of major significance in the case of unitization of a servitude tract with a well which has already been drilled and shut in. Under those circumstances, no credit for an interruption will have been earned by virtue of the drilling operations. Thus, the presence of the shut-in well will be of significance. Recommendation 21 specifically provides that if this situation arises, prescription is interrupted and recommences from the effective date of the order or act creating the unit.

Unit Operations

Perhaps the most significant change in the entire set of recommendations lies in the proposed alteration of the existing rules governing the effect of unit operations on prescription accruing against mineral servitudes and royalties. These proposals are found in Recommendations 22 and 24, applicable to mineral servitudes, and Recommendation 77, applicable to mineral royalties. Insofar as unit operations are concerned, Recommendation 24 suggests that unless landowner and servitude owner have agreed otherwise, the effect of unit drilling operations should be that prescription is interrupted as to the entirety of the servitude regardless of whether all or only a part of the servitude is included in the unit. Recommendation 24 would achieve the same result as to unit production for mineral servitudes, and Recommendation 77 has similar impact for mineral royalties. Insofar as units established by the Commissioner of
Conservation are concerned, this would be a reversal of what appears to be the present rule. The jurisprudence as to conventional units is in a state of confusion. The recommendations would establish a uniform rule for all types of units subject to the right of parties to contract so as to make the burden more onerous for the mineral servitude owner. Mineral royalty owners and those whose interests are burdened by royalties may contract in similar fashion.

Mode of Use

One of the lingering doubts concerning the law applicable to mineral servitudes, and perhaps mineral royalties as well, concerns the possible application of those articles of the Civil Code which contemplate that predial servitudes may be reduced by a use less extensive than that granted by the original title and those which provide that certain modes of use of servitudes may prescribe. Recommendation 27 provides that, as to mineral servitudes, if prescription is interrupted by any means, the interruption extends to all minerals covered by the act creating the servitude and all modes of use contemplated by the servitude. Similarly, Recommendation 80 provides that as to mineral royalties, production of any mineral will interrupt prescription as to all minerals covered by the act creating the royalty.

Acknowledgment and Extension

The recommendations concerning acknowledgments seek to preserve the present jurisprudence. As is presently the case, no consideration, or "exchange of equivalents" as the recommendations put it, is required for a valid acknowledgment. However, the rather extensive rules as to form and content which have been evolved in the cases are preserved.

There is a significant change found in the rules regarding so-called "extension" of mineral servitudes and royalties for periods differing from the normal interruption. The concept of

33. LA. CIV. CODE arts. 796, 798.
34. RECOMMENDATION Nos. 28-31.
extension developed through the cases involving joint leases entered into by a landowner and servitude owner. Essentially, this body of cases holds that if a landowner and the owner of a mineral servitude burdening that land intentionally executed a joint lease for a primary term running beyond the prescriptive date of the servitude, the servitude is thereby "extended." No express intent to affect the running of prescription has been required; it has been necessary only that the parties intend to execute a joint lease. This rule can be viewed as a justifiable attempt to give the mineral lessee a secure lease title under such circumstances. It is based upon the notion that if the landowner enters into a contract stating that the lease will remain in force and effect as written, as to both his interest and that of the mineral servitude owner, he should be bound accordingly. There have, however, been difficulties with the rule. Extrinsic evidence has been admissible to prove whether the parties intended to execute a joint lease, which has caused considerable swearing and counterswearing. Additionally, no definition has ever been given to the term "extension." The Louisiana Supreme Court has, in fact, dodged definition of the term in at least one instance. Thus, it is not clear what would happen if the lease were dropped prior to the original prescriptive date, if dry hole operations occurred after the prescriptive date and the lease were subsequently dropped, or if production were established and ultimately depleted, resulting in expiration of the lease.

The net effect of Recommendations 32 through 34 is to abolish the joint lease-extension concept and to require that if any effect is to be had upon prescription, whether it be an interruption by acknowledgment or some form of extension for a period different from that resulting from an acknowledgment, there must be an express intent to achieve that effect in the instrument in question. Thus, the rules presently applicable to acknowledgments will be applicable to all acts alleged to have an effect on prescription. In the case of extensions for periods different from that involved in an ordinary acknowledgment, Recommendation 34 provides that unless the parties agree otherwise, any agreement "extending the life of a mineral servitude will continue it in force subject to all of the normal rules of

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35. E.g., Achee v. Caillouet, 197 La. 313, 1 So.2d 530 (1941). See Recommendation Nos. 32-34 and the comments thereon at 52-55.
prescription.” This means that if there are drilling operations or production normally sufficient to interrupt prescription, they will have that effect if they occur during the period of extension of the mineral servitude. If the parties wish to provide that the interest will terminate at the end of the period of extension regardless of the character or degree of operations, it will be necessary for them to contract expressly for that effect if the period of the extension is less than ten years. If the parties provide for an extension greater than ten years, it seems that the rule presently existent in the jurisprudence concerning the initial creation of servitudes for periods greater than ten years will be applicable. That is, the act would be construed as fixing the ultimate term of the servitude. However, the prescription of nonuse would be otherwise applicable, and to maintain the interest for the entirety of the period fixed, operations sufficient to interrupt prescription would be required. No cases involving contractual extension of royalties have arisen. This is simply because the royalty owner, as he does not have the power to execute leases, has not been involved in the joint lease situation with which the courts have dealt in the case of mineral servitudes. However, the owner of a mineral royalty and the owner of the interest burdened by the royalty certainly could contract for an extension. In view of this, Recommendations 85 through 87 provide rules regarding the extension of royalties which are identical to those applicable to servitudes.

If, as noted, the joint lease cases represent an attempt to give the mineral lessee some measure of security of title when he takes a lease from the landowner and mineral servitude owner, the proposed change in the recommendations will deny to the lessee this small measure of security. This fact was noted, and the determination was made that this change would be beneficial in requiring that if any effect on prescription is to be wrought by the execution of a written act, that intent should be express. The problem of giving security of title to mineral lessees is, it is hoped, cared for in Recommendation 147, which provides that lessor and lessee may execute a lease containing an after-acquired title clause which will be binding not only on the lessor, but on his successors in title as well. Present jurisprudence recognizes the validity of such clauses between the

original lessor and the lessee. However, such clauses have been regarded as merely personal obligations and not binding on the lessor's successor in title unless expressly accepted by him. The proposed change in the rule as to the binding effect of an after-acquired title clause will permit a mineral lessee to obtain a secure lease title where mineral rights are outstanding at the time he seeks to place the full interest in the minerals under lease. Thus, this recommendation would relieve, if not completely eliminate, the present need for the rule developed in the joint lease cases.

By Whom a Use May Be Made

Recommendations 39 and 40 involve both change and elaboration of present law. Recommendation 39 sets forth the fundamental rule that a mineral servitude must be exercised "by the owner of the servitude, by his representative or employee, or by some other person acting in his behalf. To be considered as acting in behalf of the servitude owner, there must be some legal relationship, such as co-ownership, or evidence of an affirmative intent to act for the servitude owner. Silence or inaction by the servitude owner will not suffice to establish any legal relationship by which it might be said that another person is acting in his behalf."

This recommendation would have the effect of overruling the recent decision in Nelson v. Young, in which the silence of the servitude owner was utilized to establish a quasi-contractual relationship between the landowner, who had granted a mineral lease, and the servitude owner, with the consequence that operations conducted by the landowner through his lessee were said to interrupt prescription on behalf of the servitude owner. The result was reached despite the fact that the servitude owner did not assert any claim that the operations constituted a use until five or six years after the date on which his rights would otherwise have prescribed. The decision is regarded as inimical to the system of prescription which has been fashioned by the courts.

Recommendation 40 is too long and involved to permit discussion in this Article. It is sufficient here to note that the recommendation is intended to make it clear under what circumstances a servitude owner may adopt operations which have not been conducted by him, by his representative or employee, or someone acting in his behalf. Fundamentally, this means operations conducted by a stranger. The recommendation permits adoption of operations by strangers provided the servitude owner takes action within the original prescriptive period of his interest. Formal requirements are proposed to assure the legitimacy of the servitude owner's action in adopting operations by another. The significant exception to these rules is in the case of operations conducted by the operator of a unit established by the Commissioner of Conservation. In this case, the statement in *Mire v. Hawkins* that the operator of a compulsory unit is the "representative" of all those within the unit is recognized and adopted. This rule can be seen as consistent with the terms of Recommendation 39, and the unit order as satisfying the requirement of some form of legal relationship.

The lengthiness and elaborate character of this recommendation are subject to the possible criticism that it is an example of the proverbial sledge hammer being used to kill a gnat. Nevertheless, it does deal with a situation which has occurred and which occasionally presents troublesome problems for the title examiner. It is unfortunate that such a lengthy recommendation is necessary. However, if the gnat is to be killed, in this instance at least, a sledge hammer is required.

