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AU-DELÀ DU CODE CIVIL, MAIS PAR LE CODE CIVIL*

John H. Tucker, jr.**

Oil and gas were discovered in Northwest Louisiana early in this century. Development since these early discoveries has been extensive in all parts of the state, including production from the submerged lands lying offshore from Louisiana in the Gulf of Mexico. For many years, oil and gas have been the source of the largest and most profitable industry in Louisiana.

Initially the drillers and developers came from other states that had had oil and gas production sufficiently long to develop not only the technical and mechanical methods of exploration and exploitation, but also the legal procedures and techniques to establish the legal basis for the relationships between landowner, driller and exploiter, and the owner of mineral rights only. The first forms used in Louisiana for oil and gas leases, and sales of minerals, were largely reproductions of forms used in these other states. The common law derived from England prevailed in all of these states, either by origin or subsequent election.

Louisiana, on the contrary, has always been a civil law jurisdic-

* "Aussi je ne saurais mieux finir que par cette forte devise, inspirée d'un mot analogue de Jhering, et autour de laquelle converge, qu'enveloppe ou que développe, comme l'on préfère, tout le livre de M. Géný: *Par le Code civil, mais au-delà du Code civil!*

"Je serais de ceux peut-être qui en eussent volontiers retourné les termes: Au-delà du Code civil, mais par le Code civil! Je reconnais que ce serait manquer un peu de hardiesse et vouloir conserver une part de fiction. Aussi je n'insiste pas, trop heureux de me laisser convaincre, pourvu que cela puisse convaincre: ce à quoi nous tenons le plus c'est à 'l'au-delà'.

"Il sera difficile désormais que cet 'Au-delà' ne devienne pas le mot d'ordre de tous les juristes." (R. Saleilles, Preface to GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, 1st ed. Paris 1899)

English translation by Jaro Mayda under the auspices of Louisiana State Law Institute 1963, p. LXXXVI:

"I could not end with better words than those inspired by an analogous phrase of Jhering, which is the focal point of the whole book of Mr. Géný: 'Through the Civil Code; but beyond the Civil Code.'

"Perhaps I would be among those who should gladly reverse the order of things and say 'Beyond the Civil Code, but through it.' I recognize that this might be somewhat conservative and show the desire to preserve a part of the fiction. I do not insist on it and I am only too glad to be persuaded that the most important is the 'beyond.'

"It will be difficult hence to prevent this 'beyond' from becoming the password of all lawmen."

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tion, beginning with the time of its occupation and settlement by France.

Inevitably, in the rapid and extensive development of the industry, there arose legal problems that required Louisiana solutions because, ever since Louisiana's first Constitution of 1812, the adoption of any system of laws by reference has been prohibited.

All of these legal problems relate back finally to two basic, fundamental conceptions, namely;

(a) What is the nature of the right created by the sale or reservation of mineral rights, and what are the derivative rights and obligations created thereby?

(b) What is the nature of the oil, gas and mineral lease, and what are the derivative rights and obligations of the parties thereto?

THE LEGAL INHERITANCE OF LOUISIANA

Before these problems are discussed, it will be necessary to delineate very briefly the legal history of the civil law institutions of Louisiana, for otherwise it would be difficult to understand how these problems were solved.

Louisiana was originally occupied by the French, and then it was established first as a Charter Colony, then as a Crown Colony of France. The first charter provided that it should be regulated by the *Coutume de Paris* and the Royal Ordinances.

At that time, France derived its laws from two sources: in the south two-fifths of the country, there was the Roman law derived from the predominantly Roman origin of its population together with the tradition of the personality of laws. In the north three-fifths, largely settled by Germanic tribes, law was unwritten and based on customs that derived their authority from antiquity, repetition and general knowledge of their existence. These customs were systematized, reduced to writing and promulgated early in the 16th century; they were revised late in the same century. Of these customs, there were about sixty general or regional customs, and some three hundred local customs with very limited jurisdiction.

In 1769, Spain established its control over Louisiana through General Don Alexander O'Reilly, pursuant to a treaty by which France ceded Louisiana to Spain. Whether O'Reilly ever supplanted French private law with Spanish private law has always been questioned. Spanish law at the time was contained in a multiplicity of legal institutions, ranging in point of time from the earliest, *Fuero Juzgo* of 693, to the latest, *Nueva Recopilacion* of 1567, and *Auto Acordados* of 1745. None of these institutions had ever been repealed, and coherence was only partially achieved by means of schedules of

priorities, enunciated particularly in the *Ordenamiento de Alcalá*, 1348; and in the *Leyes de Toro*, 1505.

In any event, there was considerable consanguinity between French law and Spanish law, for both systems were derived from the same sources, namely, Roman and customary law.

