Partition of Land and Mineral Rights

Andrew L. Gates III
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Partition is the division or distribution into distinct physical shares of that which previously has been held in common.¹ The need for partition arises from the requirement that there be unanimous consent of co-owners in managing commonly held property.² The action of partition is based upon the principle that no one can be compelled to hold property with another,³ and it is available to anyone who does hold property in common with another.⁴

The purpose of partition is to terminate ownership of undivided fractional interests in the whole and to create perfect titles in individual physical portions of the former whole.⁵ If all of the co-owners agree to the terms of the partition, all of the co-owners are represented in the partition, and none of the co-owners is a minor or an interdict, the partition may be voluntary and made in such form and by such act as the co-owners agree upon.⁶ If any of the co-owners is a minor, an interdict, or an unrepresented absentee or if there is not unanimous agreement on the terms of the partition, judicial proceedings are available to effect the partition.⁷

The right to partition is not without some limitations. Co-owners may agree not to partition property owned in common for a certain

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¹ LA. CIV. CODE art. 1293; Succession of Ramp, 252 La. 660, 666, 212 So. 2d 419, 421 (1968). This is true whether property owned in indivision is partitioned in kind (with each former co-owner becoming the sole owner of a portion of the partitioned property) or by llicitation (resulting in the subsequent division or distribution of the proceeds of the public sale).


³ LA. CIV. CODE art. 1289. The right to partition against the United States, or any branch or agency thereof has been limited by LA. R.S. 9:1701 (1950).

⁴ LA. CIV. CODE art. 1308; Fabacher v. Fabacher, 214 La. 939, 946, 39 So. 2d 426, 428 (1949). Determining whether property is held in common usually will determine whether partition is available. See infra notes 69-86 and accompanying text.

⁵ See Succession of Ramp, 252 La. 660, 666, 212 So. 2d 419, 422 (1968).

⁶ LA. CIV. CODE arts. 1294, 1322. If the property to be partitioned is immovable, the agreement of partition should be in writing. LA. CIV. CODE art. 2275; Fox v. Succession of Broussard, 161 La. 949, 952, 109 So. 773, 774 (1926).

⁷ LA. CIV. CODE arts. 1294, 1323. If the partition is to be in kind, there is no necessity for a judicial partition. However, the legal representatives of minors and interdicts must obtain court authorization to act. See infra note 41 and accompanying text.
limited time, but a stipulation that there will never be a partition of property owned in indivision is null. A donor or testator can order that property given or bequeathed not be divided for a certain period of time or until the happening of a certain condition, but this term cannot exceed five years. Normally, there can be no such restriction on that portion of the property reserved by law to the forced heirs. One notable exception to this rule is that an ascendant may provide in his will that no partition will be made among his minor children or minor grandchildren inheriting from him during their minority or until one of the children or grandchildren comes of age and demands partition. Finally, there can be no partition when the use of the property owned in common is indispensable to the use or enjoyment of other property owned by the same co-owners, e.g., a co-owned entry which serves as a passage to several houses owned by the same co-owners.

If a partition is permanent and irrevocable, such as a judicial partition, it is said to be definitive. If a partition is not definitive, it is provisional.

VENUE

If a judicial proceeding is necessary, as a general rule, the proper venue is the parish where the property to be divided is situated, and if immovable property to be partitioned is situated in more than one parish, the action may be brought in any one of those parishes.
Since a partition of succession property, community property, or partnership property is ancillary to the succession, dissolution of the community, or dissolution of the partnership, respectively, these proceedings can offer alternative venue possibilities. For example, until such time as a judgment of possession is rendered, an action to partition the succession must be brought in the court in which the succession proceeding is pending. An action to partition the succession brought in the court in which the succession proceeding is pending is proper only as to those partitions which take place as part of the succession proceeding between co-heirs, and an action to partition property owned in indivision by the succession and another should be filed in a separate proceeding. Moreover, once a judgment of possession has been rendered, an action to partition the inherited property should be initiated in a separate action and not as part of the succession proceeding.

An action to partition community property may be brought either as an incident of the action to dissolve the community or as a separate action in the parish where the judgment dissolving the community was rendered, or if the parties own community immovable property, the action may be brought in any parish where any of said immovable property is situated. Similarly, an action to partition partnership prop-

18. LA. CODE CIV. P. arts. 81, 3461.
19. LA. CODE CIV. P. arts. 1292-1293; LA. CODE CIV. P. art. 81, comments (d), (e); Fabacher v. Fabacher, 214 La. 940, 945, 39 So. 2d 426, 428 (1949); Medicis v. Medicis, 155 La. 171, 174, 99 So. 27, 28 (1924). As a practical matter, few partitions will be effected in a succession proceeding because article 3462 of the Code of Civil Procedure delays the right to petition for partition until such time as the heirs and legatees can be sent into possession. Once heirs and legatees can be placed in possession, a judgment of possession usually is rendered; then they will be co-owners rather than coheirs and should file a separate action for partition. It has been suggested that article 3462 should be amended to allow an heir who wishes to accept the succession to partition immediately so as to avoid an administration as long as he is able to furnish security for his share of the debts. Pascal, Heirs, Creditors and the Fisc Under Louisiana Legislation, 23 LOY. L. REV. 313 (1977).
20. LA. CODE CIV. P. art. 82. Prior to the enactment of article 82, LA. R.S. 13:4991 (Supp. 1954) (repealed 1961) provided that jurisdiction over the judicial partition of a preexisting community of acquets and gains vested exclusively in the district court of Louisiana having jurisdiction of the last matrimonial domicile and, in the absence of such matrimonial domicile, jurisdiction vested exclusively in the court having jurisdiction over the immovable property belonging to said community or the court having jurisdiction over the principal immovable property; in the event such property was located in more than one parish or in the absence of any immovables within Louisiana, jurisdiction vested in the court having jurisdiction of the principal movable effects within the state. In Steere v. Marston, 228 La. 94, 81 So. 2d 822 (1955), the Louisiana Supreme Court refused to apply this statute retroactively. Prior to 1964, there was no special statute governing venue of suits to partition community property, but in
Property may be brought either as an incident of the action to dissolve the partnership or as a separate action in the court which rendered the judgment dissolving the partnership, or if the partnership owns immovable property, the action may be brought in the parish where any of the immovable property is situated.\textsuperscript{21}