*Acquisitive Prescription*

Recommendations 42 through 45, applicable to mineral servitudes, and 92 through 96, applicable to mineral royalties, deal with the complex area of acquisitive prescription. The only simple principle in these recommendations is that, harmoniously with the present jurisprudence, neither mineral servitudes nor mineral royalties can be established by acquisitive prescription. The remainder of these recommendations wrestles with the problems involved in determining when possession of the surface of land as owner constructively includes possession of outstand-

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41. 249 La. 278, 186 So.2d 591 (1966).
ing mineral rights. The jurisprudence has articulated the rule that one possessing land as owner in good faith and under just title can, by acquisitive prescription, perfect his title not only as to defects in the basic surface title but as to mineral rights outstanding at the time the possessor went into possession.\textsuperscript{43} There are, however, complications of this rule which have never been worked out in the jurisprudence. As noted, the jurisprudence deals with those situations in which the surface possessor is attempting to clear his title of a mineral servitude or royalty created by someone preceding him in that chain of title. Recommendations 43 and 93 retain the rule of the present jurisprudence where the possessor is concerned about a mineral right stemming from his own chain of title. The jurisprudence does not, however, deal with the matter of the surface possessor's possession as including mineral rights adversely to those claiming through another chain of title. These same recommendations provide that in situations of this kind possession of the surface as owner is possession adverse to other chains of title and includes, therefore, the mineral rights. This is as it should be since if A, the possessor, perfects his title by adverse possession of the surface, he will prevail over one claiming under another chain of title and all of those holding derivative rights, including mineral rights, from that claimant.

Another situation not dealt with in the present jurisprudence is the extent to which one possessing as owner without title is deemed to possess the mineral rights inherent in perfect ownership. Recommendations 43 and 93 postulate that such possession includes the mineral rights inherent in perfect ownership.

Recommendations 44 and 94 deal with the problem of determining when one who possesses the surface of land, and constructively the mineral rights inherent in title thereto, is ousted from possession of the mineral rights, although his possession of the surface may not be disturbed. Fundamentally, if the owner of mineral rights possesses his rights by exercising them, this will oust one who is constructively possessing the mineral rights through possession of the surface. This preserves the rule of

\textsuperscript{43} E.g., Palmer Corp. of Louisiana v. Moore, 171 La. 774, 132 So. 229 (1930). See Recommendations at 73-76 for the discussion contained in the comment on Recommendation No. 43.
the present jurisprudence. Such ouster may occur even though operations or production occur on land other than that which is being adversely possessed. This, too, is harmonious with the present jurisprudence. The existing cases, however, have dealt only with possessors in good faith under just title. There has never been a disposition of a contest between one possessing in bad faith and without title and the owner of a mineral servitude. A strong argument can be made for the proposition that the possessor in bad faith without title is acting in the face of everything disclosed by the public records, not only derivative rights but the basic record title itself. In light of this, it could be argued that if such a possessor perfects title through thirty years of naked possession as owner, he acquires in perfect ownership, and no outstanding mineral right or other derivative right could, therefore, survive his claim. This argument, which was discussed at length, was nevertheless not adopted. It was deemed desirable to apply the rule of the present jurisprudence to all adverse possessors. In the case of a large servitude, adoption of any other rule would burden the servitude owner not only with the requirement that he use his rights within the prescriptive period, but that he patrol the entirety of the servitude tract in the same manner as if he were protecting full ownership of the property. This was regarded as an unreasonable burden.

One other problem which is not dealt with in the present jurisprudence is found in the provisions of article 3517 of the Civil Code, which state that a "natural interruption" of acquisitive prescription takes place "when the possessor is deprived of possession of the thing during more than a year, either by the ancient proprietor or even by a third person." This article was, of course, written with particular regard for possession and consequent acquisitive prescription of corporeal things. The jurisprudence has never specifically treated the question of whether possession of a mineral servitude or other mineral right according to its nature by a use sufficient to interrupt liberative prescription would oust an adverse surface possessor from posses-


sion of that element of ownership when the use required less than one year. The Civil Code does not deal with the question of adverse possession of real rights of any kind as fictitiously included in possession of the corporeal thing in question. However, it is provided in article 3551 that those causes which interrupt acquisitive prescription will also interrupt liberative prescription operating as a release from debt. Applying this provision in reverse, it can be argued that the Code embraces the general notion that if there is a use of a mineral right or other real right which would interrupt the prescription of non-use, this should be sufficient to oust an adverse possessor of the surface whose possession constructively included the mineral right in question from possession of that element of ownership even though the use might take place within the span of less than one year. The recommendations therefore provide that whenever there is a use of mineral rights according to their specific nature, the possession of an adverse possessor of the surface, insofar as that possession includes mineral rights, is interrupted even though the use requires a period of less than one year.

There are no provisions presently in the Civil Code regarding the possibility of a suspension of the running of acquisitive prescription. Recommendations 45 and 95 suggest that although the existence of an obstacle to use of a mineral right would not normally affect the running of acquisitive prescription, if the obstacle to use or, in the case of a mineral royalty actual production, is created by the adverse possessor, the running of acquisitive prescription should be suspended.

Recommendation 96 deals with a problem peculiar to the mineral royalty: the question whether a mineral servitude owner could ever unburden his title of an outstanding mineral royalty by any form of possession. Recommendation 96, taking cognizance of the fact that neither a servitude nor a royalty is technically a possessory interest, provides that the owner of a mineral servitude "cannot by any form of possession perfect an acquisitive title against the owner of a mineral royalty burdening the servitude in question."

Although it is not consistent with the order of the recommendations to present a full view of this particular subject matter, it is appropriate at this point to discuss the corresponding
recommendations concerning the operation of acquisitive pre-
scription as to mineral leases. Recommendation 139 reiterates
the rule that mineral rights, including mineral leases, cannot be
established by acquisitive prescription. Recommendation 140
discloses a meaningful difference between the position of a
possessor of land as against the owner of a mineral servitude
on that land and a possessor of land subject to a mineral lease.
One who creates a mineral lease obviously cannot possess ad-
versely to his lessee. Although a person taking title to land
subject to a mineral lease, whether disclosed by his title or not,
is not necessarily bound by all the terms and conditions of the
lease insofar as some of them may represent merely personal
obligations, he is, nevertheless, in a sense a mineral lessor.
He is bound by a previously created interest giving rise to a
relationship in which there is a complex set of reciprocal rights
and obligations looking toward the development of land for
the production of minerals—a sort of common undertaking. In
this situation it would not be logical or just to construe the
possessor’s possession of the surface as being adverse to the
lessee. Accordingly, Recommendation 140 provides that one pos-
sessing land as owner under a title subject to a mineral lease
cannot possess adversely to the lessee. The remainder of the
recommendations concerning acquisitive prescription dealing
with possession and ouster therefrom are essentially the same
as those previously discussed in connection with servitudes and
royalties.

The Role of Possession in Real Actions

Recommendations 46, 97, and 142 essentially track the lan-
guage of article 3664 of the Code of Civil Procedure in providing
that the owners of a mineral servitude, mineral royalty, or min-
eral lease, respectively, are owners of real rights and may assert,
protect, and defend their rights in the same manner as owner-
ship or possession of immovables. In this respect, the recom-
mendations sustain clearly established present law.

Recommendations 47, 98, and 143 make an attempt to deal
with a problem presented by articles 3658 and 3660 of the Code
of Civil Procedure. Under the former article, to assert a posses-
sory action a plaintiff must have possessed quietly and without
interruption for more than a year immediately prior to the dis-
turbance. Under the latter article, the possession supporting
the action may be either corporeal or civil. The peculiarities of possession of mineral rights present difficulty in applying these provisions. First, mineral operations, and thus actual possession of mineral rights, often exist for less than a year. Second, the concept of civil possession cannot be satisfactorily applied to mineral rights.

These recommendations provide what may be best described as a limited concept of civil possession applicable to mineral rights for procedural purposes. The basic idea is that if the owner of a mineral right takes possession of his right according to its nature by exercise thereof, his right to bring the possessory action will mature after the passage of a year and a day (satisfying the requirement of possession for more than one year) from commencement of his possession. This means that if the act of possession does not consume the entire year, the cessation of actual possession according to the nature of the right in question will be followed by a period of civil possession for procedural purposes so that the right to bring the possessory action matures despite the fact that the actual possession of the right has not continued for more than one year. If, under these circumstances, there is someone who, by his possession of the surface, is considered as constructively possessing a mineral right, his constructive possession is resumed upon cessation of the actual possessory activities of the owner of the mineral right, and the surface possessor becomes entitled to bring a possessory action against the owner of the mineral right one year from the point in time at which the mineral operations ceased.

Evaluation of these provisions is somewhat difficult. They are complex and require extremely close reading for understanding. In the final analysis, it might be simpler to declare that the concept of civil possession is totally inappropriate to mineral rights. This would mean that to bring a possessory action, the owner of a mineral right would have to show a period of operations or, in the case of a mineral royalty, production in excess of a year. However, it was felt that considering the nature of mineral rights and the fact that acts of possession frequently occupy a time span of less than one year, considerations of fairness warrant recommendations of the kind proposed. It is to be emphasized that these recommendations are viewed as effective only for procedural purposes. They will have
no bearing whatsoever on operation of the rules of acquisitive prescription for substantive purposes.\textsuperscript{46}

Recommendations 48 and 99 represent a confirmation of present jurisprudence regarding the burden of proof to be borne by a plaintiff possessor of land who is asserting a possessory action against the owner of a mineral servitude or mineral royalty. The jurisprudence establishes that one possessing land under title who brings a possessory action against one claiming a mineral right under a recorded deed must make "prima facie proof" that the right in question has expired for nonuse.\textsuperscript{47}

The recommendations, however, place some limitation on this jurisprudential rule by restricting the requirement of such proof to cases in which the plaintiff possesses under title which discloses the mineral servitude or royalty in question. This is intended to cover both the situation in which the act under which the plaintiff took possession discloses the outstanding interest and that in which he himself is the creator of the interest in question.

