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Private Law: Mineral Rights

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MINERAL RIGHTS

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INTRODUCTION

The law governing the creation, maintenance, and transfer of rights in minerals is simply a branch of property law. Mineral law has its own special problems and technical matters, but the fundamental concerns are the same as those permeating the rules and doctrines of other areas of property law: long-term stability, predictability, and uniformity that allow the careful practitioner and his clients to conduct their transactions and plan their activities with assurance that their intentions will be given effect and that their reliance upon reasonable assumptions and inferences from prior cases and statements of the law will not cause them to lose their investments.

Cases arise in oil and gas law and proceed to the appellate level for two reasons only: poor planning by attorneys, or a failure of the law to provide definite, certain and reasonable rules to guide those dealing in mineral rights in ordering their transactions. The bar of Louisiana is sufficiently experienced and sophisticated that the former is seldom a cause of litigation. Rather, the cases reported in recent years have tended to be in several areas where the law gives little guidance for planning or for resolution of disputes without resort to the courts. The Mineral Code has settled some troublesome issues that previously prompted litigation, but cases in several areas will recur until the courts give clearer standards for predicting the treatment of particular controversies by the courts or until legislation provides such standards. The two areas in which litigation is most likely to continue—implied lease obligations and conservation practice—will be discussed first. In such matters, the author intends no criticism of the courts or the administrative agency, for they have had to work with the case law and statutes as they have received them.

IMPLIED LEASE OBLIGATIONS

A. Diligent Development

The law of implied lease covenants to drill additional wells in other jurisdictions, according to the authors of the leading casebook

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on oil and gas law, has developed to the point that "regulatory commissions have adopted regulations requiring wider spacing than in earlier years. It is not surprising, therefore, that current litigation involving . . . the reasonable development covenant is greatly reduced."[1] Nevertheless, litigation regarding implied lease duties for further drilling continues to arise with some frequency in Louisiana, because the courts have generally been unwilling to distinguish between an implied duty of reasonable development and one of further exploration. The failure to provide clear standards has been a virtual invitation to litigation.

The duty of additional drilling on a lease tract is implied from the lease itself and imposed by article 122 of the Mineral Code which provides that the lessee will "develop and operate" the property leased as a prudent operator.[2] That the lessee will, in the appropriate circumstances, drill more wells than the lease expressly requires to keep it alive beyond the primary term is said to be implied in the lease. Other jurisdictions determine if the lessee has acted as a prudent operator by requiring the lessor who claims a breach of the implied duty to prove that a lessee could drill a well in a known producing formation which would produce oil and gas in paying quantities.[3] These jurisdictions do not require the lessee to explore to depths that are not known to have formations capable of producing in paying quantities.[4] The Louisiana courts, on the other hand, indicate, and sometimes hold, that a lessee must both reasonably develop and explore further under what might be termed the implied obligation or covenant of diligent development.[5] Without a requirement that the lessor prove the likelihood of production in paying quantities from a known producing formation, the courts are free to employ such a variety of factors to test what a prudent operator would do in a given situation that it is difficult to advise a client as to his development obligations and even more difficult to predict the outcome of litigation.

A recent case on the diligent development obligation is *Frazier v. Justiss Mears Oil Company, Inc.*[6] In this case, the lessor of oil and gas rights on 160 acres of land brought suit for cancellation of the

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1. H. WILLIAMS, R. MAXWELL, & C. MEYERS, CASES AND MATERIALS ON THE LAW OF OIL AND GAS 501 (4th ed. 1979).

2. LA. MIN. CODE: LA. R.S. 31:122 (1974).

3. H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §§ 801-878 (1980).

4. *Id.* §§ 841-843.

5. *See* LA. MIN. CODE: LA. R.S. 31:122, comments (1974); *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Mineral Rights*, 39 LA. L. REV. 739, 750-52 (1979). *But see* Le Jeune v. Superior Oil Co., 315 So. 2d 415 (La. App. 3d Cir. 1975).