\textbf{PROCEDURE}

Although a partition proceeding is an ordinary proceeding,\textsuperscript{22} it takes preference over other ordinary proceedings.\textsuperscript{23} A judicial partition is commenced by filing a petition requesting same in a court of competent jurisdiction.\textsuperscript{24} Former Civil Code article 1324\textsuperscript{25} provided that every judicial partition had to be preceded by an inventory according to the form prescribed for public inventories; however, it was held that when partition was ordered by licitation,\textsuperscript{26} i.e., by public sale of the property and division of the proceeds, there was no need for an inventory because the property could be sold for whatever it would bring.\textsuperscript{27} The Code of Civil Procedure now provides that a court "may order" an inventory to be made of all property sought to be partitioned.\textsuperscript{28}

Demoruelle v. Allen, 218 La. 603, 50 So. 2d 208 (1950), it was implied that venue was proper before the tribunal having jurisdiction of the divorce or dissolution proceedings as well as before a court of competent jurisdiction where the property to be divided was situated.

\textsuperscript{21} LA. CODE CIV. P. art. 83.
\textsuperscript{22} LA. CODE CIV. P. art. 4603.
\textsuperscript{23} LA. CODE CIV. P. art. 4605. Although a judicial partition is not a summary proceeding, summary proceedings may be used for the homologation of a judicial partition. LA. CODE CIV. P. art. 2592(4).
\textsuperscript{24} LA. CODE CIV. P. art. 4603.
\textsuperscript{26} For a detailed discussion and analysis of the term and concept of "licitation," see Comment, \textit{Licitation}, 8 TUL. L. REV. 574 (1934). In this article, "licitation" is defined as "the offering at auction of an object belonging in indivision to several persons to be adjudicated to the highest and last bidder, in order to divide the price among the coowners, in proportion to the share of each in the thing." \textit{Id.} at 575 n.6. The licitation is said to be declarative of title when the adjudication at auction is to a co-owner and is said to be translative of title when the adjudication is to a stranger.
\textsuperscript{27} Green v. Small, 227 La. 401, 408, 79 So. 2d 497, 499 (1955); Barbarich v. Meyer, 154 La. 325, 327, 97 So. 459, 460 (1923).
\textsuperscript{28} LA. CODE CIV. P. art. 4604. When an inventory is ordered, the inventory is made in accordance with articles 3131-3137, which provide that a notary in each parish in which the property to be partitioned is situated must be appointed to take the inventory of such property in that parish. The appointed notary takes the inventory in the presence of at least two competent witnesses, assisted by two competent appraisers appointed and sworn by the notary. These witnesses and appraisers need
The court is directed to effect the partition in the manner most advantageous and convenient to the parties,\textsuperscript{29} but unless the property to be partitioned is indivisible by its nature or cannot conveniently be divided, the court must order the partition to be made in kind.\textsuperscript{30} There are exceptions to this general rule, however, and when one or more of the co-owners is an absentee, the partition may be effected by licitation whether the property is divisible in kind or not.\textsuperscript{31} Naturally, if the absentee co-owner timely appears in the proceeding and requests partition in kind, the court is still obligated to render a judgment ordering the partition to be made in kind, assuming the property sought to be partitioned is divisible in kind.\textsuperscript{32}

When a partition by licitation has been ordered, the sale is held at a public auction after proper publication of notice of the sale, but the co-owners may agree upon a nonjudicial partition at any time prior to the sale.\textsuperscript{33} A co-owner may purchase any property sold to effect

\begin{footnotes}
\item[29.] LA. CODE CIV. P. art. 4605; LA. CIV. CODE art. 1336.
\item[30.] LA. CIV. CODE art. 1337; LA. CODE CIV. P. art. 4606; Babineaux v. Babineaux, 237 La. 806, 811, 112 So. 2d 620, 621 (1959). Civil Code article 1340 states that "a thing cannot be conveniently divided when a diminution of its value, or loss or inconvenience of one of the owners, would be the consequence of dividing it." There is diminution of value when the total value of the individual divided shares is less than the value of the property as a whole. Babineaux, 237 La. at 813 n.4, 112 So. 2d at 622 n.4. This presumption in favor of partition in kind can be reversed if a mineral right granted by fewer than all of the co-owners burdens the property. See infra notes 120-125 and accompanying text.
\item[31.] LA. CODE CIV. P. art. 4621.
\item[32.] LA. CODE CIV. P. art. 4630.
\item[33.] LA. CIV. CODE arts. 1339, 1346; LA. CODE CIV. P. arts. 2331-2343, 4607.
\end{footnotes}
a partition, whether the sale is by licitation or by private sale. It is not necessary to serve any party with notice of seizure prior to the sale of property to be partitioned at public auction. Furthermore, a judgment ordering a partition by licitation and directing that property be sold at public sale is a final judgment that cannot be collaterally attacked.

If a partition by licitation is desired when one of the co-owners is an absentee, the petition must be supported by an affidavit that the allegations contained therein are true and notice of the institution of the proceeding must be published at least once in the parish where the proceeding is pending. Once the public sale has been consummated pursuant to judgment, the absentee, his succession representative, and his heirs are precluded from asserting any right, title, or interest in the property. The undivided interest in property owned by a minor or an interdict also may be sold to effect a partition, and said interest may be purchased by a co-owner. Tutors of minors and curators of interdicts also may obtain court authorization to agree to a partition in kind without the drawing of lots, thereby eliminating the need for a judicial partition.