The present jurisprudence would, if read literally, apply the requirement of such prima facie proof to all cases in which a possessor sues one claiming a mineral servitude or mineral royalty. However, the recommendations take the position that this requirement is appropriate only where the plaintiff's title discloses the outstanding mineral servitude or royalty or where he himself has created that interest. Under those conditions, quite clearly his possession of the surface does not purport to include the outstanding servitude or royalty until ten years have passed during which there has been no use of the interest in question. After that time, the possessor's surface possession constructively includes the mineral interest, and he would have to show possession for more than a year succeeding the ten-year period during which no use occurred. In all other cases, including those in which the plaintiff possesses without title and those in which he possesses under title which does not disclose the outstanding interest (and the interest is not one which he has created), the plaintiff's surface possession constructively includes the mineral rights inherent in ownership

\textsuperscript{46} Recommendation Nos. 49, 101.
\textsuperscript{47} Ware v. Baucum, 221 La. 259, 59 So.2d 182 (1952); Lenard v. Shell Oil Co., 211 La. 265, 29 So.2d 844 (1947); International Paper Co. v. Louisiana Central Lumber Co., 202 La. 621, 12 So.2d 659 (1943); Baker v. Texas Co., 88 So.2d 263 (La. App. 1st Cir. 1958).
of the land from the moment he enters possession. Therefore, his right to bring the possessory action should mature one year and a day after his entering into possession of the surface.

It is noteworthy that in the section on mineral leases there is no provision corresponding to Recommendations 48 and 99. This is principally because of the fact that Recommendation 144 is a procedural corollary to the rule suggested in Recommendation 140 that a possessor of land under title subject to a mineral lease cannot possess adversely to the lessee. He cannot, therefore, as stated in Recommendation 144, assert the real actions against the lessee on account of the termination of the lease by running of the term or occurrence of an express resolutory condition. His proper remedy is by ordinary action against his lessee seeking judgment that the lease has terminated. The comment to Recommendation 144 notes that it is applicable only where the contest is over whether the lease has expired and does not deal with suits for cancellation, or dissolution, based upon nonperformance of the obligations of the lease.

Recommendation 100 contains a special rule applicable to disputes between owners of mineral servitudes and owners of mineral royalties burdening, or alleged to burden, the mineral servitude interest. Since neither the mineral servitude nor the mineral royalty can be established by acquisitive prescription and, therefore, the owner of neither type of interest can be said to possess adversely to the other, the use of the possessory action in title disputes between owners of these types of interests is inappropriate. Thus, the recommendation proposes that in these circumstances the parties be relegated to use of the petitory action, with the burden of proof to be borne by the plaintiff to be that which must be borne in an ordinary possessory action when neither party is in possession. This proposed rule is viewed as applicable only where the royalty is claimed to burden the servitude in question. It would not be appropriate if the interests arise under different chains of title. In such cases the title contest will not be limited to the servitude owner and the royalty owner, but will involve claimants to the mineral rights generally, possibly including both the landowner and mineral servitude owners. In such instances, of course, a servitude owner should not be permitted to win a contest with the royalty owner and lose to the land or servitude owner from whose title the royalty claim is derived.
**Indivisibility of Mineral Servitudes and Royalties**

The sections of the recommendations dealing with the concept of indivisibility of mineral servitudes, royalties, and leases largely confirm existing jurisprudence in this area. There are, however, one or two noteworthy suggestions. One provision concerns a matter which, organizationally, might as easily have been placed under either the recommendations dealing with indivisibility or under those dealing with co-ownership problems. It involves the surprisingly frequent occurrence of a desire by co-owners of a tract of land to partition the surface and reserve to themselves the mineral rights covering the entirety of the tract. Although touched upon in some judicial opinions, no decision has resolved the doubt as to whether such an act of partition would have the effect of creating a single servitude owned in indivision by the former co-owners or multiple servitudes with varying ownerships. The suspicion has persisted that such an act might violate the principle that one may not fractionate his title to land in favor of himself. The situation is, however, observably one in which the parties commonly desire to accomplish the end of creating a single servitude covering the entirety of the original, co-owned tract of land. There is no discernible reason why they should not be permitted to do so. There is no widespread adverse impact to be seen on the title system, and accordingly Recommendation 51(c) would legitimate transactions of this kind.

Although partially dissipated by the decision in *Gulf Oil Corp. v. Clement*, it has remained doubtful whether a conveyance creating mineral servitude or royalty rights at varying depths beneath a single tract of land would give rise to a single or multiple servitude or royalty rights. Harmoniously with what seems to be the direction indicated by the *Clement* decision, Recommendation 52 would make it clear that, unless otherwise provided in the act creating a mineral servitude, a conveyance of rights at varying depths would create only a single servitude. Recommendation 104 accomplishes the same result as to mineral royalties.

Another significant principle is found in Recommendations 54 and 106, which make it clear that, unless the parties have

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49. 239 La. 144, 118 So.2d 361 (1960).
agreed otherwise, unitization will not divide a mineral servitude or royalty interest. Language suggesting the possibility of division is found in the present jurisprudence. This negation of the concept of divisibility under these circumstances is, of course, harmonious with the recommendations already discussed which provide that unit operations will interrupt prescription as to the entirety of a mineral servitude or royalty interest regardless of the amount of the servitude or royalty tract included within the unit.

Co-ownership Problems

The various recommendations governing problems of co-ownership relating to mineral servitudes, mineral royalties, and mineral leases generally preserve the basic rules presently in existence. There are, however, some important changes suggested. Again, although out of the order of the recommendations, comparisons with the recommendations applicable to mineral leases are beneficial in giving an overall view of the recommendations in this area.

The first of these suggested changes is found in Recommendations 62 and 114, which deny to the co-owners of mineral servitudes and mineral royalties respectively the right to partition these types of interests. This is a complete reversal of present property theory. The motivation for this suggested change is that the right to compel partition of mineral servitudes can, on occasion, result in compelling some among those owning in indivision to divest themselves of their portion of what is essentially a speculative interest at a time when its value is small. Therefore, it is recommended that co-owners of mineral servitudes not be allowed to demand a partition. It is important to note that with respect to mineral servitudes Recommendation 62 makes the further provision that co-owners shall have the independent right to operate on the co-owned servitude. This, too, would be a change in present law. There is, of course, no corresponding change as to royalty owners since the nature of that right does not include operating rights. Any co-owner of

51. See Recommendation Nos. 60-65 (Servitudes); Recommendation Nos. 112-15 (Mineral Royalties); Recommendation Nos. 148-53 (Mineral Leases).
a mineral servitude who does elect to operate is, of course, under the obligation to account to his co-owners for their share of any production which is obtained.

Recommendation 63 preserves what is apparently the present rule that a co-owner of a mineral servitude may act independently to prevent waste or destruction of the servitude, even without the consent of his co-owners. The distinction between this situation and the independent right to operate afforded by Recommendation 62 is that the independent right to operate gives a co-owner the power to act only insofar as his own interest is concerned. However, in the case of action to prevent waste or destruction, a co-owner would have the power to deal with the entire co-owned interest, including the execution of such contracts as might be necessary to afford the desired protection. If a co-owner takes it upon himself to act, he cannot burden other co-owners with the costs of development or operation or any other costs except out of production. Additionally, he is forbidden to act in any discriminatory manner which would provide him with benefits which he does not also obtain for his co-owners. This standard is stated in Recommendation 63 in the form of imposing a duty of "acting as a reasonable, prudent mineral servitude owner whose interest is not subject to co-ownership." In other words, it does not require that the co-owner acting to prevent waste do more than can be expected of an ordinary servitude owner under the circumstances, but it does not permit less, especially where the "less" would result in profit to the acting co-owner at the expense of the others.

Recommendations 65 and 115 deal with a problem which has remained clouded for some time: the right of a co-owner of land to create mineral servitudes or mineral royalties. In the case of mineral royalties, Recommendation 115 also deals with the right of a co-owner of a mineral servitude to create mineral royalties. In the case of mineral servitudes, Recommendation 65 provides that a co-owner of land may create a valid mineral servitude in proportion to his ownership rights in the land. Prescription on such an interest commences from the date of creation. However, such a servitude cannot be exercised without the consent of the other co-owner or co-owners of the land subject to the servitude. Additionally, the owner of such a servitude cannot compel partition of the surface. The latter provision would be an alteration of the articles of the Civil Code
presently applicable to predial servitudes. There has long been speculation as to whether these would be applicable to one acquiring a mineral servitude from a co-owner of land. It simply does not seem proper to permit a person acquiring a mineral servitude from a co-owner of land to compel partition of the total ownership. Thus, a person acquiring a mineral servitude under such circumstances would, under the provisions of this recommendation, simply act at his peril.

In the case of mineral royalties there is a slight variance in theory because of a difference in the nature of the right as compared with the mineral servitude. Because the mineral royalty is only a passive right to share, Recommendation 115 provides that the creation of a royalty by a co-owner of land or a co-owner of a mineral servitude is completely valid, and no consent is necessary on the part of the remaining co-owners of the land or mineral servitude out of which the royalty is carved. It is believed that the nature of the mineral royalty warrants this distinction.

By comparison with the recommendations relating to servitudes and royalties, those applicable to mineral leases are similar. However, some distinctions should be observed. Those who co-own a mineral lease do not have independent rights to operate, as is the case with mineral servitudes, unless the lease is threatened by waste or destruction, in which case any co-owner can act to protect the interest of all. If a co-owner of a mineral lease acts under such circumstances, he acts under the same limitations and the same duty as imposed upon a co-owner of a mineral servitude acting to protect the co-owned right. The co-owner of a working interest in a mineral lease is recognized by Recommendation 153 as having the right to create nonoperating interests in production or net profits without the consent of his co-owners. This comports with present practice. However, if he transfers all or any part of his undivided interest, which would include operating rights as well as a share of production, the transferee has only the same right to operate on the lease premises as the transferor. Fundamentally, this means that the transferee of an undivided share of the working interest would not be able to operate without the consent of the remaining co-owners.

