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Private Law: Mineral Rights

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MINERAL RIGHTS

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From the reported cases, it would appear that the Mineral Code is serving fairly well as a guide to people in handling mineral rights transactions and in resolving possible disputes. Many of the cases reaching the appellate courts do not involve matters covered by the Mineral Code. Nevertheless, several of the cases do indicate areas where the Mineral Code could be more specific or where it could have pretermitted controversies had it addressed the subject. The significant appellate cases involving mineral rights can be regarded as falling in four basic categories.

PROCEDURAL MATTERS

Three cases were decided which turned upon points basically procedural in nature. Two of these were decisions of the Louisiana Supreme Court.

Trinidad Petroleum Company v. Pioneer Natural Gas Company[1] was a case brought by a lessee against his lessor to assert the continued existence of a lease and to seek damages. A blowout had occurred on the lessee's well which, the lessee contended, prevented further operations for a time. The lessor granted a lease to another party, taking the position that plaintiff's lease had terminated, despite the plaintiff's contention that the force majeure clause of the lease prevented termination during cessation of production for the blowout.

The trial court dismissed the action on the lessor's exceptions of no cause and no right of action. Upon appeal, the third circuit initially reversed and remanded but granted a rehearing after which it ruled that the plaintiff's appeal had not been timely.[2] The third circuit characterized the plaintiff's action as a possessory action; thus it had to be appealed within thirty days.[3] The appeals time for an ordinary action is sixty days,[4] and plaintiff's appeal was filed within sixty days. Thus the issue on appeal to the Louisiana Supreme Court was

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1. 381 So. 2d 808 (La. 1980).

2. *Id. See also* Trinidad Petroleum Corp. v. Pioneer Natural Gas Co., 381 So. 2d 834 (La. App. 3d Cir. 1980) (the third circuit's ruling).

3. LA. CODE CIV. P. art. 3662.

4. LA. CODE CIV. P. art. 2087.

whether it was proper to characterize plaintiff's suit as a possessory action.

The supreme court reversed the third circuit, holding that the plaintiff's suit was an ordinary action, and thus its appeal had been timely. It remanded to the third circuit because that court's initial decision (remanding for a trial on the merits) never had become final.

The court reviewed the pertinent provisions of the Mineral Code and the Code of Civil Procedure indicating that a mineral right is a real right which may be asserted by possessory action or other action.[5] Ordinarily, however, a lessor and lessee may not assert the possessory action against one another since the lessee possesses for and under the lessor. The Code of Civil Procedure specifically provides that the real actions cannot be asserted by the lessor (or possessor bound by a lease) against the lessee "on account of the termination of the lease by running of the term or occurrence of an express resolutory condition."[6] The court felt that since the plaintiff's action was simply the inverse of this, the plaintiff could not maintain a possessory action. It stated that although the pleadings were couched in the terms and form of a possessory action, the claims were more in the nature of a suit based on the obligations of the parties under their contract. Hence, the court viewed the parties as urging an ordinary action rather than a real action. As an ordinary action the appeal had been filed timely.

The proper venue for litigation over the terms of a gas purchase contract was at issue in *Hawthorne Oil & Gas Corporation v. Continental Oil.*[7] The third circuit had held that the gas purchase contract had multiple objects involving immovable rights—rights of ingress and egress to lay pipelines and construct facilities—as well as rights to movables (the gas after production).[8] Thus, the court of appeal held that the place of the immovable rights was the proper venue.[9] The supreme court reversed.

The opinion of the supreme court was that the gas purchase con-

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5. LA. CODE CIV. P. arts. 3664 & 3665. *See also* LA. R.S. 31:12, 18, & 23 (Supp. 1974).

6. LA. CODE CIV. P. art. 3670.

7. 377 So. 2d 285 (La. 1979).

8. 368 So. 2d 726 (La. App. 3d Cir. 1979).