34. LA. CODE Civ. P. arts. 4614, 4641.
37. LA. CODE Civ. P. art. 4622.
38. LA. CODE Civ. P. arts. 4623-4624; LA. R.S. 43:203 (1950 & Supp. 1961 & 1972). The absentee's share of the proceeds of the sale are deposited in the registry of the court for the account of the absentee, and this deposit may be withdrawn only on order of the court. There are deducted from the absentee's share of the proceeds his portion of the court costs and expenses of the sale, the fee awarded by the court to the attorney appointed to represent him, and any amount required by the court to be paid to a co-owner as reimbursement for payment of taxes or expenses. LA. CODE Civ. P. arts. 4625-4629.
39. LA. CODE Civ. P. art. 4627. Where real property is partitioned in any manner whatsoever, any co-owner not a party thereto is not affected by the partition and his interest remains the same as if the property had not been partitioned. Nevertheless, the partition shall be valid as to the parties thereto, their heirs, and their assigns. LA. R.S. 13:4985-4990 (Supp. 1952).
40. LA. CODE Civ. P. art. 4641.
41. LA. CODE Civ. P. arts. 4642-4643. The tutor of a minor or the curator of an interdict must obtain court authorization to sell or exchange any interest in the property to be partitioned. LA. CODE Civ. P. arts. 4271, 4301-4304, 4321-4323, 4341-4342, 4554. If the interest of an incompetent conflicts with that of his legal representative, the court is authorized to appoint an attorney to represent the incompetent in the partition. A tutor or curator and an undertutor or undercurator may be appointed.
Partition of Community Property

Partition of community property and settlement of claims arising from matrimonial regimes are now provided for in Louisiana Revised Statutes 9:2801, enacted by Act 439 of 1982. This new statute allows either spouse to institute a proceeding in which each party files a sworn detailed descriptive list of all community property indicating the fair market value and location of each asset and all community liabilities. Each party then either traverses or concurs in the inclusion or exclusion of each asset and liability and the valuations listed in the detailed descriptive list of the other party. The trial of the traverses may be by summary or by ordinary procedure to determine the community assets and liabilities, but the valuation of assets is to be determined at the trial on the merits. In its discretion, the court may determine all issues at one hearing and may appoint experts to assist in the partition of community property.

The court must divide the community assets and liabilities so that each spouse receives property of an equal net value by allocating or assigning to the respective spouses all of the community assets and liabilities. The allocation of a liability to a spouse obligates that spouse to extinguish the liability, but this allocation does not affect the rights of creditors. In the event that the allocation of assets and liabilities results in an unequal net distribution, the court shall order the payment of a sum of money to equalize the distribution, and the court may also order the execution of notes, mortgages, or other documents as it deems necessary. In the event that the allocation of an asset would be inequitable to one of the parties, the court may order the parties to draw lots for the asset or may order the private sales of the asset on such terms and conditions as the court deems proper. Only in the event that an asset cannot be allocated to a party, assigned by the drawing of lots, or sold at private sale, shall the court order a partition thereof by licitation. In such event, the court must expressly state the reasons why the asset cannot be allocated, assigned by the drawing of lots, or sold at private sale.

Partitions By Parents Among Their Descendants

Fathers, mothers, and other ascendants may partition their property among their children and descendants either by designating the amount of the portions which they assign to each or by designating the property that is to compose each's respective share. These par-
tions may be made by a donation inter vivos, having only present property for its object, or by testament. If all of the property of the ascendant on the day of his death has not been included in the partition, the excluded property is divided according to law. A partition made by testament or donation inter vivos may be set aside when the advantage to one of the descendants exceeds the disposable portion, but an attempt to rescind the partition may be circumvented by offering to the complaining heir the supplement of the portion to which he has a right. Although the rescission of the partition does not nullify any donation made as an advantage, the partition is null and void in its entirety if any of the children living at the time of the ascendant’s death or any of the descendants of predeceased children are omitted therefrom.

**PRESCRIPTION**

In a partition, the co-owners warrant to each other the property that each acquires against disturbance and eviction from a cause arising before the partition. The action of warranty prescribes in five years, but this five-year period does not commence until the day of the eviction.

An action to rescind a partition is prescribed by five years, but this prescription only commences against minors after they reach their majority. Although it appears that collation is an incident to the partition of a succession, it has been held that the five-year prescriptive period provided for with respect to the rescission of partitions does not apply to collation. The ten-year prescription provided for in Civil Code article 3544 applies to a demand for collation, and this prescription begins to run from the date of death of the person to whose succession collation is to be made.

Prescription does not run against the action of partition as long as the property remains in common, and as a general rule, co-owners

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43. LA. CIV. CODE arts. 1725-1726.
44. LA. CIV. CODE art. 1728.
45. LA. CIV. CODE arts. 1730-1732.
46. LA. CIV. CODE arts. 1729, 1733.
47. LA. CIV. CODE art. 1384.
48. LA. CIV. CODE art. 1396.
51. *Id.* “Collation” is the return of property to the succession in order to assure equal distribution of an ascendant’s property among his direct descendants. LA. CIV. CODE arts. 1251-1253.
52. LA. CIV. CODE art. 1304; Sibley v. Pierson, 125 La. 478, 51 So. 502 (1910).
cannot acquire title by prescription against each other. This is because the possession of one co-owner is presumed to be for the benefit of all co-owners. On the other hand, if one of the co-owners can prove continuous, uninterrupted separate possession for thirty years, he can successfully oppose an action for partition. To rebut the presumption of precarious possession and obtain the advantage of acquisitive prescription, a co-owner must actually possess the property in an open and hostile manner and declare his intention to possess adversely to the other co-owners. It has been held that the filing of record of an act of partition can furnish the basis for notice of adverse possession. Presumably, adverse possession by a co-owner must be of the same quality, extent, and duration as the possession required of a bad faith adverse possessor without title, rather than the possession required of a good faith purchaser by deed transitive of title, whereby possession of part of the property constitutes possession of the whole.

When a co-owner acquires perfect ownership in a particular tract by an act of partition, the act is not transitive of title, but rather is declarative of title, and the instrument cannot support a title based on ten-year acquisitive prescription. However, if one co-owner purportedly conveys all of the property owned in indivision to a good faith purchaser, said purchaser may acquire title to the entirety of the property in ten years by acquisitive prescription.