53. Id. art. 740.
After-Acquired Title Problems

Recommendations 66 and 117 deal with the application of the after-acquired title doctrine to oversales of mineral servitudes and mineral royalties respectively. The so-called oversale of mineral rights is to be distinguished from direct dealings with the “expectancy” of a landowner in the extinction of a mineral servitude. Transactions of the latter kind, once referred to as reversionary interest transactions, have been declared to be against public policy.\(^\text{54}\) This means that a landowner cannot deliberately deal in commerce with his interest in the termination of a mineral servitude. However, it has been recognized for a number of years that if, instead of attempting directly to buy or sell the so-called reversionary interest or right, a landowner simply purports to sell a mineral servitude when he does not own the mineral rights in question, the after-acquired title doctrine can operate to perfect a title in the vendee of such a transaction if the vendor remains the owner of the land at the time the previously outstanding mineral servitude expires.\(^\text{55}\)

Recommendations 66 and 117 preserve the basic rules that the reversionary interest or right is not an object of commerce and that if an oversale occurs, it is possible for the after-acquired title doctrine to operate.

There are, however, several elaborations of the existing law to be found in these recommendations. First, the possibility for the operation of the after-acquired title doctrine is limited to those situations in which the party acquiring a mineral servitude or mineral royalty in an oversale is in good faith. This limitation is not specified in present jurisprudence. However, in view of the decision in Hicks v. Clark\(^\text{56}\) it is proper to limit the operation of the after-acquired title doctrine to situations in which the party acquiring a mineral servitude or royalty is in good faith. Otherwise, it would be possible for parties to accomplish indirectly, by means of an oversale, what they cannot accomplish directly under the rule of Hicks v. Clark\(^\text{57}\) by engaging in

\(^{54}\) Hicks v. Clark, 225 La. 133, 72 So.2d 322 (1954).

\(^{55}\) McDonald v. Richard, 203 La. 155, 13 So. 2d 712 (1943); White v. Hodges, 201 La. 1, 9 So.2d 433 (1943). The White opinion speaks of the right outstanding as an obstacle under article 792 of the Civil Code. It mentions the after-acquired title doctrine as an afterthought. However, the court seems to have elected to follow the after-acquired title doctrine in McDonald and has apparently discarded the obstacle in oversale situations.

\(^{56}\) Hicks v. Clark, 225 La. 133, 72 So.2d 322 (1954).

\(^{57}\) Id.
a transaction frankly purporting to deal with a reversionary interest.

Another question about which doubt has persisted is the problem of determining the time from which prescription commences in the event of an oversale and the later operation of the after-acquired title doctrine. For example, if A sells a mineral servitude to B, who is in good faith, at a time when the mineral rights purportedly sold are outstanding in X, and if the rights of X terminate by prescription seven years after the transaction between A and B, does B have ten years within which to exercise his rights commencing from the date on which the after-acquired title doctrine operates, or does he have only the three years remaining between the date of operation of the doctrine and ten years from the date of the transaction between himself and A? The recommendations take the latter approach. That is, although the after-acquired title doctrine does not operate, in the hypothetical case in question, until seven years from the date of the oversale by A to B, when it does operate, prescription is deemed to run from the date of the oversale and not the date of the vesting of title by virtue of the after-acquired title doctrine. It is admitted that logical analysis might dictate the other possible result. However, it was felt that adopting the suggested rule would deter deliberate entry into oversales in circumstances in which it would be difficult to prove bad faith on the part of the purchaser in such a transaction.

The Relationship Between Landowner and Servitude Owner

Recommendation 67(b) deals with the relationship between the landowner and the owner of a mineral servitude regarding utilization of the surface. This is a matter about which there has been little litigation to date. However, in these days when there is great concern about maximum utilization of land surface, it is a matter about which litigation is likely to occur with increasing frequency. The present provisions of the Civil Code relating to the rights and obligations of a landowner and the owner of a predial servitude are inadequate to meet the problems of the relationship between the owner of a mineral servitude and the owner of the surface. Article 777 of the Civil Code provides that the owner of the servient estate can do nothing tending to diminish the use of the servitude or make it more inconvenient. Article 778 provides that the owner of a
predial servitude can use it only according to his title, without being at liberty to make, either in the estate which owes the servitude or in that to which the servitude is due, any alteration by which the condition of the first may be made worse. Article 779 provides that if the manner in which the servitude is to be used is uncertain, as if the place necessary for the exercise of a right of passage is not designated in the title, the owner of the estate which owes the servitude is bound to fix the place where he wishes it to be exercised. All of these articles are demonstrably inappropriate to the relationship between a landowner and the owner of a mineral servitude. As a suggested standard for governing the relationship, Recommendation 67 (b) proposes the simple formula that a landowner and a mineral servitude owner have correlative rights to use of the surface and that each must exercise his rights with reasonable regard for the those of the other.

Special Mineral Royalty Problems

There are three special problems dealt with in the recommendations concerning mineral royalties which are worthy of note. One is found in Recommendations 89 and 90. It is, of course, true that the mineral royalty does not include active use rights of the kind characteristic of the mineral servitude. In the case of the mineral servitude it is sensible to apply the principle of Civil Code article 792 that if there is an obstacle to the use of the servitude which the owner thereof can neither prevent nor remove, prescription does not run so long as the obstacle continues to exist. At first glance, the nature of the royalty might suggest that there is no place for the obstacle concept in the rules of prescription applicable to mineral royalties. However, it is conceivable that there might be an obstacle preventing the production of minerals in circumstances where it is clear that commercial production is possible. Recognizing this, Recommendation 89 proposes that if there exists an obstacle to actual production which would suspend the running of prescription if the interest in question were a mineral servitude, the prescription of nonuse accruing against the royalty will be suspended until the obstacle is removed. Recommendation 90 completes the picture by adding that if such a suspension of prescription occurs as to any one mineral included within the royalty interest, it applies to all minerals so included.
Recommendation 91 deals with modes of extinction of a mineral royalty other than by accrual of prescription by nonuse. These additional modes of extinction include confusion of title to the royalty with title to the land or mineral servitude subject to the royalty, renunciation or remission of the royalty, expiration of the term for which a royalty may have been granted, and dissolution of the right of the person who established the royalty. Discussion of the first three of these modes is not required. However, the last deserves elaboration; it is directed particularly, though not perhaps exclusively, at the situation in which a mineral royalty is dependent upon a mineral servitude. In cases of this kind, inheritance of the land subject to the servitude or a voluntary release of the servitude on which the royalty is dependent could result in the extinction or “wash-out” of the royalty. In the case of a voluntary release of the servitude, the opportunities for collusion between the owner of a mineral servitude burdened by a royalty and the owner of the land are clear. With these possibilities in mind, Recommendation 91 provides protection in stating that if a mineral servitude upon which a royalty is dependent is extinguished by inheritance or by any act of the servitude owner, the royalty burdening the servitude continues to exist unless the royalty owner is a party to the act or otherwise consents expressly and in writing to become bound by it.

A third special problem is found in Recommendation 116, which deals with the relationship between the owner of a mineral royalty and the owner of the land or mineral servitude subject to the royalty. Considering the prescriptive system applicable to mineral rights generally in Louisiana, the jurisprudence has appropriately developed the principle that the owner of land or a mineral servitude burdened by a royalty is under no obligation to grant a mineral lease within the prescriptive term of a royalty so as to afford the royalty owner a chance that production will occur and prescription will be interrupted.\(^5\)\(^8\) To impose such an obligation would require the land or servitude owner to act contrary to his own legitimate interests in the termination of the outstanding right by prescription. However, contrary to the overwhelming majority view in other jurisdictions,\(^5\)\(^9\) Louisiana jurisprudence has projected this rule

by stating that not only is there no obligation to lease, but there is also no obligation whatsoever on the part of the landowner or servitude owner to consider the interest of the royalty owner in executing or administering leases. Recommendation 116 deals with this problem by preserving the existing rule that the relationship between the owner of the land or mineral servitude and the royalty owner is not fiduciary in character. Thus the land or servitude owner is not under any obligation to lease, develop, or otherwise act for the benefit of the royalty owner. However, the recommendation does require that if the land or servitude owner undertakes to act regarding development of minerals, he must act in the same manner as he would if no royalty were outstanding. This principle will prevent arbitrary or discriminatory action by the land or servitude owner whose interest is burdened by a royalty. It does not require that he act selflessly in the manner required of an agent. However, he cannot discriminate against the royalty owner. This matter of the relationship between holders of executive and non-executive mineral rights is more fully dealt with in the section of recommendations dealing with executive rights which is discussed immediately below.

Executive Rights

The nature of the executive right has not been fully clarified in the Louisiana jurisprudence. In other jurisdictions if a royalty is created, the right to execute leases and retain the consideration therefor remains united with the mineral estate. If a non-executive mineral interest is created, the right to execute mineral leases remains with the mineral estate, but the owner of the mineral interest has a right to share in bonuses, rentals, and other considerations for the making or extension of leases.

