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Mack E. Barham

Albert Tate Jr.

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## JURISPRUDENTIAL DEVELOPMENT IN LOUISIANA CIVIL LAW

*Mack E. Barham and Albert Tate, Jr.\**

The mineral law of Louisiana is almost entirely a product of jurisprudential development. The Civil Code was totally silent on the subject of regulating the rights to explore for and produce minerals, except for the provision in Civil Code article 505 pertaining to the ownership of all that is above and under the soil, and to the owner's right to make constructions below the soil in order to draw the benefits. Neither the ancient juriconsults who first formulated civilian concepts, nor the Napoleonic scholars who drafted the provisions which in many cases were adopted verbatim in our own Code, could have imagined the nature and intricacies of the production of oil and gas from under the ground. Nevertheless, the general concepts and broad rules of our Code provide a wise and practical twentieth century basis for principles regulating the private rights of the landowner, the mineral producer, and the holders of mineral interests.

Professor Daggett said, "The Louisiana courts deserve unstinting praise for the formulation of the governing principles regarding mineral law. The meshing of the old articles of the code for traction in a modern and peculiar industry was not an easy task."<sup>1</sup>

However, as Colonel Tucker points out in the article which follows, the jurisprudential development of the basic mineral law of Louisiana was a result of reaching beyond the letter of the Civil Code and applying the spirit out of which that code was born, to formulate a solid civilian conception of the mineral servitude and the mineral lease. He states that this development "represents, probably, the most extended analogical *adaptation* of the civil law to modern circumstances." (Emphasis added.) How fortunate for Louisiana that the court rejected the idea of a mineral estate subject to ownership separate and apart from the soil. How fortunate for the landowners as well as the industry, especially in light of the present energy crisis, that the jurisprudence established the requirement that the owner of a mineral servitude must use that servitude timely, or suffer the extinguishment of his right of use as a matter of public policy.<sup>2</sup>

The jurisprudential development of the mineral law in Louisiana is one of the best examples of civilian judicial methodology. Suddenly confronted with legal issues that had to be resolved out of circum-

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\* Associate Justices of the Louisiana Supreme Court.

1. H. DAGGETT, *MINERAL RIGHTS IN LOUISIANA* xix (rev. ed. 1949).

2. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

stances never envisioned by the redactors of the Code, and without specific pronouncement of legislative will but on the basis of code concepts and analogies, the court fashioned on a case by case basis the whole cloth of a most important aspect of Louisiana law. Louisiana, as one of the largest producers of oil and gas in the United States, had to resolve quickly the perplexing legal problems in an area where lawyers and judges were almost without guidelines. Most amazing perhaps is the tenacity with which the Louisiana court resisted the common law, and resorted to the civilian tradition for the resolution of these problems. It says much for the court of the early twentieth century that it did not, as had some previous courts, simply adopt the common law because of the ease with which it could have replaced the civil law in this area.

The evolution of the mineral law over the years indicates the court's awareness of new developments in that field and of the need for flexible rules of law which could be adapted to changing conditions. While the jurisprudence may not have laid a solid philosophical base for the various rules of law which govern mineral rights, it has at least left these rules of law open for growth and change. This jurisprudence is a good example of the civilian tradition of looking not only to the Code, but through and beyond the Code. It has to date kept that Code and the mineral law alive and viable.

The court would be the first to admit that it is not designed to create broad principles of law or reduce the philosophy of the people into general statements of public policy, or to lay down broad underlying principles of law. However, in the field of mineral law, the court was forced to act in these spheres of endeavor. A perusal of the doctrinal writing and general comment upon the fruits which have been born of this judicial exercise, indicates strong, general approval of that activity.

Perhaps, as Professor Daggett stated:

The history of legal thought cannot neglect the role of judge-made law. Louisiana jurisprudence on oil and gas is a continuing tribute to the patience, research, wisdom, and fairness of the members of the bench of the state. The evolution in the hands of judges of the present body of law dealing with one of the most valuable property rights known in the state should restore the confidence of every citizen in the democratic judicial process, if such confidence has ever wavered.<sup>3</sup>

However, the judiciary has no desire to make law such as was

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3. H. DAGGETT, *MINERAL RIGHTS IN LOUISIANA* xx (rev. ed. 1949).

required of it in the formulation of the mineral law of this state. It is preferable that the legislature lay down broad principles of law and create the public policy reflecting the philosophical concepts of the people. But civilian academicians, as well as the court, would strongly urge that if the mineral law of this state is to be a part of its civilian tradition, any legislative codification should lay down public policy determinations and broad, general concepts whereby the court, on a case to case basis, can determine justice between the parties in litigation under particular circumstances.