9. *Id.* The third circuit looked to article 80 of the Code of Civil Procedure which provides in pertinent part:

> The following actions shall be brought in the parish where the immovable property is situated:
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> (1) An action to assert an interest in immovable property, except as other wise provided in Articles 72 and 2633 . . . .

tract had a single object, the sale of a movable.[10] The contract provisions concerning rights-of-way were incidental and nonessential stipulations, and no relief for or adjudication of immovable rights was sought. Recission or reformation of the contract would have had, the court observed, at most only an incidental effect on immovable property.

The dissent by Mr. Justice Dixon turned upon his view that the rights were to be classified immovable as applying directly to the land. The parties to the gas purchase contract attempted to limit the power of the lessee to assign the lease without making the assignment subject to the gas contract. Since this affected the lease, Mr. Justice Dixon felt it affected an immovable and thus came within the language of article 80 of the Code of Civil Procedure.

It is to be noted that the Mineral Code has been amended to make the gas purchase contract subject to the laws of registry.[11]

The characterization of a contract right in relation to certain mineral leases also was at issue in *Hobbs v. Central Equipment Rental.*[12] The plaintiffs and defendants (counterclaimants) had entered into an unwritten contract for operations on a mineral lease they apparently owned in indivision. Under the contract the plaintiffs, the two Hobbs brothers, were to maintain the well (or wells) on the lease, and defendants, the Hances (Central Equipment Rentals, Inc.), were to provide a laborer as well as their share of the financial expenses in the operation of the wells. When the final well on the lease ceased production in February, 1973, the partners decided to plug and abandon the well.

Each of the parties sought bids for the work, but plaintiffs then informed defendants they were not financially able to contribute to the plugging and cleanup operations. Thereupon Sam Hance contracted with several companies to perform the work which was completed entirely at the expense of the Hances. With the great increase in the value of oil field equipment in the wake of the 1973

10. The Louisiana Supreme Court looked to article 42 of the Code of Civil Procedure which provides in pertinent part:

> The general rules of venue are that an action against:
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> . . . .
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> (4) A foreign corporation licensed to do business in this state shall be brought in the parish where its principal business establishment in the state is located, as designated in its application to do business in the state.

11. *See* LA. R.S. 31:212.1 (Supp. 1979). This provision was added by Acts 269, § 2 of 1979. The comment to this statute notes that the amendment "preserves the distinction between a mineral right and contracts disposing of or hypothecating the minerals themselves after severance."

12. 382 So. 2d 238 (La. App. 3d Cir. 1980).

Arab embargo, plaintiffs brought suit for conversion, contending that had they been allowed to do the work themselves, they could have sold the salvage at great profit. They claimed damages of $329,811.86. Defendants reconvened for plaintiffs' share of the cost of cleanup and ad valorem taxes paid by defendants. The trial court ruled for the defendants on the claims of the plaintiffs and on defendants' reconventional demand.

On appeal to the third circuit, the plaintiffs argued that it was error for the trial court to admit parol evidence of the agreement between the plaintiffs and defendants because the rights and obligations affected mineral leases and thus became incorporeal immovable rights requiring written instruments or proof. The court rejected this contention. It stated:

> The contracts in dispute were for the removal of equipment from and the plugging of defunct oil wells. The contracts in no way purported to affect any rights or title to the mineral leases per se. The equipment used to extract the oil from the reservoir was not so situated as to be of a permanent nature. The equipment would have to be removed as soon as the wells ceased producing in paying quantities and were abandoned. The contracts involved in this litigation have a single object; the removal of production equipment from and the plugging of non-producing wells.[13]

Since only rights pertaining to movables were involved, no writing was necessary. In so holding, the court relied on the supreme court opinion in *Hawthorne*.[14] The court also rejected the plaintiffs' contentions on several other assignments of error and thus affirmed the trial court's judgment.

CONVEYANCING PROBLEMS

Several cases have arisen that have required interpretation or construction of documents to ascertain what was conveyed between the parties. Two of these are straightforward applications of well-accepted principles and should pose no problems for the future. The third of these, however, is of considerable significance for future mineral development in the state. It is *Continental Group v. Allison*.[15] Because it is on appeal and may soon be decided by the Louisiana Supreme Court, *Continental Group* will be described only briefly.