In neither of these situations is there any dire necessity for defining the executive right. However, if the right is conveyed by itself, it has been variously designated as a power of appointment, a power coupled with an interest, and a statutory power in trust. The need for definition of the executive right is perhaps more critical in Louisiana because of the regime of prescription. Thus, it is necessary to know exactly what the executive right includes, whether a conveyance of the executive right alone creates a real right, whether the creation of a mineral royalty accompanied by executive rights creates a mineral ser-
vitude or a royalty for purposes of prescription, and, similarly, whether creation of a mineral servitude with a retention by the landowner of the executive right reduces the interest created from a servitude to a royalty for purposes of prescription. Additionally, as already noted in the preceding discussion concerning the relationship between the royalty owner and the owner of land or a mineral servitude burdened by a royalty, the system of prescription in Louisiana presents the problem of whether the owner of land or a mineral servitude burdened by a royalty or the owner of any other executive interest has a duty to the owner of the nonexecutive interest. Although the system of prescription makes it proper to honor the concept that the owner of land or a mineral servitude to which any outstanding interest is about to return by virtue of the accrual of prescription should not be required to act contrary to his expectation that prescription will accrue, nevertheless there is no reason for Louisiana not to adopt the overwhelming majority position of other jurisdictions that once the owner of an executive interest undertakes to exercise his right to lease, he must act fairly toward the owner of the nonexecutive right. As observed by one national authority, the most difficult question has not been whether a duty exists, but rather what the exact nature of the duty is. Recommendations 118 through 120 therefore deal with the problem of the relationship between owners of executive and non-executive interests.

Recommendation 118 defines the term "executive right" as "the exclusive right to execute mineral leases on specified land or mineral rights. Unless restricted by contract, it includes the right to retain bonuses and rentals." This definition is declarative of the jurisprudence. To make it clear exactly what the executive right includes insofar as retention of bonuses and rentals is concerned, the remainder of Recommendation 118 seeks to define the terms "bonus," "rental," and "royalty." Detailed analysis of these definitions is not required in this discussion. However, the reader should consider them in evaluating these particular recommendations.

Recommendation 119 states that the executive right can be transferred by itself. When conveyed by the landowner, it

60. Id.
is a form of mineral right and, therefore, subject to the prescription of nonuse. The executive right can also be transferred as a part of a mineral right, such as a mineral servitude. Any mineral right which includes the executive right is designated as an "executive mineral interest." Examples of "nonexecutive interests" are the mineral royalty, the grant by a landowner of the executive rights over mineral rights united with his title to the land, or the grant of executive rights over a mineral servitude to the landowner or some other party.

Recommendation 119 (b) defines the duty of the owner of an executive interest to the owner of a nonexecutive interest. It is expressly stated that there is no affirmative obligation to lease for the benefit of the nonexecutive. However, once the executive undertakes to exercise his rights, he is under the obligation to do so in good faith and in the same manner "as an ordinary, prudent landowner or mineral servitude owner whose interest is not burdened by a nonexecutive interest when acting in his own behalf. The executive must administer any leases executed by him in the same manner." Thus, the executive owes a duty to deal fairly and in a nondiscriminatory manner. He is not required to act with total disregard for his own interests. However, he cannot act in such a manner as to damage the interest of the nonexecutive right where the reasonable, prudent landowner or mineral servitude owner would not act in the same manner if there were no outstanding nonexecutive interest.

Some indication of the practical meaning of this proposed standard may be useful. It is clearly stated that the executive owes no duty to grant a lease. Thus, he may accept or reject lease offers as he desires. However, if he chooses to grant a lease, what type of conduct will be reprobated by the recommended standard? Assume that A has granted to B a mineral royalty expressed as "one fourth of all royalties stipulated for in any oil, gas, and mineral lease granted on the described property." Suppose, then, during the existence of B's royalty, X offers to lease A's property. X states that he will pay a bonus of $20,000 and give a royalty of $6 or, alternatively, a bonus of $10,000 and give a royalty of $4 of the minerals produced. Is it required that A accept the offer with the larger royalty share? The answer is negative. The reasonable, prudent landowner negotiating without the existence of the outstanding royalty will be entitled to
consider on the merits whether it is wise to accept the large cash bonus with a smaller royalty or to roll the dice by taking less cash and a greater royalty share. Factors entering into this decision would, of course, include such matters as development in the area, known or suspected potential of the particular property, and expressions by the prospective lessee concerning plans to drill. The landowner would be entitled to consider these factors in the decision-making process and to exercise his business judgment without regard to the outstanding royalty right.

Suppose, however, that in the described situation X does not make such an alternative offer. He offers merely to pay a $10,000 bonus and give a 4% royalty. Would it be possible for A then to request that the documentation be structured so as to provide for a 1/8 lessor's royalty and a 1/8 overriding royalty? Under the recommendations, this would be unsuccessful for two reasons. First, applying the standard of conduct proposed in Recommendation 119, the ordinary, prudent landowner negotiating for his own interest in the absence of an outstanding royalty of the kind in question would have no motive to ask that the documentation be structured as suggested. His only motivation, then, would be to reduce B's right to share in production, which would be violative of the required standard of conduct. The second reason why such a transaction could not succeed under the recommendations is that the definition of "royalty" under Recommendation 118(b) includes "any interest in production or its value from or attributable to the property subject to the nonexecutive interest." Thus, the overriding royalty springing from the transaction would be termed "royalty" under this definition, and B's interest would be protected under the circumstances.

Recommendation 120 deals with a problem which has plagued the courts for a number of years; that is, the effect of transactions which either strip executive rights away from what otherwise purports to be a mineral servitude or add executive rights to what otherwise purports to be a mineral royalty. The jurisprudence on this matter is, to say the least, confused and confusing. The

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recommendation cuts through this knotty problem, providing that the stripping of executive rights from a servitude does not alter its nature as a servitude. Similarly, the creation of a "stepped-up" mineral royalty does not change its nature as a royalty. The consequences of this resolution of the problem are not merely academic. Questions dependent upon the choice include: does the owner of a nonexecutive mineral servitude have a right to operate in the absence of a lease; in the event of compulsory unitization prior to leasing, would he or the holder of the executive rights be responsible for drilling costs; who would be liable to third parties for damages resulting from drilling operations on the burdened tract; and, most importantly, what rules of prescription would be applicable? Similar questions arise regarding the position of the holder of a mineral royalty and executive rights. These questions are answered by providing that the stripped-down mineral servitude remains a servitude and the stepped-up royalty remains a royalty. Admittedly, this means of dealing with the problem permits the parties some flexibility by affording them a functional choice between the use rules applicable to servitudes as compared with those applicable to royalties in many situations. However, no real damage to the system of prescription is foreseen. The flexibility, of course, lies in the fact that when a nonexecutive mineral servitude is created, the interest is a rather passive one strongly resembling a royalty. Thus, the creation of a nonexecutive mineral servitude, while it bears strong functional resemblance to the royalty, would nevertheless give to the owner of such an interest the benefit of the dry hole use rule applicable to mineral servitudes.

Recommendation 120 also deals with the problem of what happens to the right to operate if a nonexecutive mineral servitude is created. Recommendation 120 (b) provides that the servitude owner retains the right to operate, but he is prohibited from exercising it as long as the executive rights are separated from his servitude interest. This means, of course, that if a unit is formed by the Commissioner of Conservation without a lease having been granted on a servitude owner's interest, he is an "owner" as defined by the Louisiana Conservation Act, and his rights and liabilities under the act are determined accordingly.63

MINERAL LEASES

The general approach of the recommendations concerning mineral leases has been to deal with the basic concepts concerning the law in this area and to avoid detailed consideration of matters presently dealt with in the elaborate express clauses of the standard lease. There are, however, a number of noteworthy recommendations in this area.

General Characteristics

Recommendation 122 states the principle that the mineral lease partakes of the nature of both sale and lease. The character of the lease as an incorporeal immovable is preserved by Recommendation 123 (a) dealing with the long, running controversy over whether the interest of the lessee in a mineral lease is a real right or merely a personal contract. Recommendation 123 (b) recognizes that the mineral lease contract does create real rights. However, it is expressly stated that the interest of the lessee is not subject to the prescription of nonuse. This, of course, preserves existing law.

One of the more important recommendations in this area is found in Recommendation 124, which provides that although the mineral lease is not subject to the prescription of nonuse, it must have a term. To this point, it is reflective of present law. However, the recommendation adds that the primary term may not exceed a maximum of ten years. Although this may be described as new, there has always lurked in the background of the law applicable to mineral leases the possibility that the court might hold that although a mineral lease is not subject to the prescription of nonuse, it cannot be granted for a primary term greater than ten years. Customarily, primary terms do not exceed ten years. However, there are some unofficially reported instances in which long term mineral leases have been granted. None of these has been litigated. Placing the proposed limitation on the primary term is consistent with the public policy underlying the system of prescription applicable to other mineral rights. The net effect of this in combination with Recommendation 123 (b) is to free the mineral lease of the use rules applicable to servitudes while accomplishing the end of

64. See RECOMMENDATIONS at 159-60 for a brief discussion.
prohibiting all basic forms of mineral rights from remaining outstanding for periods greater than ten years without some form of development. This leaves the matter of what form of drilling or mining operations or production will maintain the mineral lease within the discretion of the contracting parties. Established custom in this regard indicates that there is virtually no danger to the basic philosophy of a system of terminable mineral rights in permitting this freedom.