MORTGAGES

In a judicial partition where the property is divided in kind, mort-
gages, liens, and privileges existing against only one of the co-owners attach to the property allotted to him and cease to encumber the property allotted to the remaining co-owners.\(^{59}\) If the owner whose share is mortgaged is entitled to a payment of money because his share is of less value than the remaining shares, the owing parties must retain said sums, which are secured by a mortgage on the owing parties' respective shares and are subject to the demands of the mortgagees of the owing parties' former co-owner.\(^{60}\) In a judicial partition by licitation, if the mortgagees and holders of liens and privileges are made parties to the partition, the mortgages, liens, and privileges are transferred to the proceeds of the sale.\(^{61}\)

In *Sutton v. Sutton*,\(^{62}\) a mortgage remained effective against former community property purchased at a public partition sale where the mortgagee was not made a party to the partition proceeding. Similarly, in *Beene v. Wilbur*,\(^{63}\) a mortgage holder was not made a party to the partition proceeding, and therefore the property passed to the purchaser at the sale subject to the mortgage. In *Beene*, the mortgage was enforceable by foreclosure under executory process, and a subsequent sheriff's sale to enforce the mortgage was held valid. Unless the mortgagee is actually made a party to the suit, the mortgage will not be extinguished. This is true even when the mortgagee has actual notice of the partition proceeding, since a mortgagee is not required to intervene in the proceeding nor obligated to bid at the public sale to protect his interest.\(^{64}\)

Louisiana Revised Statutes 9:5031\(^{65}\) now provides that no lien or privilege shall be cancelled, removed from the public records, or affected by any public or private sale of property in a partition proceeding. Similarly, Louisiana Revised Statutes 6:833\(^{66}\) provides that no mortgage in favor of an association\(^{67}\) can be cancelled, removed

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60. LA. CIV. CODE art. 1338.
61. LA. CIV. CODE art. 1338; Vincent v. Vincent, 168 La. 63, 121 So. 303 (1929); Prichard v. McCranie, 160 La. 605, 107 So. 461 (1926); Succession of Williams, 138 La. 383, 70 So. 334 (1915).
62. 320 So. 2d 597 (La. App. 4th Cir. 1975).
63. 388 So. 2d 435 (La. App. 2d Cir.), writ denied, 393 So. 2d 738 (La. 1980).
64. 388 So. 2d at 437.
from the public records, or affected by a sale in a partition proceeding unless prior to the petition for sale, at least ten days' written notice of the sale is given by certified or registered mail to the association in whose favor the mortgage was executed. 68

HOLDING IN COMMON

The Civil Code clearly provides that no one can be compelled to hold property in common with another. 69 However, a demand for partition may be thwarted by a determination that property is not in fact "held in common," and it should be noted that the mere ownership of some right or rights in property in which another owns some right or rights is not synonymous with holding in common. An owner of property may have one or more of the elements of ownership, i.e., the right to use the property (usus), to enjoy the fruits of the property (fructus), and to dispose of the property (abusus) within the limits and under the conditions established by law. 70 Thus, perfect, or full, ownership consists of the right to use, the right to enjoy, and the right to dispose of the property. 71 The usufructuary is entitled to the fruits of the property 72 as well as the use of the property, 73 but he may not dispose of the property. The naked owner may dispose of the naked ownership, and he also may alienate or encumber the property subject to the usufruct. 74

Usufruct is susceptible to division, and it may be partitioned among the usufructuaries. 75 Similarly, the naked ownership may be partitioned among the naked owners subject to the rights of the usufructuary, 76 and perfect owners may demand partition among themselves. 77

In Smith v. Nelson, 78 a naked owner demanded partition by liciation against the usufructuary, but the court concluded that there was

68. This notice may be waived by the association if the waiver is in writing and is filed with the court authorizing or ordering the sale. La R.S. 6:833(I) (Supp. 1970).
73. La. Civ. Code arts. 539, 566.
78. 121 La. 170, 46 So. 200 (1908).
no basis for the action of partition because there was no property "held in common"—the title had been dismembered and each part was a distinct thing held by a different owner. It is clear, therefore, that naked owners cannot force a partition against usufructuaries nor can usufructuaries compel a partition against naked owners.

In *Devillier v. Devillier*, the third circuit ruled that some co-owners could not burden their interests with a usufruct in favor of a third person which would thereby extinguish the rights of another co-owner to obtain a partition by licitation. Plaintiff was one of four children who inherited the separate property of their deceased mother in perfect ownership. The three children other than plaintiff granted a usufruct in favor of their father burdening their undivided three-fourths interest, and plaintiff sought and was granted partition by licitation against her father and three siblings. While there is no dispute that article 543 of the Civil Code permits partition in kind in a situation such as this to enable a co-owner of an undivided interest to acquire perfect ownership in a definite part of the property in question, it seems equally clear that article 543 prohibits partition by licitation in such a case.

Civil Code article 543 was partly misinterpreted in *Devillier* when the court declared that the policy statement embodied in the article is to the effect that "there can be no partition by licitation if 'there is a person who is both a usufructuary and owner.'" Finding no person who was both an owner and a usufructuary, the court allowed partition by licitation. The court interpreted article 543 as forbidding partition by licitation only if a person was both a usufructuary and owner, but the language of the article precludes partition by licitation even though there is such a person. Thus, article 543, when read as a whole, permits partition in kind, free of any usufruct, to enable