The transfer of Louisiana to French dominion in 1803, to be followed twenty days later from France to the United States, left Louisiana in a juridical vacuum. Laussat, the French Colonial Prefect, immediately on taking office, abolished Spanish courts and the Spanish colonial government, without substituting any legal institutions or governmental organization to replace that which he had destroyed.

Governor William C. C. Claiborne, transferred to New Orleans from Mississippi to assume the governance of Louisiana, found Louisiana in a shambles, with no government, no courts, no laws and no replacements provided for by the Congress of the United States.

In 1804, however, the Congress of the United States passed an act erecting the Territory of Louisiana into two jurisdictions, the Territory of Orleans comprising what is now called Louisiana, lying south of the southern boundary of Arkansas, and the balance of the Louisiana Purchase into the Territory of Louisiana. This act of 1804 gave Louisiana a form of territorial government, and made provision for legislative and judicial functions.

The population of Louisiana then was predominantly French; Spanish was indeed a foreign language. Spanish law was contained in a multiplicity of books, few of which were to be found in Louisiana. The influx of citizens from the United States, following the Cession in 1803, generated an attempt to establish the common law in Louisiana. In this situation, the indigenous people manifested a desire for a Civil Code, no doubt prompted by the adoption of the Civil Code in France, first in parts between 1802 and 1804, and then as a whole on 21 March 1804.

A Civil Code was authorized by the Legislature in 1806, and was adopted in 1808. It was originally written in French, and even today the French text prevails over the English translation.

A recent detailed, meticulous study of the source of each article of the Code of 1808 made by Professor Rodolfo Batiza of Tulane University, demonstrates conclusively that a great majority of the articles of the Code of 1808, literally or well-nigh so, reproduce the corresponding source articles of the Code Napoleon.¹

1. Batiza, *The Louisiana Civil Code of 1808: its Actual Sources and Present Relevance*, 46 TULANE L. REV. 4 (1971).

In 1822, the Legislature of Louisiana ordered a revision of the Civil Code of 1808. This was brought about by the decision of the Louisiana Supreme Court giving effect to Spanish law where it had not been supplanted or repealed by the Code of 1808. This revision was adopted and promulgated in 1825, and is the basic Civil Code of Louisiana today, officially designated as the Revised Civil Code of 1870. The 1870 revision was largely editorial in nature intended only to give effect to legislative changes made since 1825 and to eliminate all articles on slavery. The Civil Code of 1825 was preceded by a *projet*, republished by the state in 1937. This *projet* often cites the source of new articles and reasons for changes made in articles of the Code of 1808. The republication volume also contains the 1823 report to the Legislature made by the three redactors of the Code, explaining the methods they planned to employ, the sources they would consult and the underlying philosophy they would follow in preparing the Civil Code.

The primary sources establish clearly the undergirding of the Civil Code of 1825 with the French Civil Code and French doctrine, and Roman law and its exponents. This is particularly so, in that part of the Code involved in this study, namely, Book II, Title II, of Ownership; Title III of Usufruct, Use and Habitation; and Title IV of Predial Servitudes or Servitudes of Land. In fact, such great reliance was placed on the authority of Toullier that parts of his commentary were converted into articles of our Civil Code, either literally or by paraphrase. A similar use was made of Maleville's "*Analyse Raisonnée*" as well as Pothier's treatises and occasionally the Digest of Justinian.

This résumé of the history of the Louisiana Civil Code has been necessary to justify the extensive use that must be made of French sources and French doctrine in discussing the development of the solutions to those two problems basic to the mineral law of Louisiana. These problems are grounded deeply in the fundamental philosophy of the Code Napoleon, which must be consulted if their solution is to be consistent, coherent and understandable.

It must be noted that for nearly the first century of its existence Louisiana had only two branches of the legal profession — lawyers and judges. It did not have formal law schools, with full-time faculties, fine libraries and law reviews. It did not have its own doctrine — that is to say, the written, objective discussion of legal history, philosophy and logical interpretation — that has been the very life of the civil law. For that purpose, resort had to be made to French treatises, for French doctrine has assisted greatly in the development of Louisiana civil law.

THE MINERAL SERVITUDE

Our mineral law has been developed jurisprudentially, but since it involves some of the fundamental expressions of the very spirit of the Louisiana Civil Code, some incursion into French doctrine must be made to see if the results of that jurisprudence ring true metal.

In France prior to the Revolution there had developed a system of feudal tenures and practices that were very restrictive of the freedom of ownership and the freedom to contract. One of the first fruits of the French Revolution was the abolition of feudalism on the night of August 4, 1789. This spirit of freedom was carried over into the legislation of the Revolution and animates the French Civil Code.