6. 391 So. 2d at 485 (La. App. 2d Cir. 1980).

100 acres outside a unit (consisting of 200 acres), the unit well for which was on plaintiff's land. The lease contained no Pugh clause for division of the lease upon unitization. The trial court held for the plaintiff. The Court of Appeal for the Second Circuit reversed, holding that under the facts the lessee had fulfilled its obligation to develop as a prudent operator. The lessee had drilled or participated in drilling a number of wells in the area and had farmed out the hundred acres in question for the purpose of development prior to suit by the plaintiff. An unsuccessful well to the only known producing formation—the Wilcox—was drilled on the farm-out prior to trial. In most states, the court would have stopped at this point. But the Louisiana court went on to indicate that the lessee had a duty to develop the lease as to unproven formations of greater depth. The duty had been satisfied by the lessee through his participation in the area in a deeper play.[7]

B. Protection Against Drainage

Another facet of the implied obligation to act as a prudent operator is the duty to prevent drainage from the lessor's property. In this area, the matters likely to generate controversy are the manner of fulfilling the duty and whether the lessee is held to a higher standard when it is he who is causing the drainage on an adjacent tract.

A recent case has spoken to these issues. In *Pierce v. Goldking Properties, Inc.*,[8] the plaintiff lessor brought suit against his lessee for failure to protect his land from uncompensated drainage. The lessee had completed a gas well on land adjacent to plaintiff's land on August 21, 1974. The well was shut-in, and steps were undertaken by the lessee to unitize the property a short time later. A pre-application hearing was held on February 4, 1975. On February 7 a public hearing on the proposed unit, which was to include portions of plaintiff's land, was applied for, and the Commissioner of Conservation then set the hearing for April 8, 1975. The well was put in production on February 16, 1975. As of May 1, 1975, the effective date of the unit established after the public hearing, the plaintiff began to have royalty attributed to his property which was thereafter paid to him. Plaintiff's contention, expressed first in a letter of July 2, 1975, was that he should have royalty paid to him from the first date of production, not from the effective date of the unit.

Pertinent to the disposition of the case was *Breaux v. Pan American Petroleum Corporation*,[9] a case which indicated that the

7. *Id.* at 488.

8. 396 So. 2d 528 (La. App. 3d Cir. 1981).

9. 163 So. 2d 406 (La. App. 3d Cir.), *cert. denied*, 246 La. 581, 165 So. 2d 481 (1964).

obligation to protect against drainage can be fulfilled in two ways: by drilling a well or by including the property in question in a unit with the well causing the drainage. Implicit in *Pierce v. Goldking* is recognition of a duty to undertake unitization. Until the unitization takes effect, the rule of capture applies, said the third circuit in *Pierce*, following the holding in *Desormeaux v. Inexco Oil Co.*[10] Citing *Breaux v. Pan American*, the court said that "[t]his result is not changed merely because the mineral lessee is lessee of both the tract on which the well is physically located and the tract or tracts adjacent thereto."[11] The lessee had acted as a prudent operator and thus was not liable.

By recognizing a duty to unitize or seek unitization the courts in Louisiana are able to avoid a controversy that has posed problems in other jurisdictions.[12] Where a lessor can show that drainage of his property is taking place but cannot show that an offset well would produce sufficient revenue to repay all of its investments and operating costs, other jurisdictions have not required an offset well to be drilled,[13] though some would require payment of damages if the lessee was the party causing the drainage.[14] In looking to a duty to drill a well to offset drainage, one must focus on the profitability of the well, which brings in its wake the necessity of further consideration of whether the drainage is caused by the same lessee since some courts might wish to ignore the profitability issue in the common lessee situation. In looking to the duty to unitize or to seek unitization, one need not be concerned with profitability of a well nor whether the lessee is common to both tracts. Instead, the focus is on the fact of drainage and the steps the lessee could take for unitization. Of course, where the same lessee is common to both tracts, unitization may be simpler. But even if the lessee is not common to both tracts, the lessee is still able to seek unitization before the Commissioner of Conservation.