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79. 121 La. at 174, 46 So. at 201.
81. Louisiana Civil Code article 543 provides as follows:
   A coowner whether or not he is also a usufructuary of an undivided part of a thing may demand its partition in kind to the extent necessary to enable him to obtain the perfect ownership of a determined part. Partition by licitation is not allowed even though there is a person who is both a usufructuary and an owner. (Emphasis added.) See also Humble v. John W. Nugier Real Estate & Ins. Agency, 380 So. 2d 206 (La. App. 3d Cir.), cert. denied, 381 So. 2d 1235 (La. 1980) (granting partition in kind to owner of undivided one-half interest in suit against the naked owner and the usufructuary of the other one-half interest, and affirming the validity of *Devillier*).
82. 371 So. 2d at 1236 (quoting LA. CIV. CODE art. 543) (emphasis added).
a co-owner to obtain perfect ownership of a particular part of the property held in common, but partition by licitation is not allowed to accomplish this notwithstanding there is a person who is both a usufructuary and an owner. The court in Devillier ignored the literal wording of article 543 and allowed partition by licitation of property subject to a usufruct.83

In Pasternack v. Samuels,84 the Louisiana Supreme Court was presented with the same issue presented in Devillier, i.e., whether the owner of an undivided interest in full ownership of property subject to an outstanding usufruct may demand partition by licitation. Relying on the “clear wording” of article 543, the court decided that partition by licitation was not allowed and suggested that any requests for changes in the article be addressed to the legislature.85 While the wording of article 543 is clear, it has been suggested that the policy considerations behind the article indicate that its wording is clearly wrong.86 Meanwhile, there is no sound basis for distinguishing Devillier from Pasternack.

PREDIAL SERVITUDES

A predial servitude on land owned in indivision must be established with the consent of all of the co-owners. However, if a co-owner purports to establish a predial servitude on the entire estate, the act is not null, but its execution is suspended until the consent of all of the co-owners is obtained.87

If a predial servitude is granted by all of the co-owners, it will burden the land and will not be affected by a subsequent partition of the servient estate. If the servient estate is sold pursuant to partition by licitation, the purchaser acquires the property subject to the preexisting servitude. If partition is made in kind, each divided tract may be burdened by the preexisting servitude in accordance with the rules governing division of the servient estate.88

83. Pasternack v. Samuels, 415 So. 2d 211, 213 n.4 (La. 1982).
84. 415 So. 2d 211 (La. 1982).
85. Id. at 213-14.
87. LA. CIV. CODE art. 714; Greater Baton Rouge Port Comm’n v. Morley, 232 La. 87, 93 So. 2d 912 (1957).
Any co-owner who has consented to the establishment of a predial servitude may not prevent its exercise because of another co-owner’s failure to consent. Moreover, if a co-owner consents to the establishment of a servitude and later becomes the sole owner of the servient estate by terminating the indivision, the servitude will continue to burden the property.\(^9\)

When a co-owner consents to the establishment of a predial servitude on his undivided part of the property only, the exercise of the servitude is suspended until the state of indivision is terminated.\(^9\)

If partition is made in kind, the servitude established will burden only that property allotted to the co-owner establishing the servitude, but if the partition is by licitation, the servitude will burden the entire estate if the co-owner establishing the servitude acquires the property and the right to the servitude will be extinguished if the entire estate is conveyed to any person other than the one granting the right.\(^9\)

In the event that the conditional right is terminated by a sale of the servient estate to one other than the granting co-owner, there is no longer an express provision obligating the granting co-owner to return the purchase price.\(^9\)

**MINERAL RIGHTS**

The Louisiana Mineral Code\(^9\) contains specific articles on co-ownership\(^9\) and partition.\(^9\) If these articles do not explicitly or impliedly provide for a particular situation, the pertinent articles of the Civil Code or the Code of Civil Procedure are applicable.\(^9\)

On the other hand, to the extent that the provisions of the Mineral Code

\(^89\). LA. CIV. CODE art. 715.

\(^90\). LA. CIV. CODE art. 716.

\(^91\). LA. CIV. CODE arts. 717, 718. If a co-owner attempts to create a predial servitude burdening the commonly held tract without the consent of his co-owners, the acquiring party receives only a conditional right which does not become absolute unless and until the grantor or his successor acquires ownership of the entire estate or a divided part of it at the termination of the indivision. See LA. CIV. CODE arts. 716 & 718, comments. The successor of the co-owner who has consented to the establishment of the servitude occupies the same position as his ancestor. LA. CIV. CODE art. 719.

\(^92\). Prior to the enactment of 1977 La. Acts, No. 154, § 1, articles 740 and 741 of the Louisiana Civil Code required the grantor to return the price which he had received for his consent to establish the predial servitude.


are in conflict with the provisions of the Civil Code or other laws, the articles of the Mineral Code prevail.\(^\text{97}\)

Although the ownership of land does not include the ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, such ownership does include the exclusive right to explore and develop property for the production of such minerals and the exclusive right to reduce such minerals to possession and ownership.\(^\text{98}\) A landowner may create basic mineral rights such as the mineral servitude, the mineral royalty, and the mineral lease, and these rights are alienable and heritable real rights.\(^\text{99}\) A mineral right is an incorporeal immovable, susceptible of ownership in indivision,\(^\text{100}\) and its situs is the parish or parishes in which the land burdened by the mineral right is located.\(^\text{101}\)

A co-owner of land may grant a mineral servitude, a mineral royalty, and a mineral lease affecting his undivided interest in the land, but the servitude owner and the mineral lessee may not exercise their rights without the consent of the other co-owners of the land.\(^\text{102}\) Although a servitude owner may not “exercise his right” and a lessee may not “exercise his rights” without the consent of the other co-owners of the land, the servitude owner and the lessee nevertheless should each be entitled to receive his proportionate part of production in the event of production attributable to the land burdened by the servitude or lease. For example, if a well were drilled in the

\(^{97}\) Id.

\(^{98}\) La. R.S. 31:6 (1974). Ownership of land does include ownership of minerals occurring naturally in a solid state, but until reduced to possession, such minerals are insusceptible of ownership apart from the land. La. R.S. 31:5 (1974). Minerals are reduced to possession when they are under physical control that permits delivery to another. La. R.S. 31:7 (1974).


\(^{100}\) La. R.S. 31:168 (1974).