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13. *Id.* at 242.
14. See note 7, *supra*.
15. 379 So. 2d 1117 (La. App. 2d Cir.), *cert. granted*, 383 So. 2d 789 (La. 1980).

Involved in *Continental Group v. Allison* was a reservation of all mineral rights in a sale of more than 90,000 acres in 1956. In accordance with the established principle which is now written into the Louisiana Mineral Code,[16] each separate tract had to be treated as a separate servitude. It was stipulated by the parties at the trial that on those noncontiguous tracts upon which no drilling or attempted development had taken place for a period of ten years or more, prescription had run and the servitudes had terminated. At issue, however, was who had the right to produce lignite, a form of coal which is to be mined principally by strip mining. Was it to be the party which reserved all mineral rights, or the owner of the land? A further issue concerned the effect of drilling for oil on the running of prescription as to the lignite.

The trial court held that the reservation of all mineral rights did not serve to create a servitude as to the right to produce lignite by strip mining. While the court recognized that the reservation reasonably could be read to include only those minerals whose development did not interfere significantly with use of the surface, or all minerals, regardless of the effect of the development of the surface by the purchaser, it concluded that the former was preferable in view of the Civil Code's policy favoring interpretation which least restricts the ownership of the land conveyed.[17] Since the court ruled lignite was not reserved, it had no reason to rule on the issue of interruption of prescription on one mineral by operations for another.

The second circuit reversed.[18] The court of appeal reviewed the evidence, testimonial and documentary, surrounding the negotiations and bearing on the intent of the parties in 1956, and it concluded that "the parties intended that solid material could be extracted by the open-pit or strip-mining process from beneath the surface of the lands in the exploitation of the servitude."[19] Other factors, such as knowledge of existence of the lignite prior to the agreement, were given by the court as support for its conclusion. The court specifically noted but declined to follow the Texas rule that mineral substances which can be extracted only by strip-mining belong to the surface owner and not to the mineral owner and that the mineral owner may not strip-mine unless the mineral grant expressly provides for the

16. LA. R.S. 31:64 & 73 (Supp. 1974).

17. Article 753 of the Civil Code of 1870, referred to by the trial court, provides: "Servitudes which tend to affect the free use of property, in case of doubt as to their extent or the manner of using them are always interpreted in favor of the property to be affected." Act 514, § 1 of 1977 added article 730, which simply replaced the above article of the 1870 Code with no substantive change.

18. See note 15, *supra*.

19. 379 So. 2d at 1126.

right to strip-mine.[20] Despite its holding in favor of the owners of the mineral reservation, the court recognized that this did not permit them to exercise their rights arbitrarily or without due regard for the rights of the landowner.[21]

On the issue of interruption of prescription as to lignite by oil and gas operations, the court followed articles 36 and 40 of the Mineral Code, which expressly provide for this result.[22] While the Mineral Code was not in effect until January 1, 1975, the court felt the issue had not been resolved before adoption of the Mineral Code; the Code's provisions were the proper resolution and were in accord with prior authorities.

At issue in *Lowry v. MRT Exploration*[23] was whether a 1966 conveyance of property with a reservation of mineral rights by three brothers to another party created one mineral servitude or three. If three were created, then liberative prescription had not been interrupted as to all of the property. The property on which the minerals were reserved was owned in indivision and the reservation was simply to the vendors.

The second circuit court of appeal upheld the trial court's award of summary judgment. The court ruled that the reservation created a single servitude, and its use by one co-owner inured to the benefit of the others. The holding on both points is in accord with the Mineral Code.[24]

Patrick Petroleum Company v. Poche[25] presented a controversy as to whether a 1936 conveyance created a fractional mineral servitude or a mineral royalty. If it was a royalty, it had prescribed, since there had been no production on the tract in question since 1955.[26] If it was a mineral servitude, prescription was interrupted by drilling operations conducted on the tract in 1965 and 1974.[27]

Examining the instrument and subsequent documents, the fourth circuit concluded that the trial court was correct in construing the instrument as creating a mere royalty interest. Thus prescription had not been interrupted, and the royalty had expired. The court focused on the references in the instrument and other agree-