Several further aspects of the case should be noted. The court did rely in part on the lessor's delay in putting the lessee in default until July of 1975, after the effective date of the unitization. Damages can be calculated from a time prior to the putting in default if the lessee is found to have had actual or constructive knowledge of drainage.[15] However, the drainage in such a case would be computed from the time a reasonably prudent operator would

10. 298 So. 2d 897 (La. App. 3d Cir. 1974), *writ refused*, 302 So. 2d 37 (1974).

11. 396 So. 2d at 534.

12. *See generally* H. WILLIAMS & C. MEYERS, *supra* note 3, at § 824.

13. *See* Gerson v. Anderson-Pritchard Prod. Corp., 149 F.2d 444 (10th Cir. 1945).

14. Cook v. El Paso Natural Gas Co., 560 F.2d 978 (10th Cir. 1977); Millette v. Phillips Petroleum Co., 48 So. 2d 344 (Miss 1950).

15. LA. MIN. CODE: LA. R.S. 31:136 (1974).

have protected the leased premises, and, since the court found the lessee had acted as a prudent operator, there could be no damages. The remaining issues in the case concerning practice before the Commissioner of Conservation are discussed in the next section.

CONSERVATION PRACTICE

The second significant area in which litigation tends to occur has been with respect to matters related to the rules and orders of the Commissioner of Conservation and practice before the Office of Conservation. In recent years a lessening of reluctance to bring suit against the Commissioner has been observed. The reasons for this are several. The money involved is far greater than a few years ago. Second, there has been a revolution in due process in administrative law in the past decade or so at the federal level,[16] accompanied by enactment of a state administrative procedure act,[17] the full impact of which has yet to be seen. Third, the Office of Conservation has been given new duties in the areas of strip mine regulations, price determinations for natural gas, and oil price and tax determinations, all of which have increased the staff's work load and given new areas in which controversy might arise.

A. Time in Which to Invoke Judicial Review

The importance of the Commissioner's orders and the necessity of stability and finality of determinations by the Commissioner cannot be overemphasized. Millions of dollars are spent on drilling and production in reliance upon these orders, and many millions more in property interests are maintained in existence by unitization orders. Two competing interests in judicial review of action by the Commissioner or in respect of practice before the Commissioner exist: all affected persons should receive due process, and, on the other hand, once entered the orders must have a high degree of finality so that they may be relied upon.[18]

A recent case in which the Court of Appeal for the First Circuit wrestled with the problem of finality of a Commissioner's order and the timing of judicial review is *Jordan v. Sutton*.[19] At issue in the

16. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970). For an illustration of the impact on state law of the line of cases flowing from *Goldberg*, see *Haughton Elevator Div. v. State Div. of Administration*, 367 So. 2d 1161 (La. 1979).

17. LA. R.S. 49:951 *et seq.*

18. The author feels it necessary to bring out that he has been a consultant in several cases involving challenges to Commissioner's orders, but these have not included any cases discussed herein.

19. 401 So. 2d 389 (La. App. 1st Cir. 1981).

case was the validity of Order No. 78-F-4 dated April 20, 1979, establishing the Bear Creek Pettit Limestone Gas Storage Area, subject to the applicant, Southern Natural Gas, obtaining the consent of 75 percent of the owners in interest in the area. The order assumed that oil and gas wells in the area had been depleted. A supplement to the order was issued July 3, 1979, with a finding that more than 75 percent of the owners in interest had consented. The plaintiff, an owner of an interest in the area, contended that the Commissioner relied on false information in creating the storage reservoir order. He filed suit against the Commissioner challenging the order on July 21, 1980.