\(^{102}\) La. R.S. 31:164-66 (1974). A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership. La. R.S. 31:21 (1974). A mineral lease is a contract whereby the lessee is granted the right to explore for and produce minerals. La. R.S. 31:114 (1974). A mineral royalty is the right to participate in production of minerals from land owned by another or from land subject to a mineral servitude owned by another. La. R.S. 31:80 (1974). Since a mineral royalty is a passive interest, it is not necessary for the royalty owner to obtain the consent of the co-owner of the party creating the mineral royalty in order to receive his proportionate part of production. La. R.S. 31:165 (1974).
vicinity of the land burdened by the servitude or lease and a compulsory unit\textsuperscript{103} was formed which included the land in question, the mineral servitude owner and the lessee would be entitled to receive their proportionate part of production from that well even without the consent of the remaining co-owners.\textsuperscript{104} This is particularly true since the co-owner of a mineral servitude may create a mineral royalty out of his interest in the servitude and the consent of the co-owner of the servitude is not necessary to entitle the royalty owner to receive his proportionate part of production.\textsuperscript{105} A co-owner of a mineral lease also may create nonoperating, dependent rights such as production payments, net profits interests, and overriding royalty interests or he may transfer all or part of his undivided interest, all without the consent of his co-owner.\textsuperscript{106}

The Mineral Code provides that co-owners of land constituting a continuous whole may partition the property and reserve a single mineral servitude in favor of one or more of them.\textsuperscript{107} In \textit{GMB Gas Corp. v. Cox},\textsuperscript{108} property was partitioned, but there was no partition made of the minerals underlying said property which remained owned in indivision. Some co-owners had granted a mineral lease prior to the partition, and the nonconsenting co-owner sought an injunction prohibiting operations and production by the mineral lessee. The second circuit ordered the issuance of the injunction and held that a co-owner of a mineral servitude may not conduct operations on lands subject to the servitude without the consent of the other co-owner.

\textsuperscript{103} \textit{LA. R.S. 31:213(5)} (1974).
\textsuperscript{104} The comment to article 165 of the Mineral Code states that since the creation of a mineral royalty does not confer an active use right in the same sense that a mineral servitude confers such a right, there is no reason to require the consent of co-owners to the participation by the owner of a mineral royalty in production. For the same reason, there is no reason to require the consent of co-owners to the participation by the owner of a mineral servitude or a mineral lessee in an interest in production. While this may seem obvious to most practitioners, a literal reading of the Mineral Code articles and the official comments could yield a different result. The comment further states that "actual participation in production without the consent of all co-owners does no violence to the basic rule requiring unanimous consent; for there to be production there will have had to be consent to the exercise of a servitude or the granting of a lease." The latter quoted language is not necessarily true when land has been included within the surface boundaries of a compulsory unit.
\textsuperscript{107} \textit{LA. R.S. 31:67} (1974); \textit{see also Wall v. Leger}, 402 So. 2d 704 (La. App. 1st Cir. 1981). There was some question whether this was possible prior to the enactment of the Mineral Code. \textit{See GMB Gas Corp. v. Cox}, 340 So. 2d 638 (La. App. 2d Cir. 1976); \textit{Whitehall Oil Co., Inc. v. Heard}, 197 So. 2d 672 (La. App. 3d Cir. 1967).
\textsuperscript{108} 340 So. 2d 638 (La. App. 2d Cir. 1976).
The court noted that the co-owners granting the mineral lease were not without a remedy since a partition of the mineral servitude was authorized by article 172 of the Mineral Code.\(^\text{109}\)

In the related case of \textit{Cox v. Sanders},\(^\text{110}\) the landowner sought a judgment cancelling all mineral servitudes affecting her property, based on the accrual of liberative prescription for ten years of nonuse. The landowner was also a co-owner of the mineral servitude which had been established by a partition agreement, but the landowner had refused to execute a mineral lease that had been executed by the other co-owner of the mineral servitude. The mineral lessee obtained production from the servitude tract, but the landowner contended that drilling operations and production did not interrupt prescription since she, a co-owner, was not a party to the lease and had rejected all benefits from it. The court noted that although the landowner, as co-owner of the mineral servitude, could enjoin operations by the lessee of her co-owner,\(^\text{111}\) any production obtained from the land burdened by the servitude would interrupt prescription for nonuse. The supreme court concluded that the controlling law was the pre-Mineral Code law between landowner and mineral right owner and not the codal provisions applicable to co-owners of mineral rights on which the second circuit had based its decision.\(^\text{112}\) The result should have been the same whether or not the Mineral Code applied, since articles 174 and 175 of the Mineral Code provide that even though a co-owner of a mineral servitude may not conduct operations on the property burdened by the servitude without the consent of the other

\(^{109}\) \textit{Id.} at 641. No evidence was presented in this case to indicate that the co-owner granting the mineral lease was acting to prevent waste or the extinction of the mineral servitude.

\(^{110}\) 421 So. 2d 869 (La. 1982).

\(^{111}\) The landowner in this action, in fact, had obtained an injunction against the lessee of the co-owner of the mineral servitude in \textit{GMB Gas Corp. v. Cox}. In 1977, the mineral lease was cancelled, and the co-owner of the mineral servitude that had executed the lease contended that production obtained prior to the injunction had interrupted prescription running against the mineral servitude.

\(^{112}\) 421 So. 2d at 871-72. The second circuit, in \textit{Cox v. Sanders}, 421 So. 2d 1257 (La. App. 2d Cir. 1982), concluded that drilling and production by the lessee without the consent of the landowner and co-owner of the mineral servitude was neither such use of the servitude nor such good faith operation as would interrupt running of the prescription of nonuse. The court based its conclusion on Mineral Code articles 29, 36, 41, 42 and 175. When the lease in question was executed, the mineral servitude had an additional six-year term of existence, and therefore the court felt that article 176 authorizing one co-owner to act to prevent waste or extinction of the servitude was not applicable. To prevent a “freeze out” by a combination landowner and servitude co-owner, the court suggested the remedy of partition of the mineral servitude pursuant to article 172 of the Mineral Code. 409 So. 2d at 1261.
co-owner, a use or possession of a mineral right inures to the benefit of all co-owners of the right. The comments following these articles state that the articles preserve the established law, and the precodal law clearly provided that if one co-owner of a mineral servitude acted without the consent of another co-owner, the operations would interrupt prescription as to all co-owners and the nonoperator could claim his share of production less his proportionate share of drilling and operating costs.\textsuperscript{113}