Baudry-Lacantinerie and Chauveau discuss this in their *Traité de Droit Civil*, and explain:

In prohibiting the establishment of servitudes which are imposed upon a person or which profited a person, the redactors of the Civil Code wished once more to confirm the abolition of feudalism. Under the feudal regime, the possessor of an estate owned certain services solely because he was the possessor of the estate, he owed them to the possessor of another estate because the latter estate was above his in the feudal hierarchy. Thus it is notable that the possessor of a fief owed to his feudal lord the duty of military service and the services of court, and of counsel and also those extraordinary contributions which one calls feudal aids. Still more it is thus that the possessor of a manor was bound towards the lord of the manor for the payment of quit-rent, that is to say a pecuniary and periodical payment. The first owed personal services or extraordinary subsidies by reason of the possession of the fief and the second owed the quit-rent by reason of the possession of the manor. The legislator wished to prevent the revival of the feudal regime by stipulating for services of this kind. Such is the explanation moreover given by the Tribune Gillet at the time it was discussed in the Corps Legislatif: 'Today since these three kinds of rights (usufruct, use and habitation) are found properly treated in our Civil Code as attributes of property, one can no longer have mixed or personal servitudes of which feudal institutions furnished the model; and it is for this reason that care has been taken to suppress the way by which they can be revived.' It is then the same preoccupation which has inspired the dispositions of articles 638 and 686. Article 638 strikes the landed hierarchy which formed the basis for feudalism and article 686 the personal services which were due because of this hierarchy.²

2. 6 BAUDRY-LACANTINERIE AND CHAUVEAU, *TRAITÉ DE DROIT CIVIL*, no. 1078 (Paris 3d ed. 1907). (Translation by the author).

It is to be noted with respect to the last two sentences above that the Louisiana Civil Code article 709 reproduces precisely article 686 of the Code Napoleon. The Code of 1808 reproduced article 638, which "strikes the landed hierarchy which formed the basis for feudalism," but it was deleted when the Code of 1825 was prepared with this explanation in the *Projet*:

We have thought it best to suppress this article which prescribed that servitudes did not establish any right of pre-eminence of one estate over another, as it is copied from the Code Napoleon, and was adopted in France only for the purpose of preventing, that under the title of servitude, feudal rights should be established, which had been abolished. It is utterly useless among us.

This deletion, of course, recognizing that feudal rights had no existence in Louisiana, emphasizes the intention in Louisiana to achieve simplicity and complete freedom of ownership by the adoption of the provisions of the Code Napoleon designed to establish this basic philosophy.

The objective of establishing simplicity and complete freedom of ownership and complete freedom of contract was built into the foundation of the Code Napoleon and adopted well-nigh literally into the Louisiana Civil Code. The principal provisions of this codal structure are the following:

Louisiana Civil Code Article 484 (C.N. Art. 537) says that individuals have the free disposal of their property under restrictions established by law.

Art. 488 "Ownership is the right by which a thing belongs to someone in particular, to the exclusion of all other persons." This was taken from Pothier's *Traité du Droit du Domaine de Propriété*, no. 4, but it is not found in the Code Napoleon.

Art. 487 (C.N. Art. 543) says that one may have over things either (a) a right of ownership (b) a right of use of enjoyment or (c) a right of servitude on an immovable.

Art. 491 (C.N. Art. 544) says that "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." The English texts of the Codes of 1808 and 1825 use the term "absolute ownership," while the French texts use "*la pleine propriété*." The Code Napoleon simply uses "*la propriété*."

The French text of Article 482 (par. 2) of the Louisiana Civil Code of 1825 reads: "*Une propriété est pleine et parfaite, lorsqu'elle est perpétuelle, et que la chose n'est chargée d'aucun droit réel envers d'autres personnes que le propriétaire.*" This is imperfectly trans-

lated in the English text of that article which now appears as Article 490 of the Revised Civil Code of 1870.

Freedom of contract is provided by Article 1901 (C.N. Art. 1134) which reads:

Agreements legally entered into have the effect of laws on those who formed them.

They cannot be revoked unless by mutual consent of the parties, or for causes acknowledged by law.

They must be performed with good faith.

The provisions of the Louisiana Civil Code further extend this freedom of contract and of ownership in the articles relating to real obligations.

Art. 1997 says that an obligation "is real when it is attached to immovable property, and passes with it into whatever hands it may come, without making the third possessor personally responsible."

Art. 2012 relates how real obligations may be created, and says, in effect, that servitudes, and rights of usufruct, use and habitation may be created "by alienating to one person the immovable property, and to another, some real right to be exercised upon it."