In response to the claim of the plaintiff, the Commissioner and intervenor Southern Natural Gas filed exceptions of prescription and lack of jurisdiction. The trial court sustained the exception of prescription. On appeal, the First Circuit Court of Appeal initially reversed the trial court on the ground that the thirty day prescriptive period of the Louisiana Administrative Procedures Act was not an exclusive prescriptive period for judicial challenge of a Commissioner's order. While Louisiana Revised Statutes 49:964(B) does require an action to set aside an order of an administrative agency to be brought within thirty days of its becoming final, the court of appeal felt that the provision of the Conservation Act for judicial review of an order of the Commissioner, Louisiana Revised Statutes 30:12, is a "parallel and co-existing" form of review not superseded by the Administrative Procedures Act, and it, said the court, does not specify a time for review.[20] Thus the trial court erred in sustaining an exception of prescription. Initially the court also declined to apply the principle of laches.

On rehearing in *Jordan v. Sutton* on the laches issue, the court remanded for further findings as to the unreasonableness of the delay and the prejudice that may have resulted to the defendant or third parties from the delay. The prior ruling on the prescription issue was undisturbed.

If the first circuit is correct, then thousands of orders entered over the years by the Commissioner of Conservation to unitize property, upon which billions of dollars have been expended, are subject to being overturned at any time, subject to the defense of laches based on the individual facts of each case as to unreasonableness of delay and the degree of prejudice to other parties. This result is most troublesome, and the writer doubts seriously that the First Circuit's reading of the Conservation Act is correct. The legislature did not

20. *Id.* at 393.

intend that the order of the Commissioner could be challenged indefinitely any more than a court judgment could be appealed at any time, even years later after the initial decision. Indeed, the orders of the Commissioner are as serious as the judgment of a trial court and seeking redress in court is an *appeal*, a seeking of judicial *review*, not a trial de novo. Had the court recognized this, it perhaps would have found a prescriptive period specified in the Conservation Act. Section 15 of Title 30 provides the following:

> In proceedings brought under authority of, or for the purpose of contesting the validity of, a provision of this Chapter, or of an oil or gas conservation law of this state, or of a rule, regulation, or order issued thereunder, appeals may be taken in accordance with the general laws relating to appeals. In appeals from judgments or decrees in suits to contest the validity of a provision of this Chapter, or a rule or regulation of the commissioner hereunder the appeals when docketed in the proper appellate court shall be placed on the preference docket of the court and may be advanced as the court directs.[21]

To seek judicial review of an order of the Commisioner is to appeal the order of the Commissioner. This usage of "appeal" and "review" is common by the courts and legislatures and reflects the quasi-judicial status of the administrative agency. The Texas legislature was a bit more specific in this regard, for in the same situation regarding judicial review of the Texas Railroad Commission, the agency responsible for conservation regulation, it provides as follows:

> §102.111 Right to *Appeal*
>
> A person affected by an order of the commission adopted under the authority of this chapter is entitled to judicial *review* of that order in a manner other than by trial de novo.
>
> §102.112 Venue
>
> *Appeal* shall be to the district court of the county in which the land . . . is located. . . .[22]

The author believes that this was also the intent of the Louisiana legislature; for although the language was borrowed almost verbatim from the Arkansas conservation statute,[23] the legislature made a clear distinction in section 15 between "proceedings" (which would include actions by the Commissioner) and "judgments or decrees in suits." Only the latter is specified to be placed on the

21. LA. R.S. 30:15 (1950).

22. TEX. NAT. RES. CODE ANN. §§ 102.111 to .112 (Vernon) (emphasis added). *See* Superior Oil Co. v. Texas R.R. Comm'n, 519 S.W.2d 479 (Tex. Civ. App. 1975).

23. ARK. STAT. ANN. § 53-120.

preference docket of the proper appellate court, but the "appeals" language of the first sentence of section 15 relates to all "proceedings"; thus "proceedings" obviously contemplates something more than "judgments and decrees in suits" that go to an appellate court. Likewise, if "proceedings" contemplated only judgments from a trial court, the legislature would have no reason to state specifically in a statute that appeals would be taken in accordance with the general laws relating to appeals; for that result would be effected even without such language.