The Mineral Code specifically provides that mineral servitudes and mineral royalties are subject to partition\textsuperscript{114} and that co-owners of the lessee's interest in a mineral lease may compel partition of their rights.\textsuperscript{115} However, co-owners of overriding royalties, production payments, net profits interests, and other dependent rights created by fewer than all of the co-owners of the lessee's interest cannot be compelled to partition their rights.\textsuperscript{116}

As stated previously, although a use or possession of a mineral right inures to the benefit of all co-owners of the right, a co-owner of a mineral servitude may not conduct operations on the property subject to the servitude without the consent of the other co-owner, nor may a co-owner of a mineral lease independently conduct operations without the consent of his co-owner.\textsuperscript{117} However, a co-owner of a mineral servitude may act independently to prevent waste or the extinction of the servitude, but he does so at his own risk and he cannot impose any liability on his co-owner "for any costs incurred except those arising out of production."\textsuperscript{118} Similarly, a co-owner of a


\textsuperscript{114} LA. R.S. 31:172 (1974).


\textsuperscript{116} Id. Since these dependent rights are passive interests in the economic benefits derived from production attributable to a mineral lease, there is no active use right involved and, therefore, no need for a right to compel partition of the interest. Generally, production is sold, and the owners of these interests receive only their proportionate share of the proceeds. Id., comment.

\textsuperscript{117} LA. R.S. 31:174-77 (1974); Hodges v. Norton, 200 La. 614, 8 So. 2d 618 (1942). If one co-owner of a servitude acts without the consent of the other, the nonconsenting co-owner can claim his share of any production less his proportionate share of costs and expenses incurred in obtaining production. Huckabay v. Texas Co., 277 La. 191, 78 So. 2d 829 (1955).

\textsuperscript{118} LA. R.S. 31:176 (1974). The servitude owner may grant a lease covering the full ownership of the servitude when necessary to prevent waste or extinction of the
mineral lease may act independently to prevent waste or termination of the lease, but he cannot impose any costs on his co-owners except those arising out of production.  

If land is burdened by a mineral right (or by mineral rights) created by fewer than all of the co-owners of the land, a judicial partition must be by licitation unless the partition in kind results in the surface and mineral value of each tract being in the same proportion to the total value of the surface and mineral rights respectively as each co-owner’s interest bears to the whole of the surface and mineral rights respectively.  

Additionally, the partition in kind is not allowed if it will “significantly impair” the owner’s ability to develop the minerals on his own tract. This presumption in favor of partition by licitation when land is burdened by a mineral right created by fewer than all of the co-owners of the land is in direct contrast to the general presumption in favor of partition in kind.

In *Patrick v. Johnstone*, a partition proceeding was filed by the owner of an undivided one-half interest in a tract of land against the owner of the other undivided one-half interest, which was burdened by a mineral servitude owned by another defendant. The second circuit noted that ordinarily the burden is upon the party requesting a partition by licitation to show that the property is indivisible by its nature or that loss or inconvenience to one of the owners would result from dividing it. However, this presumption against licitation can be overcome by proof that the land to be partitioned is burdened by mineral rights created by fewer than all of the co-owners. After such proof, a presumption arises in favor of partition by licitation which can be rebutted only by proof that the requirements set forth in article 178 of the Mineral Code have been met. In this case, the defendant, who had requested a partition in kind, offered no evidence whatsoever that the requirements of article 178 could be satisfied, and a partition by licitation was affirmed.

Thus, it appears that a co-owner of land can create a presumption in favor of partition by licitation, but he must act in good faith and as a reasonably prudent mineral servitude owner.

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121. LA. CIV. CODE arts. 1336, 1337, 1339; Babineaux v. Babineaux, 237 La. 806, 112 So. 2d 620 (1959).
123. 361 So. 2d at 896-97.
124. Id. at 897.
licitation merely by granting a mineral right, however small, burdening the land.

In *Thibaut v. Thibaut*, 125 a demand for partition by licitation of land subject to mineral rights created by fewer than all of the co-owners of the land was opposed based on allegations that the donated mineral rights were relatively insignificant, were soon to prescribe, and were of no proven value. The first circuit held that since there was no evidence that the property could be partitioned in kind in accordance with article 178 of the Mineral Code, the trial judge did not err in ordering partition by licitation.

The owner of a mineral right is a necessary party to an action for partition of the land burdened by the right, and if the owner of the mineral right is not made a party to the partition proceeding affecting his interest, the mineral right will not be extinguished or otherwise affected. 126 Likewise, if the mineral rights of an owner are derived from all of the co-owners of the land, whether by single or separate acts, such rights are unaffected by a partition. 127 This prevents co-owners of land, each of whom has consented to a particular mineral right, from forcing the sale of that mineral right by licitation. On the other hand, as explained hereafter, any mineral lease owner or servitude or royalty owner who has not acquired his mineral right from all of the co-owners of the land should be aware that his right could be extinguished if the land burdened by the right is partitioned by licitation and the land is not adjudicated to the party who created the right or to his successor. 128

If partition is to be by licitation and the owner of mineral rights derived from fewer than all of the co-owners of the land is made a party to the action, the court must appoint two appraisers to separately value the interest of each party to the action in both the land and the mineral rights. 129 A copy of the appraisal must be served upon each party to the action together with notice that the appraisal may be homologated after the expiration of 15 days from the date of

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126. LA. R.S. 31:179 (1974). The partition will not be invalid merely because the owner of a mineral right burdening the land was not made a party to the proceeding, but the mineral right itself will not be affected by the partition.
127. LA. R.S. 31:186 (1974). It is implied in article 186 that if the land to be partitioned is burdened by mineral rights acquired from all of the co-owners, a partition in kind of the surface can be achieved without affecting the outstanding mineral rights.
service. An opposition to the appraisal may be filed by any party to the action at any time before homologation, and this opposition is tried as a summary proceeding. Failure to make an appraisal of a mineral right as required by the Mineral Code does not invalidate the partition, but in such event, the mineral right will not be extinguished or otherwise affected.