20. *See* Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977).
21. 379 So. 2d at 1130-31.
22. LA. R.S. 31:36 & 40 (Supp. 1974).
23. 382 So. 2d 1034 (La. App. 2d Cir. 1980).
24. *See* LA. R.S. 31:174 (Supp. 1974) and, by implication, LA. R.S. 31:63, 66, & 67 (Supp. 1974).
25. 384 So. 2d 834 (La. App. 4th Cir. 1980).
26. *See* LA. R.S. 31:87 (Supp. 1974).
27. *See* LA. R.S. 31:29 (Supp. 1974).

ments (acknowledgments) to "royalty." From the facts given, the court's ruling was undoubtedly correct, but the court might have gone further by noting other factors indicating that a royalty was contemplated. Thus the instrument provided that the interest was to be free of further cost, an incident of a normal royalty interest. And, the interest was as to minerals "that may be produced" indicating an interest after production, which is also a characteristic of a royalty interest.[28]

While there is no doubt as to the correctness of the court's approach on the question of prescription in *Patrick Petroleum Company v. Poche*, one might ask whether the pertinent rule of law makes any sense whatsoever. Why must use of a mineral royalty be production while use of a mineral servitude can be mere good faith operations? Why will a dry hole interrupt prescription on a mineral servitude but not on a mineral royalty created from the mineral servitude? The object of both servitude and royalty is use of the minerals, and the distinction as to what is necessary to interrupt prescription seems unsound. Indeed it seems harsh, since the royalty owner lacks power to go on the land to take steps to interrupt prescription. Further, it may be a trap for the unwary. The Mineral Code clearly permits one to alter the normal characteristics of the mineral royalty and mineral servitude.[29] What is to prevent the careful draftsman from describing an interest as a mineral servitude while giving it most of the characteristics of the mineral royalty, *i.e.*, creating a cost-free fractional mineral servitude without executive rights or veto power over development? Such an interest would be similar to a royalty in most respects but would get the more favorable treatment as to interruption of prescription of the mineral servitude. Perhaps the Mineral Code should be amended to provide that any act that would interrupt prescription as to a mineral servitude also will interrupt prescription as to a mineral royalty.

LEASE ADMINISTRATION

The case of *Arceneaux v. Hawkins*[30] addresses a problem not specifically provided for in the Mineral Code. The lessors granted the defendant an oil and gas lease under which they were to receive a one-sixth royalty. Production was obtained in paying quantities in July, 1976, and certain quantities of the production were allocated to plaintiffs' interests. On February 17, 1978, the plaintiffs gave writ-

28. On the characteristics of a royalty as opposed to a mineral interest, *see* H. WILLIAMS AND C. MEYERS, 1 OIL AND GAS LAW §§ 303-07.4 (1978).

29. *See* LA. R.S. 31:72-75 & 103 (Supp. 1974).

30. 376 So. 2d 362 (La. App. 3d Cir. 1979).

ten notice of nonpayment to defendant. On February 21, 1978, the defendant responded that payment had been delayed because of the complexity of the ownership interests in the tracts of land involved, and that these interests were being determined. On April 25, 1978, the defendant tendered payment of the royalties but lessors refused and filed suit for dissolution of the lease, damages, and attorney's fees. The trial court sustained the defendant's exception of prematurity and dismissed the suit. Plaintiffs appealed and the third circuit court of appeal reversed and remanded.

Under articles 137 and 138 of the Mineral Code,[31] the lessor must give the lessee written notice of failure to make timely or proper payment of royalties as a prerequisite to a judicial demand for damages or dissolution of the lease, and the lessee has thirty days after receipt to pay or respond in writing with a reasonable cause for nonpayment. No article specifies the effect of a nonpayment within the thirty days where a response to the notice is made timely. From the related Mineral Code articles,[32] the court concluded that the lessor may file suit to have the court determine whether the cause of delay was reasonable. If so, the damages would be limited to interest on the royalties owed. If the delay was unreasonable, the court may award damages of double the royalty, plus interest, attorney's fees, and, if the facts so justify, dissolution of the lease.

