Louisiana Law Review
Volume 45 | Number 2
Developments in the Law, 1983-1984: A Symposium
November 1984

Mineral Rights

Patrick H. Martin
Louisiana State University Law Center

MINERAL RIGHTS

*Patrick H. Martin**

The oil and gas industry continues to suffer from the difficulties of the past several years. There are few signs of improvement. The active rig count was 314 for the week of October 15, 1984, up from 268 one year earlier. The price of natural gas has not improved and the price of oil continues to slip. Although recent sessions of the legislature have changed the tax structure of the state, Louisiana remains heavily dependent on the industry for revenue. Of great importance to the state will be the deregulation, on January 1, 1985, of a considerable portion of natural gas now being produced.

LEGISLATIVE DEVELOPMENTS

In an active session of the Louisiana legislature, a number of acts were passed affecting mineral rights in the State. Three will be noted here for special attention.

Act 345 of 1984 amends Section 10 of Title 30 of the Revised Statutes. With it, Louisiana joins several other states which have long placed a risk charge on owners of operating interests who are unwilling to commit funds to the drilling of a well on land included in a unit. The risk charge is 100 percent of the tract's allocated share of the costs of drilling, testing, and completing the unit well. The Act contains provisions specifying how notice is to be given and election is to be made. Another provision states that if

> there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract, then the unity [sic] operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale.

Act 768 of 1984 amends Section 3(6) of Title 30 to redefine "pool" for purposes of establishing units. It also amends Section 5(C) to define more clearly the method for calculating the three-fourths in interest of owners and of royalty ownership necessary to create a reservoir-wide unit.

Act 559 of 1984 enacts Section 102 of Title 30 of the Revised Statutes. It provides that within ninety days after the expiration of (1)

---

* Professor of Law, LOUISIANA STATE UNIVERSITY

production under a mineral lease previously maintained by production and (2) all other rights maintaining the lease, the lessee or his assigns must notify the lessor or his representative that the lease has terminated, unless notification is already provided in the lease.

Conveyance Problems; Interpretation of Agreements

Often in the oil and gas industry, parties will enter into "agreements to agree." The extent to which such agreements are binding is a question of considerable concern to attorneys advising clients on such transactions. The Louisiana Supreme Court has recently had occasion to rule on whether such a "preliminary" agreement could be given effect in *Chevron U.S.A. v. Martin Exploration Co.*[1]

Chevron and Tomlinson were co-owners of a mineral lease. Tomlinson entered into an agreement with BTA on November 18, 1975 for BTA to drill a well on the leased property. The agreement stated that Tomlinson and Chevron had reached a preliminary agreement for operations on the lease, and provided for BTA to join the negotiations. It further specified that the agreement provided for forfeiture of interest for not joining in well costs. In July 1976, Tomlinson assigned part of its interest to BTA, and in April 1977 Tomlinson assigned part of its interest to Cotton. In July 1977, Chevron, BTA, Cotton, and Tomlinson entered into an operating agreement for a well with a penalty of 350 percent of well cost for nonconsenting parties. In May 1978, Tomlinson assigned Martin a 7 percent interest in the same lease, subject to the November 18, 1975 Tomlinson/BTA agreement and the July 1977 Chevron/Tomlinson/BTA/Cotton agreement. Martin paid its share of well costs for one well under the July 1977 agreement, but did not join in operating agreements or pay well costs for other wells drilled on the same lease. Chevron, BTA, and Cotton brought suit, claiming that Martin lost its share of the proceeds from these other wells by virtue of the November 15, 1975 agreement. Martin claimed that the forfeiture paragraph of that agreement was only a preliminary agreement, and that as no final agreement had been reached, it had no effect. The trial court held for the plaintiffs, Chevron, BTA, and Cotton. Martin appealed. The court of appeal reversed,[2] ruling that the paragraph of the 1975 agreement in question was not binding as it was only preliminary. The plaintiffs appealed to the supreme court. In reversing the court of appeal, the court held that the "preliminary" agreement described in the Tomlinson BTA assignment was not an agreement to agree, but was an actual contract between Chevron and Tomlinson which was binding on Tomlinson's assignees, including Martin, who received assignment with notice of the prior agreement.

1. 447 So. 2d 469 (La. 1984).
2. Chevron U.S.A. v. Martin Exploration, 432 So. 2d 886 (La. App. 1st Cir. 1983).

Another source of frequent confusion in the oil and gas business is the use of terminology that lacks precise meaning. The use of the term "royalty acre" is an example. This term is generally defined as the royalty interest attributable to one acre of land, and is frequently understood to refer to a one-eighth cost-free interest. The problem arises from the fact that the actual royalty payable under a lease may be greater than one-eighth. The use of such problematic terminology was involved in a recent case from the third circuit, *Thibodeaux v. American Land & Exploration, Inc.*[3]