Art. 2011 provides: "Not only the obligation, but the right resulting from a contract relative to immovable property, passes with the property. Thus the right of servitude in favor of immovable property, passes with it"

Art. 2013 provides that the real obligation, created by condition annexed by the alienation of the real property, is susceptible of all the modifications that the will of the parties can suggest, except such as are forbidden by law.

Considering the plenary authority given by the quoted articles of the Louisiana Civil Code, there never has been, nor does it appear that there could be, any doubt about the right of the owner of land, to sell the mineral rights thereto, or to reserve the mineral rights for himself in a sale of the land to another. His own right to explore for and produce minerals, including oil and gas, from his own property is accorded to him by Article 505 (C.N. Art. 552), which in pertinent part says:

The ownership of the soil carries with it the ownership of all that is directly above and under it

He may construct below the soil all manner of works, digging as deep as he deems convenient, and draw from them all the benefits which may accrue, under such modifications as may result from the law and regulations concerning mines and the laws and regulations of the police.

The early cases involving the question of the nature of mineral rights in Louisiana were debated by proponents of the theory that there can be a "mineral estate" in Louisiana, that is, a corporeal entity separate and apart from and wholly independent of the surface of the soil under which the minerals lie. The opponents of this theory claimed that the "mineral estate" is only an incorporeal right, or charge upon the land, in effect, a servitude.

Two early cases, *DeMoss v. Sample*³ and *Calhoun v. Ardis*⁴ tended to support the theory that the owner of lands had the right to dismember the property and vest the ownership of the surface of the soil in one person and that of the minerals in another person, or retain it himself.

However, three years later, in what is considered generally to be a landmark case in the mineral law of Louisiana, styled *Frost-Johnson Lumber Co. v. Salling's Heirs*,⁵ the Supreme Court rejected the notion of a mineral estate, separate and apart from the land and subject to full ownership as a specific thing apart from the soil of which it forms a part. On the contrary, it held, in effect, that the reservation of minerals gave only the right to explore for and produce oil and gas, if found; that this right was a real right in the nature of a servitude, to which the ten-year prescription of non-usage under Article 789 (C.N. Art. 706) would apply. The decision in *Frost-Johnson*, particularly, is generally considered to have reached a salutary conclusion, for the requirement that the owner of a mineral servitude must use his right or suffer the penalty of having it extinguished for non-usage is sound public policy. However, there was a multiplicity of judicial opinions, prevailing, concurring, and dissenting, on original hearing and on rehearing.

There is considerable discussion about the nature of the mineral servitude. Is it a personal servitude, or is it a predial or landed servitude? This semantical discussion has plagued our jurisprudence, but the common denominator of all our mineral right cases is this: The sale or reservation of mineral rights by the owner of the land affected, creates a real right in the nature of a predial servitude, the rules of which will be applied to this right insofar as applicable and appropriate.

This semantical debate arises out of a superficial consideration of Louisiana Civil Code Article 646 which reads:

3. 143 La. 243, 248, 78 So. 483, 484 (1918).

4. 144 La. 311, 314, 80 So. 548, 549 (1919).

5. 150 La. 756, 91 So. 207 (1922).

All servitudes which affect lands may be divided into two kinds, personal and real.

Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: usufruct, use and habitation.

Real servitudes, which are also called *predial or landed servitudes*, are those which the owner of an estate enjoys on a neighboring estate for the benefit of his own estate.

They are called *predial or landed servitudes*, because, being established for the benefit of an estate, they are rather due to the estate than to the owner personally.

This kind of servitude forms the subject of the present title.

The *Projet* of the Code of 1825 (p. 68) says that the sources of this article are: Digest, book 8, tit. 1, law 1; and Pothier, *Coutume d'Orléans*, Introduction to tit. 13, of servitudes, Art. 1, No. 2. It has no corresponding article in the Code Napoleon, but that does not indicate any significant change in substance between the two codes.

Art. 655 of the Louisiana Civil Code provides: "One of the characteristics of a servitude is, that it does not oblige the owner of the estate subject to it to do anything, but to abstain from doing a particular thing, or to permit a certain thing to be done to his estate." The source of this article (*Projet* p. 70) is Digest, book 8, tit. 2, law 39. There is no corresponding article in the Code Napoleon.

Justice Provosty, in his separate opinion on rehearing in *Louisiana and A. Ry. v. Winn Parish Lumber Co.*,⁶ discussing Articles 648 and 655, said:

Under Roman Law, a servitude by which the owner of the servient estate should be required to do something was unknown. From its very nature, said Pomponius, a servitude does not require that one shall do anything, but merely that he shall abstain from doing something, or shall suffer something to be done. *Servitutum non ea natura est ut aliquid faciat quis, sed ut aliquid patiatut aut non faciat.* DeFresquet, *Traité de Droit Romain*, Vol. 1. p. 290.