As noted, it is not presently established whether a mineral lease can or cannot be granted for a primary term greater than ten years. The danger of providing expressly that mineral leases could be granted for terms in excess of ten years is that there might be a widespread invasion of the public policy embodied in the prescriptive rules applicable to other forms of mineral rights. In selling land, the vendor might reserve a paid-up mineral lease with a primary term of thirty years rather than a mineral servitude. Presently, the threat that the court might impose the sort of limitation proposed by this recommendation apparently has a deterrent effect on the widespread granting of long term leases. The removal of that threat might result in subversion of the entire system of prescription. This provision is regarded as essential to preservation of the mineral property system as a whole.

Obligations of the Lessor

Presently, the mineral lessor, like any other lessor, is bound only to maintain his lessee in peaceful possession.\(^\text{67}\) However, common practice is to the contrary. Virtually all standard lease forms contain a warranty of title clause binding the lessor as if he were a vendor. As a matter of course, then, the lessor who does not wish to be placed in the position of a vendor warranting title must strike this clause from the lease. It is safe to say that in the overwhelming majority of cases this is not done. In this way, industrial custom recognizes the fact that the mineral lease is more than the ordinary lease and that, as expressed in Recommendation 122, it partakes of the nature of both sale and lease. Recommendation 129 would, therefore, adopt this industrial custom as the basic rule of law, subject to the recognized right of contracting parties to exclude the warranty of title.

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\(^{67}\) La. Civ. Code arts. 2682, 2692.
A second aspect of Recommendation 129 is its proposed rule regarding the extent of the lessor's liability for breach of the warranty of title. As discussed in the comment to the recommendation, the jurisprudence in this regard is not clear. It is proposed by Recommendation 129 that the lessor's warranty be limited to a recovery of "money paid or other property given for execution or maintenance of the lease and any royalties delivered on production from the lease." Parties are expressly permitted to limit or extend the lessor's liability. The economic realities of exploration for valuable minerals make this limitation of liability appropriate. Mineral exploration and production in general, and petroleum exploration and production in particular, are high risk endeavors. The operator commits funds and conducts business with certain calculated risks in mind. Sound industrial practice includes the procedure of a thorough title check before major commitments are made. If at the time of the check a defect is found, the normal situation will be that the lessee will be damaged to the extent of loss of the bonus and possibly rentals. Beyond this point, the wise operating practice in the industry, which includes thorough title searches, suggests the conclusion that the operator is making his own decision on commitments of funds and is assuming the risk of whatever title defects may exist. If he miscalculates, any loss incurred beyond bonuses, rentals, and whatever royalties have been paid has been suffered as much, and probably more, as a result of the operator's own business decision than by virtue of reliance on the lessor's warranty. Economically, it is preferable to place the burden of loss through title failure beyond the items listed in the recommendation on mineral operators as a class rather than lessors as a class. Realistically, most landowners would not be able to bear major risks beyond liability for return of bonus, rentals, and royalties, and most would be strained to do that. More importantly, however, title failure should be considered an industrial risk which can be more ably borne by the industry and subsequently spread to consumers as a cost of the mineral products consumed.

A third and noteworthy aspect of Recommendation 129 lies in the proposal of a rule which would permit a mineral lessee to take leases from adverse claimants unless expressly prohibited by the lease contract in question. Early cases in Louisiana recog-
nized this as one of the consequences of the view, also expressed in early cases, that the mineral lease partakes of the nature of both lease and sale. However, the decision in *Gulf Refining Co. v. Glassell* was subsequently interpreted in one case litigated in the federal court system as requiring that, since the mineral lease was like any other predial lease, lessees be prohibited from denying their lessors' titles. The status of this question has remained in doubt since. It is usually met in the standard lease form by inclusion of an express clause permitting the mineral lessee to take leases from adverse claimants of the land or mineral rights which are the subject of the contract. Recommendation 129 would, therefore, recognize another established industrial custom by providing that the mineral lessee be permitted to take leases from adverse claimants. The custom is reasonable in that the massive investments required for development of oil and gas and other mineral properties require that the maximum possible degree of security of title be obtainable. Permitting a lessee to take leases from adverse claimants promotes the development of property for mineral production by permitting the operator to take leases from all claiming parties and, as is customary, have the ultimate title resolved in a concursus proceeding if development is fruitful. This rule, too, is subject to the right of parties to contract otherwise.

**Obligations of the Lessee**

The matter of the so-called "implied obligations" is dealt with in Recommendation 131. Considerable discussion was involved in the determination of how to deal with this subject. One suggested approach was to state a general duty of the mineral lessee to act as a reasonable, prudent operator and to perform the contract in good faith, and to accompany that statement with specific enumerations of the discernible categories of cases in which that duty has been applied in the jurisprudence. These would include, essentially, the obligation of reasonable development, the obligation of further exploration, the obligation to protect against drainage, the obligation to exercise diligence in

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71. Sabine Lumber Co. v. Broderick, 88 F.2d 588 (5th Cir. 1937).
marketing, and the obligation to restore the surface of the lease premises. A second school of thought proposed that there merely be a general statement that the mineral lessee is bound to perform the contract in good faith and to "develop and operate the property leased in the manner of a reasonable, prudent operator for the mutual benefit of himself and his lessor." The latter view prevailed and is stated in Recommendation 131. It was felt that the cases involving matters such as reasonable development, protection against drainage, further exploration, marketing, and other categories merely represent specifications in commonly occurring fact situations of the one, pervasive obligation of the mineral lessee to develop the premises as a reasonable, prudent operator for the mutual benefit of both parties. This view has the advantage of considerable flexibility. In any dispute as to the propriety of the lessee's conduct in administering the lease, assuming that the lessee has acted in good faith, his conduct will be judged by the prudent operator standard. It will not be necessary to fit each dispute into a pigeon hole or box like those developed in the common law system of pleading in order that a lessor be permitted to secure relief for conduct which violates the basic obligation to act as a prudent operator and to consider the mutual interests of both parties to the lease contract.

Recommendation 131 is harmonious with existing provisions of the Civil Code. Article 1903 provides that contracts include not only that which is express in them, but all those obligations which may be fairly implied by law, equity, or custom. Articles 1964 through 1967 give further definition to what is meant by the terms "law," "equity," and "custom." One obligation which is clearly implied by law is that found in article 1901 which requires that all contracts be performed in good faith. A second obligation found in article 2710 is that a lessee use the thing leased as a "good administrator." The concept of the good administrator translates easily into the reasonable, prudent operator standard which has been used throughout the country to determine the propriety of a mineral lessee's conduct in administering the lease. A third obligation presently implied by law through the Civil Code is found in article 2720, which requires that the lessee return the thing leased in good order.\footnote{72. See also La. Civ. Code arts. 2719, 2726. The latter gives to a lessee the right to remove improvements provided he leaves the premises in the condition in which he found them.} This article may be
viewed as the source of the obligation to restore the surface of
the lease premises as nearly as is practical to its original condi-
tion.\textsuperscript{7} It is the intent of Recommendation 131 that this obligation
be included within the requirement that the lessee act as a
prudent operator.

\textit{Timely Payment of Rentals and Royalties}

Recommendation 132 deals with the obligation of the lessee to
pay all forms of rent under the lease contract, including the
standard delay rentals and production royalties. It is stated as
a basic principle that the lessee must make timely payment of all
rents according to the terms of the contract or the custom of the
industry in question if the contract is silent. Normally, the time
for payment of delay rentals and shut-in payments is clearly
stated in the lease. However, most of these contracts are silent
as to the times at which production royalties must be commenced
and subsequently paid. Custom has generally established that
once production royalties are commenced, oil royalties are pay-
able monthly and gas royalties are payable bi-monthly. The
problem of when the initial payment of production royalties must
be made has, as discussed below, been troublesome.

The question of whether failure to pay any form of rent
causes an automatic termination of the lease or merely con-
stitutes a passive breach of the contract, requiring that the lessee
be placed in default as a prerequisite to recovery of damages or
cancellation, is, as presently, regarded by Recommendation 132 (b)
as a matter of contractual interpretation. The standard lease form
makes failure to pay the delay rental a cause for automatic termi-
nation. No default is required as a prerequisite to obtaining a
decree of cancellation.\textsuperscript{74} Where, however, the lease does not
provide for automatic termination, failure to deliver or pay the
rent has been regarded as a passive breach of contract,\textsuperscript{75} except
where the failure has been in bad faith\textsuperscript{76} or for an appreciable

\textsuperscript{73} Rohner v. Austral Oil Exploration Co., 164 So.2d 253 (La. App. 3d Cir. 1953); Smith v. Schuster, 86 So.2d 430 (La. App. 2d Cir. 1953).
\textsuperscript{74} E.g., Johnson v. Smallenburger, 237 La. 11, 110 So.2d 119 (1959); Atlantic Ref. Co. v. Shell Oil Co., 217 La. 576, 48 So.2d 907 (1950).
\textsuperscript{75} E.g., Risinger v. Arkansas-Louisiana Gas Co., 198 La. 101, 3 So.2d 289 (1941); Broadhead v. Pan American Petroleum Corp., 166 So.2d 329 (La. App. 3d Cir. 1964).
\textsuperscript{76} Melancon v. Texas Co., 230 La. 598, 89 So.2d 135 (1958).
length of time without justification.\textsuperscript{77} Under the recommendation, determination of whether failure to pay any form of rent results in automatic termination will remain a function of contractual interpretation.