Pertinent also to this discussion is the final sentence of section 12, the section providing for judicial review. It states that "[t]he right of review accorded by this Section shall be inclusive of all other remedies, but the right of appeal shall lie as hereinafter set forth in this Chapter." Section 12 creates the *right* of review and section 15 specifies the *timing* and *further manner* of an appeal to a court. Thus under section 15, the general laws relating to appeals would govern the time within which suit may be brought to challenge an order of the Commissioner, namely, thirty days for a suspensive appeal and sixty days for a devolutive appeal.[24]

B. Collateral Attack

A well-recognized principle of conservation practice was reiterated in the *Pierce v. Goldking* case discussed above.[25] The rule provides that no collateral attack may be made upon an order of the Commissioner of Conservation. In addition to the claims already mentioned, the plaintiff alleged that the lessee had breached its obligations to the plaintiff by failing to request that the effective date of the unit be the date of the hearing, April 8, 1975, rather than May 1, 1975, the date selected by the Commissioner. This claim, said the court, was a collateral attack on the Commissioner's order.[26] Such orders can be challenged only in East Baton Rouge Parish under the conservation statute.[27]

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24. LA. CODE CIV. P. arts. 2123 & 2087. For further comparison one should perhaps note that that the New Mexico statute for judicial review provides for *appeal* of an order of the oil conservation commission to the court of appeals and specifies a time limit of thirty days for such appeal. N.M. STAT. ANN. § 70-2-25. Similarly, judicial review of orders regarding oil and gas of the Corporation Commission of Oklahoma is treated by appeal to the Oklahoma Supreme Court. 52 OKLA. STAT. ANN. §§ 113, 277, 2876 (West 1971). The time for filing is thirty days from the date on which the order appealed from shall have been made, as governed by the Oklahoma Civil Appeals Rule 1.76(c) Part III. Transok Pipe Line Co. v. Darks, 515 P.2d 218 (Okla. 1973).

25. See note 8, *supra*, and accompanying text.

26. 396 So. 2d at 534.

27. LA. R.S. 30:12 (1950).

CONVEYANCING AND PRESCRIPTION

A. Prescription of Lignite Rights

The Louisiana Supreme Court has rendered a significant decision regarding the right to develop lignite in *Continental Group v. Allison*.[28] In its initial opinion, the court affirmed the holding of the Second Circuit Court of Appeal that a reservation of "all minerals" in a 1956 conveyance, under the facts of that case, included lignite rights even though strip mining of the land would prevent the use of the land for the purpose for which it was purchased. On rehearing the court reversed the second circuit and its earlier opinion on another ground. It held that even with the reservation of "all minerals," the right to develop the lignite had prescribed even though prescription as to oil and gas may have been interrupted by operations. In its first opinion, the court had followed the approach of the second circuit in applying article 40 of the Mineral Code to the issue of prescription of rights in the period since 1956.[29] Article 40 provides basically that an interruption of prescription as to one mineral effects an interruption as to all minerals.[30] The opinion on rehearing held that this article should not be applied to rights vested prior to the effective date of the Mineral Code, January 1, 1975. In the words of Justice Blanche, "prior jurisprudence concerning the preservation of servitudes by use provides us with the simple proposition that if you don't use it, you lose it, and if you don't use it well enough you lose it."[31]

Concern has been expressed by some members of the bar as to the full impact of the opinion of the court on rehearing. After the decision can it be claimed that a servitude for oil and gas as to which prescription was interrupted by production or operations at a shallow depth has terminated as to oil and gas at deeper depths when ten years of nonuse accrued as to the deeper depths before January 1, 1975? Can it be said that production of gas did not interrupt prescription as to oil in the pre-Mineral Code period? This writer does not believe that the opinion can be read so expansively. The court looked to the great difference in the type of operations for lignite and oil and gas and the extent of use of the land surface in strip-mining. A servitude for oil and gas is used when one produces or seeks to produce oil or gas. The techniques are the same or similar for oil and gas regardless of the depth. Drilling in good faith

28. 404 So. 2d 428 (1981).
29. *See* Continental Group v. Allison, 379 So. 2d 1117 (La. App. 2d Cir. 1980).
30. LA. MIN. CODE: LA. R.S. 31:40 (1974).
31. 404 So. 2d at 437.

to produce, or production of, oil or gas, at any depth would evidence an intent to continue those rights.