When a proper appraisal has been made and the owner of mineral rights is entitled to participate in the proceeds of the licitation, the proceeds are distributed in the proportion that the homologated value of the interest of each party who is entitled to participate in the sale bears to the total homologated value of all of the interests of all of the parties, but the mineral rights are extinguished by the sale. However, if the entirety of the land burdened by the mineral right is adjudicated to the party who created such right or to his successor, the mineral right is not extinguished or otherwise affected by the sale and the mineral right owner has no interest in the proceeds of the sale. In such event, the party purchasing the land is entitled to a credit on the total purchase price equal to the proportionate value of the preserved mineral right.

Owners of mineral rights derived from fewer than all of the co-owners of the land burdened by the mineral rights should be aware that a partition by licitation will extinguish these mineral rights if they are made parties to the proceedings and the rights are appraised in accordance with the articles on appraisal, unless the co-owner granting the mineral right purchases the entirety of the land to be partitioned at the licitation. The owner of such a mineral right can best protect himself by opposing the appraisal of his interest before homologation if said appraisal is too low and by bidding at the public sale of the land burdened by the mineral right to assure that the sale brings a fair sum.

In Harmon v. Whitten, the second circuit discussed but did not rule upon the applicability of article 179 of the Mineral Code to mineral rights acquired while a suit to partition by licitation the burdened land was pending. The court implied that one who purchased a mineral right during the pendency of a partition proceeding need not be made

a party to the suit in order for the partition sale to extinguish that mineral right.\textsuperscript{136}

As noted previously, a landowner does not own the oil and gas beneath the surface of his land but merely has the right to explore for and reduce to possession the oil and gas beneath his land.\textsuperscript{137} This is called the "rule of capture," but it has been modified somewhat by the Conservation Statute.\textsuperscript{138} The Commissioner of Conservation may create a unit\textsuperscript{139} or units to avoid the drilling of unnecessary wells and to prevent waste, each unit consisting of the maximum area which may be efficiently and economically drained by one well. Unitization modifies the rule of capture to ensure that each tract within the unit will receive its just and equitable share of production from the reservoir for which the unit was created.\textsuperscript{140} Each owner of a mineral interest in each tract included within a unit is entitled to share in the production from that unit, and this production may be "held in common" by the owners of the mineral interest.

It seems clear that oil and gas will not be reduced to possession and ownership until severance occurs at the wellhead.\textsuperscript{141} If oil is produced, each owner can easily take his share of production in kind and dispose of it in his sole discretion, subject to any contractual limitations agreed to between and among the parties involved. However, gas is not susceptible to storage or division in kind; absent an agreement between and among the co-owners of gas production, therefore, a potential problems exists regarding the management and disposition of this commonly-held property. If each co-owner owns an un-

\begin{itemize}
\item \textsuperscript{136} 390 So. 2d at 968-69; see also Amerada Petroleum Corp. v. Reese, 195 La. 359, 196 So. 558 (1940); Martin Timber Co. v. Roy, 147 So. 2d 699 (La. App. 2d Cir. 1962), rev'd, 244 La. 1050, 156 So. 2d 435 (1963).
\item \textsuperscript{137} LA. R.S. 31:6-31:7 (1974); Desormeaux v. Inexco Oil Co., 298 So. 2d 897 (La. App. 3d Cir.), \textit{writ refused}, 302 So. 2d 37 (1974).
\item \textsuperscript{138} LA. R.S. tit. 30 (1950).
\item \textsuperscript{139} "Unit" is defined in LA. R.S. 31:213(6) (Supp. 1982) as follows: "Unit" means an area of land, deposit, or deposits of minerals, stratum or strata, or pool or pools, or a part or parts thereof, as to which parties with interests therein are bound to share minerals produced on a specified basis and as to which those having the right to conduct drilling or mining operations therein are bound to share investment and operating costs on a specified basis. A unit may be formed by convention or by order of an agency of the state or federal government empowered to do so. A unit formed by order of a governmental agency is termed a "compulsory unit."
\item \textsuperscript{140} LA. R.S. 30:9 (1950 & Supp. 1960 & 1980).
\item \textsuperscript{141} LA. R.S. 47:634(3) (1950); \textit{see} Sartor v. United Carbon Co., 183 La. 287, 163 So. 103 (1935); \textit{cf.} Texas Co. v. Fontenot, 200 La. 753, 8 So. 2d 689 (1942) (severance tax due when natural resources extracted from ground).
\end{itemize}
divided interest in each molecule or cubic foot of gas produced from the unit well, then it could be argued that management or disposition of any of the gas requires the consent of all co-owners. On the other hand, if a co-owner of gas production has a right only to his pro rata share of production, then it could be argued that any co-owner may produce and dispose of his share of production in his sole discretion, provided sufficient gas remains in the reservoir for the remaining co-owners to obtain their pro rata shares of production.

As a practical matter, a lessee of a mineral lease generally has the right and obligation to market the gas of its lessor, and lessees will usually agree to a gas balancing agreement or a gas purchase contract prior to or shortly after a well is drilled and completed and a unit is formed. In those instances in which all of the co-owners of production have not agreed on its disposition, the use of partition may block a recalcitrant co-owner’s efforts to prevent the sale or other disposition of the production. If partition is available, it will be necessary to determine exactly what property or rights are held in common, whether the property can be divided in kind by a gas balancing agreement or otherwise, and, if the property or rights are to be partitioned by licitation, whether the procedure set forth in articles 180-187 of the Mineral Code will apply.

Anyone who holds property in common with another can compel a partition of said property.142 Equitable considerations are generally not relevant in determining whether or not partition is proper. However, equitable considerations should be a factor in determining the method of partition.

142. LA. CIV. CODE art. 1289.