Prior to the Mineral Code's adoption, the Louisiana courts had developed a rule under which lessors could seek lease cancellation for nonpayment of a royalty without first putting the lessee in default. The theory was that an unjustified delay in making payment was an active breach of the lease. The Mineral Code significantly altered this result by requiring a notice and demand by the lessor, with the lessee having thirty days in which to respond. If the lessee pays within the thirty days, the lessor may seek only interest on the royalties unless the original failure to pay was fraudulent or willful and without reasonable grounds. Dissolution, although disfavored, remains a remedy if no payment is made within thirty days. *Arceneaux v. Hawkins* addresses a point not made clear in the Mineral Code. Under its rule the lessee who fails to pay within the thirty days runs the risk of damages of double the royalties due and cancellation even if he states in writing a reason for nonpayment.

Poole v. Winwell, Inc.[33] raised the issue of what prescriptive period applies to an action for damages for breach of certain surface

31. LA. R.S. 31:137-38 (Supp. 1974).
32. LA. R.S. 31:139-41 (Supp. 1974).
33. 381 So. 2d 926 (La. App. 3d Cir. 1980).

lease provisions. Defendants were the owners of two surface leases covering 5.5 acres.[34] They maintained an oil and gas gathering facility on the two leased tracts. Plaintiff-lessor brought suit seeking cancellation of the two surface leases and/or damages for the overflow of salt water on both leased and nonleased portions of his land.

The trial court found that the plaintiff's claim had prescribed because the damages had occurred more than one year prior to the filing of the suit. The third circuit reversed, noting that the nature of the obligation breached determines the applicable prescriptive period.[35] Relying on allegations in the plaintiff's petition, the court held that the suit was one sounding in contract;[36] thus, it was not barred by the prescriptive period of one year applicable to actions sounding in tort.[37] Nevertheless, the plaintiff's recovery was limited to those damages attributable to his property lying outside the leased premises. The court concluded that any determination of damages to the leased property would be premature, because the leases were still in effect and the lessees were making good faith efforts to comply with the terms of the leases.

Plaintiff also sought cancellation of the surface leases, alleging the provisions relating to duration were purely potestative. The provisions provided that the leases would continue in force and effect so long as minerals were produced. The court upheld the validity of the leases, finding that such provisions, being dependent on production, are mixed conditions as described in Louisiana Civil Code article 2025. The court went on to note that even if the provisions were potestative, they would be resolutory potestative conditions, which are specifically authorized under Civil Code article 2036.[38]

CONSERVATION REGULATION AND ITS EFFECTS

In *Bernard v. Marathon Oil Company*[39] several matters involving conservation regulation were taken up. The plaintiff-lessor in this case owned a 9.9 acre tract of land burdened by an oil, gas and mineral lease. On March 19, 1962, the Department of Conservation issued Order No. 367-4 creating the Cristellaria No. 6 Sand Unit. The entirety of the 9.9 acre tract in dispute was included. The S. Hebert well served as the unit well.

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34. It should be observed that this case concerned *surface leases*, not mineral leases, and thus the applicability of the Mineral Code was not raised. The case is nonetheless of interest to operators of mineral leases and is included for that reason.

35. *See* LA. CIV. CODE art. 3531.

36. 381 So. 2d at 928.

37. *See* LA. CIV. CODE art. 3536.

38. *See* Long v. Foster & Associates, Inc., 242 La. 295, 136 So. 2d 48 (1962).

39. 381 So. 2d 1286 (La. App. 3d Cir. 1980).

Subsequently, the Department of Conservation created the Siphonina Davisi No. 1 Sand Unit. This unit included 1.4 acres of the leased acreage included in the Cristellaria unit. The Siphonina unit also contained a producing well.

The unit well for the Cristellaria unit (the S. Hebert well) was shut-in on September 8, 1974, as a precautionary measure because of a threatened hurricane. Production was not restored until December of 1976. Plaintiff-lessors sought cancellation of the lease as to that acreage not within the Siphonina unit pursuant to a lease provision providing for termination for failure to rework and resume production within sixty days after shutting-in the well.