B. Prescription of Servitude on Partitioned Tract

Prescription of a mineral servitude was at issue in *Wall v. Leger*.[32] The case brings out an important principle that has been incorporated in the Mineral Code but is sometimes misunderstood regarding confusion. The case involved a tract of land (hereinafter called the Leger tract) that had resulted from partition of the parent tract in 1941. The parent tract was under lease when the 1941 partition took place, and when the partition was effected the owners created a single servitude in favor of them all on the whole of the parent tract. Thus, owners of the smaller individual tracts of land were also owners of an undivided interest in the servitude burdening all of the tracts established by the partition. One of these smaller tracts was the Leger tract. Production on land of the parent tract continued to December 14, 1964. On July 19, 1968, the owners of the Leger tract conveyed the land to Leger with a reservation of mineral rights. In a concursus proceeding provoked by a lessee producing from a voluntary unit which included a portion of the Leger tract, the foregoing facts gave rise to several issues.

First, the existence of the 1939 leases on the parent tract did not prevent the creation of a servitude on the tract. This was clearly correct. Second, the parties to the partition could partition the parent tract while establishing a single servitude covering the whole. Under the jurisprudence[33] and the Mineral Code,[34] the parties could clearly accomplish this through the appropriate steps. The conceptual problem is that recognition of this latter point prevents confusion from occuring; *i.e.*, it is possible to own both the land and an interest in a servitude burdening the land. For example, if A and B own Blackacre, a 100 acre tract, in indivision, and they partition it in 1970 with the west 50 acres to A and the east 50 acres to B with a reservation of a single servitude in favor of both covering all of Blackacre, A will own his own tract subject to a servitude in himself and B. To speak of A as owning the land and minerals on his tract subject to a servitude for one-half the minerals in B would be incorrect. Thus if A were to convey his tract in 1978 to C subject to a reservation of all minerals, and by 1980 there had been no drilling or production on or attributable to Blackacre, the servitude would

32. 402 So. 2d at 704 (La. App. 1st Cir. 1981).
33. Whitehall Oil Co. v. Heard, 197 So. 2d 672 (La. App. 3d Cir. 1967).
34. LA. MIN. CODE: LA. R.S. 31:67 (1974).

expire on Blackacre and the mineral rights would belong to C, the current owner. Since A's tract was subject to a servitude in 1978, even though A was one of the owners of that servitude, A could not create a new servitude and could not deal in the expectancy of the termination of the outstanding servitude (or the reversionary right). This last point was the holding of *Wall v. Leger*. Since a servitude existed already on the Leger tract when Leger's vendor attempted to reserve the mineral rights in 1968, the 1968 reservation was of no effect. Prescription was measured from the last production on the servitude on the parent tract, December 14, 1964, to December 14, 1974.

C. *Executive Right: Bonus and Delay Rental*

In *Andrus v. Kahoa*,[35] plaintiffs were sellers of land who reserved one-half the minerals in the sale, giving, however, the purchasers the exclusive right to lease all of the rights to the land. When the purchasers' assignee leased the property to an oil company, the assignee gave none of the bonus or delay rental to the plaintiffs. Plaintiffs brought suit for their claimed share of bonus and delay rental. The trial court dismissed the claim and the First Circuit Court of Appeal affirmed.

Because the conveyance creating plaintiffs' rights was made prior to the effective date of the Mineral Code, the first circuit had to look to the pre-Code jurisprudence for its determination. It was the opinion of the court that the pre-Code jurisprudence[36] and article 105[37] of the Mineral Code were to the same effect: Unless restricted by contract, the executive right includes the right to retain bonuses and rentals.