Later on, Judge Provosty says:

The Roman Law recognized usufruct, use and habitation as personal servitudes, which, in fact they are, and therefore divided servitudes into personal and real, the personal being due to a person, and the real those due to an estate; and we, in our Article

6. 131 La. 288, 59 So. 403 (1912). Judge Provosty's separate opinion was not attached to the official report of that case 59 So. 411.

646, have adopted the same classification. Real conventional servitudes varied in kind, according to the necessity for establishing them; and so we, in our Article 646, have contented ourselves with describing real servitudes in general terms, without attempting to name or enumerate their different kinds. Personal servitudes, on the other hand, were limited and restricted, under the Roman law, to usufruct, use and habitation, and terminate with the life of the beneficiary. And so we, in our *article 646* have similarly dealt with them:

'Personal servitudes,' declares the article, 'are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: Usufruct, use, and habitation.'

In describing the nature of a servitude, our Code, *Article 655*, uses the very words of Pomponius, quoted above. Thus: 'One of the characteristics of a servitude is that it does not oblige the owner of the estate subject to it to do anything, but to abstain from doing a particular thing, or to permit a certain thing to be done on his estate.'

Article 709 of the Louisiana Civil Code is broad authority for the establishment of conventional servitudes. It reads:

Owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services imply nothing contrary to public order.

The use and extent of servitudes thus established are regulated by the title by which they are granted, and if there be no titles, by the following rules.

This is almost an exact translation of the French text of Article 686 of the Code Napoleon.

As in the definition of a predial servitude, this article literally would limit the creation of predial servitudes to servitudes imposed on one estate in favor of another estate. But this restrictive language must be interpreted with the other articles of the code establishing the most extensive contractual freedom in the creation of real rights.

The Supreme Court of Louisiana has given a logical and teleological interpretation to these articles, as exemplified by the opinion in *Frost-Johnson*, and as discussed by Professor A.N. Yiannopoulos of Louisiana State University in his treatise "Civil Law of Property".

He says that in *Queensborough Land Co. v. Cazeaux*,⁷ the Supreme Court of Louisiana "adopted the view that, in principle, the parties to a contract may create real rights 'apart and beyond' those created in the Civil Code, subject to a close judicial scrutiny in the general interest of the public."⁸

In the *Frost-Johnson* case it was held:

In the matter of burdening his lands with some real obligation in favor of a person and his heirs, there is not the least doubt that the owner can do so unless some positive law prohibits it. Now the right to establish a servitude in favor of a person *and his heirs* seems to be forbidden by C.C. arts. 646, 709. But, on the other hand, it seems to be allowed by C.C. arts. 607, 758, 2013. And with these conflicting provisions before us we cannot say that the law clearly prohibits the creation of a servitude upon lands in favor of a person and his heirs. And hence the intention of the parties should govern in such matters.⁹

In some cases, the mineral servitude has been called a "personal servitude in the nature of a limited usufruct," particularly in *Palmer Corp. v. Moore*.¹⁰ But in that case it was purely obiter dictum, and was repudiated as such in the *Per Curiam* on rehearing. It was rejected also in *Sample v. Whitaker*,¹¹ and later cases have returned to the earlier definition of "a real right in the nature of a servitude."

In *Keebler v. Seubert*,¹² the Supreme Court of Louisiana held that the right to explore and exploit the property of another is the very essence of the mineral servitude, and is not accessory to the right to reduce to possession minerals found as a result of the exploration. Accordingly, it held that good faith exploration constituted usage of the servitude even when unsuccessful.

While the Supreme Court has not been consistent in the past in terminology used in referring to this real right, general usage now seems to prefer to designate it as a "mineral servitude", and semantics may ultimately sanction the designation.

Nevertheless, the court has consistently and logically applied articles of the Civil Code relating to predial servitudes to mineral rights questions, and has refused to apply those relating to personal servitudes (usufruct). Thus, in the cornerstone case (*Frost-Johnson*)

7. 136 La. 724, 67 So. 641 (1915).

8. A. YIANNPOULOS, CIVIL LAW OF PROPERTY §101 (1966).

9. 150 La. 756, 863, 91 So. 207, 245 (1922).

10. 171 La. 774, 782, 132 So. 229, 231 (1931).

11. 172 La. 722, 135 So. 38 (1931).

12. 167 La. 901, 120 So. 591 (1929).

upon which the structure of Louisiana mineral law has been erected, the court, having decided that the sale or reservation of mineral rights constituted a real right in the nature of servitude, and having to determine whether this real right of servitude could be established in favor of a person and his heirs, chose against application of those Civil Code articles applying to personal servitudes (according to which the right of personal servitudes expires with the owner) and applied the predial servitude articles which establish their permanency and heritability.