One of the most troublesome problems in recent years is found in the line of cases dealing with failure by the lessee to timely commence and subsequently pay production royalties. This jurisprudence is discussed in the comment on Recommendation 132 (c).\textsuperscript{78} It is sufficient here to say that the confusion caused by these cases cries out for clarity and definition. Recommendation 132 (c) seeks to provide repose. In the past, the problem seems to have lain in the fact that for the average mineral lessor there is no meaningful remedy if the lessee unreasonably delays the commencement of production royalty payments. The only damages now available under the Civil Code for nonpayment of money are in the form of the interest on the amount owed.\textsuperscript{79} Louisiana courts have apparently been sensitive to this fact and have responded by developing a jurisprudential rule permitting the lessor to avoid the necessity for putting the lessee in default in certain situations and to secure cancellation of the lease for failure to commence or subsequently pay production royalties. The remedy of cancellation is unquestionably a harsh one, particularly so in certain instances where the amount which the lessee has failed to pay is small. The availability of the remedy of cancellation has inspired conduct on the part of some lessors which, though within the bounds of the law, is at least questionable as a matter of personal ethics. Recommendation 132 (c) thus seeks to provide a meaningful remedy to the lessor in these situations and to afford appropriate protection to the mineral lessee who has made substantial investments involved in obtaining production against dissolution of the lease except in those cases in which his conduct clearly merits such a harsh remedy.

The recommendation proposes that if at any time a lessee has not made timely or proper payment of royalties, the lessor must notify the lessee of his failure in writing as a prerequisite to recovery of damages or to dissolution of the lease. This is not viewed as a requirement of a demand for performance because


\textsuperscript{78} RECOMMENDATIONS at 186-89.

\textsuperscript{79} LA. CIV. CODE art. 1935.
the lessor may not desire performance. He may, instead, wish to seek dissolution. The requirement, thus, is one of notification only. If within thirty days after the lessee has received the required notice the lessee pays or tenders to the lessor the amount of royalties due, the remedy of dissolution of the lease is not available unless it is determined by the court that the lessee has been guilty of fraud. Thus, except in the extreme case of fraud, the lessee may avoid the remedy of dissolution by making payment upon notice from the lessor. This would include both those situations in which the failure is the result of negligence and those in which it is intentional, but not fraudulent.

The meaningful remedy for the lessor is provided in affording him the right to recover double the amount of royalties due and attorney’s fees. It is felt that the threat of having to pay double the amount of royalties due plus attorney’s fees is sufficient to spur those operating in Louisiana to make timely payment of production royalties. It is important to note that the remedy of double damages and attorney’s fees is available to the lessor in cases in which the failure to pay is adjudged to be willful and without reasonable grounds or fraudulent, even though the lessee may have responded to the required notice by paying or tendering the amount due. Regarding the ultimate remedy of dissolution, the recommendation makes it clear that it is reserved for extreme cases. Even where fraud is found, the court may exercise discretion in dissolving the lease.

Reduced to practical terms, Recommendation 132(c) would operate in the following manner. If a lessee has failed to pay royalties for any cause, the lessor must give notice of that fact as a prerequisite to any judicial demand. If a failure to pay is the result of mere oversight or neglect, the lessor obtains what he desires in being paid within thirty days after receipt of his notice. In such a case, as under the present rules concerning default, no judicial remedy would be available to the lessor because of the lessee’s ready response by making payment. If, however, the failure to pay is willful, whether with or without justification, the lessee can avoid the remedy of dissolution by making payment upon receipt of the notice. If the failure to pay, though intentional, is reasonable under the circumstances, no further remedy would be available. If the failure to pay is willful and without reasonable grounds, the lessor can obtain double damages
and attorney's fees. If a court finds the failure to pay to be fraudulent, double damages and attorney's fees are to be awarded even though the lessee may have paid or tendered the amount due in response to the notice, and the court may also dissolve the lease if justice requires it. The consequence of failure to respond to the notice by paying or tendering the amount due is that the court may award the damages to which the lessor is entitled and may, in its discretion, dissolve the lease as well.

Production in Paying Quantities

Recommendation 133 is of significance in its change in the manner in which the test for production in paying quantities is articulated. The theory of the concept of production in paying quantities and of the proposed manner of statement of that requirement in the recommendation is explained in considerable detail in the comment following it. Essentially, the recommendation would consider that production is in paying quantities if a reasonable prudent operator would continue producing from the lease, not for mere speculation, but in an effort to secure from production either a return on his investment in the lease or a minimization of any loss on his investment. In making this determination, the entire amount of the original working interest is to be considered in comparison to current expenses. Thus, if overriding royalties or other interests in production or profits have been carved out or retained in working interest transactions, the amount of production or profit allocable to these will be included in the income stream to be compared with current expense items. The manner in which the concept of production in paying quantities is stated in this recommendation differs in form more than substance from the present jurisprudence. Presently, the decisions, if superficially viewed, seem to contemplate a mechanistic test of current expenses as against current income. If there is a small profit being yielded, production in paying quantities is being obtained insofar as the working interest is concerned. As noted in the comment following the recommendation, however,

80. RECOMMENDATIONS at 190-97.
examination of the jurisprudence reflects a more complex process at work, and the manner in which the recommendation states the concept is deemed more appropriate.

One of the most significant aspects of this recommendation is that it does away with the present requirement that the amount of royalties being paid to the lessor be “serious consideration” for the maintenance of the lease. Whether the production royalties constitute serious consideration has, on some occasions, been determined by comparing the amount of the royalties with the amount of bonuses or rentals provided for in the lease. As also revealed by the comment, however, this too is an oversimplification of the jurisprudence. The requirement that royalties constitute serious consideration has functioned as a device for determining whether it is necessary to conduct an inquiry into the possibility that the lessee may be holding the property for speculative purposes. If the amount of the current royalties is very small as compared with bonuses or rentals, inquiries have been conducted into whether the lessee has done everything reasonable to secure maximum development of the property. If the court has been satisfied that despite small current royalties, the lessee has done everything reasonable to secure maximum development, no speculative motive is apparent and the comparison between the amount of current royalties and the amount of bonus or rental has not of itself been sufficient to furnish a basis for declaring that the lease has terminated. If, however, the amount of current royalties compares favorably with bonuses or rentals, this of itself indicates the lack of speculative motive, and further inquiry into the state of development of the lease premises has not been conducted. Recommendation 133 (b) would do away with the idea that the comparison to be made between bonuses or rentals and current royalties is a purely mechanical process. However, the amount of current royalties would remain a relevant evidentiary factor in determining the reasonableness of the lessee’s conduct in continuing to produce the lease. Generally, it is felt that Recommendation 133, although it might appear to work a change in the present law, actually

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82. E.g., Caldwell v. Alton Oil Co., 161 La. 139, 108 So. 314 (1926).
distills the existing jurisprudence and states it in functional terms.

Working Interest Transactions

One of the more confused and confusing aspects of current law is found in the jurisprudence dealing with the distinction between assignments and subleases in Louisiana and the legal consequences of that distinction. Recommendation 135 seeks to dispel some of the present confusion. It operates from the premise of the present jurisprudence that if the lessee transfers his working interest and retains any interest which runs for the life of the lease, such as an overriding royalty or a perpetual or unlimited net profits interest, the transaction is a sublease rather than an assignment.85 There are, however, certain defined areas in which a specific statement of the consequences of assignments and subleases is desirable. The recommendation approaches these by providing that in several respects the consequences of assignment and subleases are the same.

First, it is provided that both the assignee and the sublessee are responsible directly to the original lessor for performance of the obligations of the lease, insofar as those obligations have been assumed. This would change the law insofar as subleases are concerned.86 However, it would conform to the actual intent of many transactions now characterized under the jurisprudence as subleases. For example, if a lessee transfers his working interest and retains a one-sixteenth override on the whole of production, this is currently viewed as a sublease. The functional intent of the transaction is, however, that the transferee will take over the operations of the lease completely and that the transferor will remain a passive party in the administration of the contract. Under these circumstances, there is no valid reason why the lessor should not be able to look directly to the sublessee for performance of the obligations of the lease contract if he desires to do so. His relationship with the original lessee remains, but the sublessee is in reality the party responsible for performing the obligations of the contract, and the recommendation would have the effect of permitting the lessor to act accordingly.

85. E.g., Smith v. Sun Oil Co., 165 La. 907, 116 So. 379 (1928). For further citations and discussion, see Recommendations at 198-99.
A second common consequence of both assignments and subleases is that neither an assignor nor a sublessor is relieved of his obligations for future performance unless the lessor has discharged them in writing. Additionally, neither an assignor nor a sublessor may relieve himself of accrued liabilities without an express release in writing. This would retain the present rules as to both assignments and subleases. In the case of the sublease, the original lessee remains bound to the lessor. An assignment is a substitution of a new debtor and thus a form of novation. It is effective only with the consent of the creditor, or lessor in this instance, and must clearly result from the terms of the agreement.

A third effect is that neither a partial assignment nor a partial sublease will divide the lease. As noted in the comment on Recommendation 135, this is a reflection of present law. However, because of certain express clauses contained in the standard lease, a partial assignment will ordinarily have the effect of dividing the lease. Thus, in this instance neither theory nor practice based upon the typical lease would be changed.