D. *Partition*

The effect of a partition by licitation upon a fractional mineral servitude owned by a person not made a party to the partition sale was an issue in *Harmon v. Whitten*.[38] The facts of the case are somewhat complicated and will be simplified by the use of letters rather than the names of the parties. In the case, A acquired an undivided 1/6 interest in land including minerals. One month later he filed suit for partition. Three months later, while his partition suit was pending, A conveyed a 1/6 mineral interest in the land to B, his father. Five months after this, judgment was rendered in the parti-

35. 400 So. 2d 1194 (La. App. 1st Cir. 1981).

36. Ledoux v. Voorhies, 222 La. 200, 62 So. 2d 273 (1952); Mt. Forest Fur Farms of America v. Cockrell, 179 La. 795, 155 So. 228 (1934).

37. LA. MIN. CODE: LA. R.S. 31:105 (1974).

38. 390 So. 2d 962 (La. App. 2d Cir. 1980).

tion suit, and a few months later the land was sold to X. The day following, X conveyed 1/3 of the land and minerals to A. One week later B conveyed 1/8 royalty to C out of the 1/6 mineral interest he thought he had. Five weeks after this, on September 16, 1976, A again executed a deed to B for a 1/6 interest in the minerals, specifying that the earlier conveyance had been extinguished by the partition sale. Subsequently X conveyed 1/2 of his rights to Y and three weeks later A conveyed to X and Y his 1/3 interest in the land but reserving all mineral rights he owned. Nine months later A again conveyed a 1/6 mineral interest to B. Based on the foregoing transactions, the unit operator paid a portion of the proceeds to A (1/6). X and Y filed suit contending they owned 2/3 of the mineral interest and B owned 1/3. Defendants contended that X and Y had 1/2, that B was conveyed 1/3 and A owned 1/6. The trial court held for plaintiffs.

The Second Circuit Court of Appeal in a 2 to 1 opinion affirmed the trial court, holding that the September 16, 1976, instrument between A and B showed agreement by them that B's servitude was extinguished in fact by the partition sale. This instrument was to convey the same 1/6 mineral interest. Whether or not article 179 of the Mineral Code making the mineral owner a necessary party to a partition suit is applicable to a mineral right created during the pendency of the partition suit, the subsequent instrument executed here would be a renunciation of the servitude and would extinguish the right if it were not already extinguished in the partition sale. Thus the renunciation and reconveyance of a 1/6 together with a subsequent conveyance of 1/6 by A to B transferred all that A had a right to convey, and A no longer had any interest.

E. Royalty Payment

The appellate courts have decided several significant cases in the past year involving nonpayment or late payment of royalty owed under oil and gas leases. Two of these were decided under pre-Mineral Code standards because they arose prior to the effective date of the Mineral Code. But they are of importance nonetheless because a court may still need to inquire into the reasonableness of a delay in payment despite the changes of the law brought about by articles 137 and 138 of the Mineral Code.[39] That is, prior to the Mineral Code lessors could seek lease cancellation for nonpayment of royalty without first putting the lessee in default on the theory that an unjustified delay in making payment was an active breach of

39. LA. MIN. CODE: LA. R.S. 31:137-138 (1974); *see* LA. MIN. CODE: LA. R.S. 31:135, comment (1974).

the lease. The Mineral Code changed this right by requiring notice and demand by the lessor, with the lessee having thirty days in which to respond. The lessee who fails to pay within the thirty days may be liable for additional damages and attorney's fees, and the lease possibly may be dissolved. Hence, a court will have to inquire into the reasonableness of delay in giving its remedy when the lessee has failed to pay the sums demanded within the thirty day period.