One of the essential characteristics of a personal servitude is its divisibility as stated in Civil Code Article 538. The court refused to apply that article in *Sample v. Whitaker*, and peremptorily refused to apply the personal servitude articles in *Ford v. Williams*.¹³ On the other hand, the court has attributed to mineral rights in Louisiana, the essential characteristics of a real or predial servitude. It was held in *Sample v. Whitaker* and many other cases that the right is indivisible; in *Frost-Johnson* and *Ford v. Williams* and other cases, that it is permanent and heritable. Accordingly, the court has applied the prescription of ten years for non-use under Civil Code Article 789; and the doctrine of interruption of that prescription by the minority or use by a co-owner under Civil Code Articles 801 and 802. All these articles relate to real servitudes.

Conservation laws establishing well spacing regulations and drilling units, and frequently necessitating unitization of drilling interests, have created problems not possible of solution by deduction and analogy from these basic principles of the Civil Code.

Well established public policy in Louisiana favors the strict application of the prescription of the mineral servitude by non-usage during ten years. This has caused the enactment of legislation insulating the servitude from the effect of Code articles that otherwise would have provided grounds for the interruption of the prescription.

However, ever since *Frost-Johnson*, Louisiana jurisprudence has adhered to the philosophy that the sale or reservation of mineral rights creates a real right in the nature of a servitude, now generally called a "mineral servitude." This is concisely and clearly stated in *Wemple v. Nabors Oil and Gas Company*.¹⁴ Notwithstanding the obfuscations of illogical semantical discussions, the jurisprudence respecting mineral rights has been developed by the consistent and analogical application of the basic rules relating to predial or landed servitudes.

13. 189 La. 229, 179 So. 298 (1938).

14. 154 La. 483, 97 So. 666 (1923).

THE MINERAL LEASE

In the usual oil and gas, or mineral lease, the mineral owners for a cash consideration called "bonus" give the lessee the exclusive right to explore and exploit the property for oil, gas and other minerals and, if successful, to reduce them to possession, giving the mineral lessors a fixed proportion thereof as royalty. Usually, the lease requires actual drilling operations to begin within one year, but drilling may be postponed from year to year, for the term of the lease, by paying annually a fixed sum as delay rental. The lease is effective as long as there is production therefrom or active drilling operations are being conducted even beyond the primary term.

In one of the earliest cases, *Spence v. Lucas*,¹⁵ the court was called upon to decide whether a mineral contract on a royalty basis was a sale or lease. The Court said:

Until the Legislature shall have passed laws especially applicable to the industry of mining, which is a new one in this state, the parties engaged in those pursuits, and the courts of the state will adhere to the jurisprudence on the subject, and treat mineral contracts as leases.

Nearly ten years later, in *Logan v. State Gravel Co.*,¹⁶ the court said:

This expression has stood on the books for nearly 10 years and since then the Legislature has met seven times without making any change in the law, in that respect, although the industry has greatly developed since then and many laws have been passed on the subject thereof. We conclude that the Legislature is satisfied with the law of the case last cited and hence we now reaffirm the principle therein announced

But there are two ways in which that incorporeal right (mineral servitude) may be dealt with, viz: (1) It may be sold outright, as may a "servitude" or any other incorporeal thing. (R.C.C. Art. 2449); or (2) *The land may be leased* for mining purposes for a fixed rental, or on a royalty basis (R.C.C. Art. 2671).

The conclusion was that land adapted for mining or quarrying may be leased for a certain portion of such mine or produce from such land and the fact that this portion is called "royalty" instead of rent is inconsequential, for rent by whatever name is a profit in money, or a certain quantity of commodities, or even a portion of the fruits

15. 138 La. 763, 70 So. 796 (1916).

16. 158 La. 105, 103 So. 526 (1925).

yielded by the thing leased. That, of course, is analogically justified by the Louisiana Civil Code, which provides:

Art. 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange

Art. 2671 (under Book III, Title IX, of Lease). The price should be certain and determinate, and should consist of money. However, it may consist in a certain quantity of commodities, or even a portion of the fruits yielded by the thing leased.

Very much later, this observation about the inaction of the Legislature was reiterated in *Tyson v. Surf Oil Co.*,¹⁷ with the added observation that the Legislature had refused to adopt the proposed mineral code of 1938, from which a sort of tacit approval of past jurisprudence was presumed.