A fourth problem is whether presently a lessor must accept performance of the obligations of the lease by an assignee or sublessee. The recommendation provides that performance must be accepted even though the assignment or sublease be unrecorded. This is consonant with provisions of the Civil Code regarding performance of obligations to give or to do. However, it might be viewed as contrary to the only case in the jurisprudence which has ever treated the problem. The recommended principle is regarded as the sounder view. The lessor has a legitimate interest in securing performance of the obligations of the lease. As long as performance is being rendered, it should not matter by whom. This is particularly true if, as contemplated by the recommendation, the lessor is protected by providing that neither an assignor nor a sublessor may relieve himself of his responsibilities under the lease without the consent of the lessor. Thus, the lessor may look for responsibility to those with whom

88. LA. CIV. CODE arts. 2189, 2190.
90. Id. For further citations and discussion, see RECOMMENDATIONS at 203-204.
91. LA. CIV. CODE arts. 2131, 2134.
he originally contracted. However, he may not complain of the identity of the party rendering actual performance.

Recommendation 135(c) deals with a matter which has sometimes been troublesome to practitioners: whether a notice or demand by the lessor is binding on an assignee or sublessee. The recommendation proposes that an assignee or sublessee be bound by any notice or demand made prior to the date of the assignment or sublease. If, however, the assignment or sublease is recorded, to bind the sublessee or assignee the notice or demand must be made upon him. It is logical to provide that if a demand is made by a lessor, a subsequent lessee or assignee takes the working interest as he finds it, subject to the demand. However, if an assignment or sublease occurs and is recorded and if the lessor wishes to make a judicial demand for damages or dissolution, any notices prerequisite to such demand would have to be made on those holding recorded assignments or subleases.

In view of the fact that this recommendation deals in detail with the identified common consequences of assignments and subleases, one might reasonably inquire whether the present basis for distinguishing between the two types of transactions needs to be preserved. In answer, it is observable that there are important consequences of the distinction between assignments and subleases which will continue to flow from characterization of these transactions. As an example, if a transaction is regarded as an assignment, the security required of the transferor is that of a vendor. If, however, the transaction is labelled a sublease, the security of the transferor is that of the lessor. For this reason, it seemed wise to retain the present distinction and to deal with the specific problem areas individually.

Rights of Usufructuaries in Minerals

One of the more complex problems of Code interpretation has arisen from the application of article 552, which articulates the so-called “open mine doctrine.” Recommendations 155 through 158 are intended to offer solutions to the perplexities which practitioners and the courts presently face.

Recommendation 155 begins with the principle that the usufruct of land does not ordinarily include the use and enjoyment of the mineral rights inherent in full ownership. The freedom to contract in such manner as to include enjoyment of mineral rights in a usufruct is specifically preserved. The recommendation also preserves the open mine doctrine, stating that as to legal usufructs and conventional usufructs not including the right to enjoy minerals, the usufructuary of land is entitled to whatever share of mineral production, or its value, would otherwise have accrued to the landowner from mines, quarries, or wells actually worked at the time the usufruct was created. The recommendation then seeks to solve the problem of what constitutes a well "actually worked" at the time a usufruct is created insofar as the petroleum industry is concerned. Thus, the matter of defining what constitutes a mine or quarry actually worked in the case of minerals other than oil and gas is left to the courts. It was felt that defining what constitutes a well actually worked in the case of oil and gas is desirable while other minerals and mining techniques presently do not present a widespread problem.

Essentially, the recommendation provides that for a well to be "actually worked" at the creation of a usufruct it must either be currently producing or be proven by surface production test to be capable of producing in commercial quantities. The usufructuary would also be entitled to all production allocable to the property subject to the usufruct from all pools penetrated by the well or wells in question. The rights of a usufructuary would extend to unit wells serving the property subject to the usufruct even though located on other lands. In practical terms, this means that if a well has been drilled and completed and is either producing or shown to be capable of commercial production, the usufructuary is entitled to production from all sands penetrated by the well even though some might be still "behind the pipe" and production of them delayed until depletion of the currently producing sand. The usufructuary's rights would not extend to sands discovered by deepening any well existent on the land at the time of creation of the usufruct or to any new wells drilled to pools not penetrated at the time of creation of the usufruct.

The rights of the usufructuary are further defined in Recommendation 155 by limiting them to a right to participation in
production or its value only. Other civil fruits or revenues flowing from mineral rights existing at the time the usufruct was created or subsequently created by the naked owner are not included. This means that the usufructuary is relegated to the status of a royalty owner insofar as he may be entitled to production from wells or mines actually worked at the time of creation of the usufruct. He would not be entitled to participate in bonuses, rentals, or other revenues stemming from enjoyment of the mineral rights. Further, the usufructuary cannot create mineral rights, except that he may sell all or any portion of his right to share in production under the open mine principle. Thus, the usufructuary would be able to create a limited form of mineral royalty. Any such rights created by him would be subject to prescription and limited in any case to the life of the usufruct.

The relationship between the usufructuary and the naked owner, insofar as the naked owner has the power to deal with the mineral rights, is established as being the same as that existent between the owner of a mineral royalty and the owner of the land or mineral servitude burdened by it. This relationship has already been discussed both in connection with the mineral royalty itself and with the concept of the executive right. Briefly, however, in dealing with the mineral rights, the naked owner would be prevented from acting in a discriminatory fashion toward the interest of the usufructuary in production or its value.

Recommendation 156 solves another current problem. That is the question of the rights of a usufructuary when the object of the usufruct is a mineral servitude, mineral royalty, or other form of mineral right. The recommendation provides that the usufruct of any form of mineral right, which would include mineral leases, entitles the usufructuary to “all of the benefits of use and enjoyment which would accrue to him if he were the owner of the right.” He is, therefore, free to use the right according to its nature for the duration of the usufruct. The jurisprudence has not dealt with this problem. However, logic dictates the suggested principle. The nature of the usufruct is that it involves the use and enjoyment of a thing. If the thing is an incorporeal which must be exercised to be enjoyed, such as a mineral servitude or mineral lease, there can be little question that the usufructuary should be entitled to make use of it according to its nature. Further, the usufructuary is charged with
preservation of the thing subject to the usufruct. Mineral rights cannot be preserved without being used. The usufruct of such a thing would obviously be meaningless without exercise of the right in question by the usufructuary.

Recommendation 157 puts another piece of the existing puzzle into place. It provides that the usufructuary of land, whose interest includes production under the open mine doctrine or the right to enjoyment of minerals by stipulation in a conventional usufruct, and the usufructuary of any form of mineral right are not required to account to the naked owner on termination of the usufruct. Effectively, this confers upon a usufructuary in these situations the benefit of a perfect usufruct in that he does not have to return in kind or value the minerals which have been extracted and enjoyed. The thing subject to the usufruct, whether it be land or some form of mineral right, will be returned upon termination of the usufruct. This assumes, of course, that in the case of a mineral right subject to a usufruct the fundamental right does not expire by prescription or otherwise through no fault of the usufructuary.

Another aspect of the problem lies in defining the relationship between the naked owner and a usufructuary of land concerning utilization of the surface. Recommendation 158 provides that, except for the limited benefits which might accrue to the usufructuary of land under the open mine doctrine, the naked owner of land has all of the rights in minerals inherent in full ownership. This would include the right to operate on the land, to produce minerals, and to create all forms of mineral rights. However, the naked owner would be responsible to the usufructuary of the land or those holding rights under him for all damages to crops, buildings, improvements, or other property belonging to them and to the value of their rights in the land resulting from mining operations on the premises. If the operations are conducted by the naked owner through another party, such as a mineral lessee, the naked owner and the person through whom operations are conducted are made liable in solido to the usufructuary.

Affording the naked owner the right to use the land for mining operations is an infringement upon the principle of
article 600 of the Civil Code that the naked owner must "neither interrupt nor in any way impede the usufructuary in the enjoyment of the usufruct, or in any manner impair his rights." The infringement is deemed justifiable on the ground that the public interest in securing the extraction of valuable minerals is strong. However, the naked owner would not be permitted to engage in mining if by so doing he would effectually deprive the usufructuary of his right to use the surface of the land. If, for example, the usufruct were of a very small tract and drilling would require the entirety of it, the naked owner could not deprive the usufructuary of his right. However, most forms of mining activity in this state can be conducted compatibly with other surface uses. For this reason, it achieves a valuable public goal to make it possible to put land to maximum economic utilization. The naked owner, thus, has a right to reasonable use of the surface.

Insofar as damages are concerned, two observations are appropriate. First, the naked owner is liable for all damages to property of the usufructuary, including growing crops, even though he is using only so much of the surface as is reasonably necessary. Thus, for example, if the construction of a road across a field destroyed part or all of a crop, the naked owner would be responsible for the damage even though construction of the road were reasonably necessary to the operations in question. Second, the naked owner would be responsible for diminution of the present value of the rights of the usufructuary. Thus, if occupation of a portion of the surface presently utilized for farming devalues the usufruct itself, the naked owner would be responsible. The liability of the naked owner in these cases extends not only to the usufructuary, but also to those who have rights derivative from him. The usufructuary is, of course, responsible to those with whom he contracts regarding use of the land, and if mining operations impair the rights of those whom he has permitted to use the land, the naked owner is properly called upon to repair damage to property or to value of any derivative rights in question.

**Conclusion**

This discussion has been focused on those areas in which the recommendations suggest changes in the law or provide solutions to yet unsolved problems. The extended length of it is, in the first
place, something for which apologies are due and given. However, something else should be borne in mind. Because this discussion has presented changes and elaborations at length, the degree of change in the basic structure of the mineral law resulting from the proposed recommendations might be misapprehended. In effect, the proposed changes and elaborations are a relatively small part of the total structure of the mineral property system. From the beginning, it has been a principal objective of this project to preserve the mineral property system except in limited instances where change was deemed necessary. Thus, an extended discussion of these changes should not obscure the fact that the recommendations would achieve that objective.