In *Bayou Bouillion Corporation v. Atlantic Richfield Company*,[40] lessors filed suit against their lessee seeking cancellation of their leases for improper payment of royalty. The lessee had promptly paid the amount underpaid after demand by the lessors, stating that mistakes in payment had not been discovered because of difficulties in applying federal oil price controls. The lessors contended the price controls did not apply to royalty owners and that the underpayment was an active breach of the lease. The trial court held against the lessors on all points and applied the Mineral Code with respect to the necessity of putting the lessee in default. The Court of Appeal for the First Circuit affirmed the decision but said it was error to apply the Mineral Code to events prior to January 1, 1975. Instead, the court said the Mineral Code was continuing the jurisprudential trend of avoiding lease cancellation by finding the nonpayment of royalties justifiable. Here, the court observed, under the "massive changes occuring in the oil industry," the defendant was justified in delaying a portion of its royalty payments, and thus there was no active breach of the lease.[41]

Likewise no active breach was found in *Nunez v. Superior Oil Company*,[42] a case also arising prior to the adoption of the Mineral Code. In this case the reason for the delay in payment was confusion arising from the death of the royalty owner and substitution of his son of the same name, first as executor then as heir. The son would not execute a division order showing his interest ownership. After several earlier stages of the litigation, not pertinent here, the trial court gave a directed verdict in favor of the lessee. The Fifth Circuit Court of Appeal affirmed, holding that "a clerical error in the context of otherwise reasonable conduct makes the delay not unjustifiable." Nothing in the record showed that nonpayment was an effort to coerce plaintiff into signing a division order, and the trial judge was justified in directing a verdict for defendant.

Two other recent cases involving claims of underpayment of

40. 385 So. 2d 834 (La. App. 1st Cir. 1980).
41. *Id.* at 840.
42. 644 F.2d 534 (5th Cir. 1981).

royalty required the courts to characterize the nature of the royalty to determine the prescriptive period applicable to such claims. Plaintiffs in both cases sought payment for the ten years prior to bringing suit.

In *Hankamer v. Texaco, Inc.*,[43] the trial court sustained an exception of prescription for claims accruing prior to three years before filing, and this was affirmed by the Court of Appeal for the First Circuit. This result followed from the court's finding that the royalty was created in the sublease of a lease from the state. As a payment by a sub-lessee to its sub-lessor, the royalty was rent[44] and thus the three year prescriptive period of article 3538 of the Civil Code was applicable.[45]

In contrast to *Hankamer* is the case of *Augurs v. Amoco Production Company*,[46] where the royalty in question was conveyed in a compromise for avoiding cancellation of the lease, rather than being created in granting the lease. This "overriding royalty" was not, in the court's opinion, "rental royalty," so three years' prescription was not applicable; rather, the proper prescriptive period was ten years. The court expressed concern that the same result might not be reached under the Mineral Code.[47]

Although this writer sees nothing incorrect in the conclusions of the two courts involving the prescription issue, it is necessary to ask whether treating the lessor's royalty claims less favorably than the claims of owners of other royalty interests carved out of a lease was actually justified. Consider for example the claim of A, the grantor of a lease to X Company for a 1/8 royalty. The next day, X conveys a 1/8 royalty on Blackacre out of its 7/8 working interest to B, a geologist, in exchange for geological data held by B with respect to Blackacre. Ten years later both A and B discover they have been paid royalty improperly. A can only claim underpayment for the preceding three years while B can claim it for up to ten years. A sound reason for the distinction between the two may exist, but it escapes this writer.

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43. 387 So. 2d 1251 (La. App. 1st Cir. 1980).

44. *See* LA. MIN. CODE: LA. R.S. 31:123 & comment thereto (1974).

45. LA. CIV. CODE 3538.

46. 465 F. Supp. 154 (W.D. La. 1979).

47. LA. MIN. CODE: LA. R.S. 31:123 (1974) provides as follows:

> Payments to the lessor for the maintenance of a mineral lease without drilling or mining operations or production or for the maintenance of a lease during the presence on the lease or any land unitized therewith of a well capable of production in paying quantities, and royalities paid to the lessor on production are rent. A mineral lessee is obligated to make timely payment of rent according to the terms of the contract or the custom of the mining industry in question if the contract is silent.