The essential right conferred by a mineral lease is, as in the case of the mineral servitude, likewise one of exploration and exploitation with the obligation of the lessee to pay rent in the form of royalty, if minerals are found in paying quantities. This royalty is rent, for the payment of which the lessor was given the lessor's pledge and privilege under Louisiana Civil Code Article 2705¹⁸ and to which the prescription of three years for the arrearages of rent is applicable.¹⁹

There are some cases that refer to mineral leases as servitudes and in the early case of *Spence v. Lucas*, it was said that they partake of the nature of both sale and lease. But just as the mineral servitude cannot fit precisely into the codal definition of a predial servitude, so the mineral lease does not coincide exactly with the codal specifications of a lease. The confusion of terminology is understandable when it is realized that the essential rights of exploration and exploitation, and reduction to possession, if successful, are exactly the same as conferred by the mineral servitude or the mineral lease. Therefore, it would seem that it matters little how we designate or label the mineral lease, the determining factor for the application of the appropriate provisions of the Louisiana Civil Code should be the tests implied in *Logan v. State Gravel Co.*²⁰

Nevertheless, any panoramic view of the mineral jurisprudence

17. 195 La. 248, 196 So. 336 (1940).

18. *Logan v. State Gravel Co.*, 158 La. 105, 103 So. 526 (1925).

19. LOUISIANA CIV. CODE, art. 3538; *Board of Comm'rs. v. Pure Oil Co.*, 167 La. 301, 120 So. 373 (1928).

20. See also the discussion of the controversial jurisprudence and legislation in A. YIANNPOULOS, CIVIL LAW OF PROPERTY §100 (1966).

of this state gives a very strong impression that mineral leases have always created real rights, in spite of two paroxysmal decisions in *Gulf Refining Co. v. Glassell*,²¹ and *Tyson v. Surf Oil Co.*,²² the adjectival effects of which were quickly cured by appropriate legislation.

Louisiana Civil Code Article 2725 (C.N. 1717) gives the lessee "the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted. The interdiction may be for the whole, or for a part; and this clause is always construed strictly."

The sublease of part of a lease by the lessee and development by the sublessee was held to enure to the benefit of the entire lease in *Smith v. Sun Oil Co.*²³ In that case, there was an encyclopedic presentation of French doctrine, to the effect that in an assignment of a lease the lessee transfers his entire interest, in effect he makes a sale, while in a sublease, the lessee super-poses a new lease upon the primitive lease, and becomes the sublessor of the sublessee. This philosophy was adopted by the Supreme Court, and reaffirmed in *Johnson v. Moody*²⁴ and *Roberson v. Pioneer Gas Co.*²⁵

It was held in *Roberson* that the retention of an overriding royalty (in addition to the royalty due the primitive lessor, the sublessee was required to pay the primitive lessee-sublessor an additional or overriding royalty) made the transfer a sublease; the price or rent was the same kind in both lease and sublease, a certain quantity of commodities or a portion of the fruits yielded by the thing leased.

The decisions of a United States Court of Appeals in some federal income tax cases involving the transfer of oil and gas leases²⁶ are in direct conflict with this Louisiana jurisprudence because they failed to follow the doctrine of the United States Supreme Court that common law regards a lease for years at a certain rent as the grant of an estate for years, in which the lessee takes title; the estate of the lessor during the term of the lease being called the reversion.²⁷ On the other hand, the civil law regards a lease for years as a mere transfer for the use and enjoyment of the property. Professor Yiannopoulos says:

The mineral lease, therefore, should necessarily be classified as

21. 186 La. 190, 171 So. 846 (1936).

22. 195 La. 248, 196 So. 336 (1940).

23. 165 La. 907, 116 So. 379 (1928).

24. 168 La. 799, 123 So. 330 (1929).

25. 173 La. 313, 137 So. 46 (1931).

26. *Waller v. Commissioner*, 40 F.2d 892 (5th Cir. 1930); *Palmer v. Bender*, 57 F.2d 32 (5th Cir. 1932).

27. *Viterbo v. Friedlander*, 120 U.S. 707 (1887).

a hybrid contract governed in part by the Code provisions on lease, sale, or servitudes, and in part by special legislation and rules of judge-made law.²⁸

This indicates the necessity for a critical evaluation and restatement of the law relating to oil and gas or mineral leases. It is agreed that, as classified by the courts and the legislature, we have a hybrid contract, but it is to be doubted that the codal provisions on sale or servitude have had nearly the effect that has resulted from applying the provisions relating to lease.