The third circuit, adopting the opinion of the trial court, found the lease provision inapplicable and held that production from the leased premises or lands pooled therewith maintained the entire lease in effect.[40] Therefore, continuous production from the Siphonina unit served to maintain the entire lease in effect.

A second claim for cancellation arose from the fact that on May 1, 1975, the Department of Conservation created Siphonina Davisi No. 3 Sand Unit. This unit included all of the 9.9 acres included in the Cristellaria unit. The Goldking well served as the unit well. Although Goldking produced as a unit well from May 1, 1975, the lessees delayed taking production from the well for eleven months. Plaintiffs sought cancellation of the lease, alleging defendants failed to pay shut-in royalties during this period. They also alleged that no shut-in royalties were paid while the S. Hebert well was shut-in.

The court refused to cancel the lease, holding that where there is actual production attributable to a mineral lease, there is no additional obligation to tender shut-in royalties in the event a second well capable of producing in paying quantities is shut-in.[41] Because there was actual production attributable to the leased premises (Siphonina Davisi No. 1 Sand Unit Well), the defendants had no obligation to pay shut-in royalties. The court was careful to note that the lease in question did not contain a provision obliging the lessees to pay shut-in royalties in the event *any* well was shut-in, even if there was actual production attributable to the leased premises.[42]

Finally, the plaintiffs sought cancellation of the lease pursuant to certain lease provisions evidencing an intent of the parties that

40. 381 So. 2d at 1288. *See* LeBlanc v. Danciger Oil & Refining Co., 218 La. 463, 49 So. 2d 855 (1950); Hunter Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947).

41. 381 So. 2d at 1289. *See* Bennett v. Sinclair Oil & Gas Co., 275 F. Supp. 886 (W.D. La. 1967).

42. The court was distinguishing the case of *Nordan-Lawton Oil & Gas Corp. of Texas v. Miller*, 272 F. Supp. 125 (W.D. La. 1967).

the lessees should release all portions of the plaintiff's land not within a unit and not being held by actual production. The plaintiffs contended that defendants should have released the acreage within Siphonina Davisi No. 3 Sand Unit after the S. Hebert well discontinued production.

Again, the court refused to cancel the lease, holding the release clause of the lease inapplicable to the instant situation.[43] The court found that the release clause was intended to serve as a one-time release requirement which previously had been complied with. Additionally, the court pointed out that the release clause called for the release of all land outside a unit or units. There was no proof showing the tract in question was ever outside a unit, since nothing in the record indicated that the order establishing Cristellaria No. 6 Sand Unit was ever dissolved. Accordingly, the court affirmed the trial court judgment against the plaintiffs.

In *Dunn v. Sutton*,[44] the plaintiff-landowner sought to enjoin Order 1047 of the Commissioner of Conservation creating a pattern of drilling and production units for Reservoir A of the Irene Field in East Baton Rouge Parish. The plaintiff owned a one-acre by twenty-acre tract of land adjacent to the eastern boundary of a unit containing a well producing gas and condensate. The plaintiff alleged that the Commissioner engaged in racial discrimination in excluding his acreage from the unit.

The first circuit affirmed the trial court judgment dismissing the plaintiff's suit, holding that the plaintiff failed to carry his burden of showing that the Commissioner's order was arbitrary and capricious. The court noted that orders issued by the Commissioner of Conservation enjoy a presumption of validity.[45]

While recognizing that the plaintiff's failure to carry his burden of proof was sufficient to uphold the Commissioner's order, the court felt it incumbent that the Commissioner's order be justified due to the accusations of racism and went beyond the normal, limited scope of review applied to such administrative determinations. Accordingly, the court reviewed the facts upon which the Commissioner based his order, ultimately concluding that the order was justified and that no racial discrimination had been proven.

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43. 381 So. 2d at 1290.

44. 378 So. 2d 485 (La. App. 1st Cir. 1979), *cert. granted*, 381 So. 2d 1221 (La. 1980) (case was remanded).

45. LA. R.S. 30:12 (1950). *See* Simmons v. Pure Oil Co., 241 La. 592, 129 So. 2d 786 (1961).