ROYALTY RIGHTS

"Royalty" according to Professor Yiannopoulos "is a polysemantic word which in the framework of concrete legal relationships may designate rights of variable content." Two basic concepts are "rent royalty" (or sometimes "lease royalty") and "mineral royalty."²⁹

By rent royalty is meant the consideration out of production paid by the lessee to the lessor. Mineral royalty, according to Professor Yiannopoulos, evolved as a distinct right to a portion of the minerals actually produced or their proceeds. It does not constitute a part of the consideration due by the lessee under a specific lease.³⁰

Professor Yiannopoulos discussed this mineral royalty, as thus far developed, with considerable skepticism. He thinks the right has not yet been fully developed, and that there is still room for speculation as to some specific characteristics of the new right. He thinks it is a *sui generis* real right according to present jurisprudence:

It differs from the traditional real rights in that, in the last analysis, it is not a right in corporeal property but a charge on an incorporeal immovable attached to land—the mineral right. It is a real right in the sense that it is an exclusive patrimonial right which, if recorded, may be asserted during its lifetime against the world.³¹

This mineral royalty is the creation of jurisprudence, but, while it may appear illogical and intrusive into the scheme of ownership of the Louisiana Civil Code, it apparently has given a measure of satisfaction to the oil and gas fraternity. Suffice it to say, therefore, that it should be the objective of any restatement or codification of the mineral law of Louisiana to accommodate this mineral royalty to a

28. A. YIANNPOULOS, CIVIL LAW OF PROPERTY §101 (1966).

29. *Id.* § 102.

30. Gulf Refining Co. v. Hunter Co., 231 La. 1002, 93 So. 2d 575 (1957).

31. A. YIANNPOULOS, CIVIL LAW OF PROPERTY §102 (1966).

sound, analytical and logical status in the hierarchy of mineral rights in Louisiana, and consistent with the basic principles of the Civil Code, if that be possible.

CONCLUSION

The development of the basic mineral law of Louisiana through the Civil Code to reach results beyond the letter of the Civil Code represents, probably, the most extended analogical adaptation of the civil law to modern circumstances. What has been achieved in the courts of Louisiana erupted out of the spirit of the Code Napoleon — simplicity of tenures, unfettered freedom of ownership and complete freedom of contract. That spirit overwhelms when the strict letter of some particular article would not permit. The Louisiana conception of the mineral servitude and mineral lease, the foundations of the most important industry in the state, growing out of the Civil Law, has served the state well.

Difficulties have been encountered when principles and motifs have been ignored to indulge in semantical argument. Even then, when the law is stated in general terms and the motifs therefor understood, it seems that there is a reflex action of the Code itself that operates to guide the judge or lawyer to the proper interpretation.

These basic concepts that support the mineral law of Louisiana were generated out of the Civil Code and established and developed by jurisprudence. The mass of this jurisprudence has increased in direct proportion with the great expansion of the industry resulting from the vast improvement in the technology by which it is conducted. There has also been felt the impact of the administrative laws established to regulate the industry that have been made necessary by considerations of public policy.

It is often difficult to discern the implications of these fundamental concepts through this jurisprudential complexity. While the results reached have been generally correct and consistently maintained and developed, there have been few statements of the principles of mineral law in the jurisprudence that have the clarity and conciseness of the Civil Code. There has been little discussion of the philosophy underlying the juridical results reached by the jurisprudence. It is always difficult to maintain clarity, consistency and coherence when interpretation is achieved by jurisprudence alone, without the objective and continuing supplement of a virile doctrine.

The pressure of these circumstances has caused the legal profession and the oil and gas industry in Louisiana to consider that it was now appropriate and necessary to undertake an analytical, logical and complete study of this mineral law, in order to restate it in form and content in the tradition of the Civil Law of Louisiana.

This study and work of restatement of Louisiana mineral law was undertaken some time ago by the Louisiana State Law Institute, the official law revision, law reform and legal research agency of the state. The processes of the Institute require the work of research and preparation to be made by a reporter, almost invariably a member of the faculty of one of the state's law schools, assisted by advisors from the profession who are specialists in the subject. These people prepare an *avant projet* for discussion by the Council of the Institute composed of lawyers, judges and professors. The *projet*, as finally adopted by the Council and corrected by the Semantics Committee for style and form, is now being submitted to the Legislature.

It is certain that we should not cast off our moorings to the Civil Code, so firmly bound to the principles of simplicity and complete freedom of ownership and of contract. That does not mean, however, that we should amend the Civil Code to accommodate the results achieved by the restatement and revision by interpolation. It may be that the desired results could be achieved by including the principles of our mineral law in a separate mineral code — as France found it expedient to do with "*mines et eaux*" in the law of 21 April 1810 (*Mines, Minières, et Carrières*).

Whether interpolated in the Civil Code or comprised in a separate mineral code, it is equally certain that the restatement should not be in the form of a statute that chokes logical and analogical interpretation by detail and definition, but should be a statement of general principles which can be adaptable to specific instances and expandable by analogy to unforeseen circumstances.