Plaintiff, Thibodeaux, owned an undivided one-half interest in three tracts of land. He executed a mineral lease covering the tracts to Stone Oil in 1980, reserving a one-fifth royalty. In 1982, assuming that the first lease had expired, he again leased the same interest in the three tracts to Stone, again reserving a one-fifth royalty. Shortly thereafter he sold one-half of the royalties he owned in the tracts to defendant, stating that in no event should the royalties conveyed equal less than 11.8 "royalties acres." Two days later, plaintiff signed an agreement with another company transferring one-half of his royalty interests in the same three tracts for a much larger sum of money. The next day, plaintiff filed suit to rescind the royalty deed to defendant. Plaintiff claimed that he had intended to convey only one-fourth of his total interest in the three tracts, asserting that the three tracts consisted of 29.5 acres which would yield 47.2 royalty acres (calculated at a one-eighth royalty) when under lease at a one-fifth royalty rate: one-fourth of 47.2 royalty acres would be 11.8 royalty acres. Plaintiff asserted that defendant had defrauded him by the reference in the deed to one-half of his royalties, or that there was an error of fact. Defendant asserted that the agreement was clear, and that it was to receive one-half of the one-fifth royalty on Thibodeaux's interest. The trial court found that there was no fraud, but that plaintiff could not read and did not understand the transfer provisions of the contract, and annulled the royalty deed. Defendant appealed. The court of appeal reversed. The court found no fraud. The plaintiff had dealt with "royalty acres" in other transactions, and the trial court was clearly wrong in finding that plaintiff misunderstood the terms of the royalty deed. Even if plaintiff had misunderstood the terms of the royalty deed, he could not prevail in a rescission action under the law of unilateral error.

A contract for the sale of royalty acres was also involved in *Meeks v. Romen Petroleum, Inc.*[4] Here, however, the claim was based on failing to perform on a contract to purchase ten royalty acres. Plaintiff was a landman who approached the defendant with a proposal to sell defendant up to twenty acres of royalty in certain lands where a well

3. 450 So. 2d 990 (La. App. 3d Cir. 1984).
4. 452 So. 2d 1191 (La. App. 1st Cir. 1984).

was being drilled; the landman would buy the royalty from the owners. After negotiation, defendant agreed to purchase ten royalty acres at a price of $11,000 per acre plus a six percent commission for plaintiff. Plaintiff then purchased the royalty from the owners and made arrangements for the transfer of the interest to defendant. When plaintiff presented title to the defendant to complete the transaction, defendant refused to pay the draft it had given to plaintiff, asserting that plaintiff had failed to provide merchantable title and had failed to provide certain technical data on the well. Plaintiff completed the transaction with the royalty owners, and then sold the royalty to another for $7,000 per acre. He then brought suit for breach of contract for $46,600, the difference between the price agreed upon and the actual price of sale, plus the broker's commission.

In defense to the claim, defendant asserted that plaintiff had simply acted as his agent, and that he had failed to provide merchantable title. Affirming the trial court, the court of appeal ruled that the acts did not support a finding of an agency relationship. The appellate court held that property has merchantable title when it can readily be sold in the ordinary course of business by reasonable persons familiar with the facts and questions involved.[5] The facts established that the plaintiff had met this requirement in a timely manner. In addition, the court ruled that providing the technical data from the well on the land was not a condition of the contract since it had not been proven to be part of the contract; the court here applied the parole evidence rule as the written agreement contained no such term.

Meadors v. Pacific International Petroleum, Inc.[6] presented a question regarding the capacity of a lessor to enter into a lease. The lessor brought suit to cancel a lease he had executed three years earlier. He claimed that the lease had expired on its face, for the date of the lease was typed as February 18, 1076, and that at the time of execution he was under medication such that he was "temporarily deranged." The trial court found for the plaintiff on the issue of capacity and ordered cancellation of the lease. The court of appeal reversed, holding that the plaintiff did not meet his burden of proving "quite convincingly and by the great weight of the evidence" that he was mentally incompetent at the time the lease was executed.[7]

Interpretation of the pricing provisions of a natural gas purchase contract was before the court in the case of *G/O Enterprises, Inc. v.*

5. 452 So. 2d at 1193, quoting from Young v. Stevens, 252 La. 69, 209 So. 2d 25 (1967).

6. 449 So. 2d 26 (La. App. 1st Cir. 1984).

7. 449 So. 2d at 28, quoting First Nat'l Bank of Shreveport v. Williams, 346 So. 2d 257, 264 (La. App. 3d Cir. 1977). Under La. Civ. Code art. 1779, it is necessary that the parties be legally capable of contracting. Article 1782 provides that in the absence of a special exception, all persons are presumed to possess capacity to contract.

Mid Louisiana Gas Co.[8] Plaintiff, a producer of natural gas, entered into a gas purchase contract in 1973 with defendant, a pipeline, for the sale of gas which was subsequently found to be a sale in intrastate commerce by the Federal Power Commission. In 1976, the gas well began producing excessive salt water and had to be shut down. To provide sufficient income to convert another well for the disposal of the salt water, the parties amended the purchase contract on July 16, 1974 to increase the price for the gas. Although the transaction was not subject to the jurisdiction of the Federal Power Commission, the contract amendment provided for the maximum just and reasonable rate permitted by the Commission for gas of the same quality and character, and referenced Opinion No. 699-H of the Commission, issued in December 1974. The well was again brought into production. The prices paid to the producer were based on the Opinion No. 699-H rate through 1978 even though the Federal Power Commission had issued Opinions 770 and 770-A in 1976, shortly after the contract amendment.

After the passage of the Natural Gas Policy Act of 1978 (NGPA),[9] counsel for plaintiff made a demand for an increase in the price paid for the gas to the highest price allowed by the NGPA, but the defendant declined to change the price it had been paying. Plaintiff turned the matter over to another attorney, who asserted that the payments should have been increased to the Opinion 770 and 770-A levels after July 1976, and then to the NGPA level; on behalf of plaintiff he demanded back payments. Suit was brought when the defendant refused to make additional payments. The trial court held that the agreement was clear and unambiguous and did not provide for continued escalations based on new Commission opinions or on statutory changes. The court of appeal affirmed. The language of the agreement was clear, it said, and the interpretation of the agreement was confirmed by the conduct of the parties. The plaintiff had made no demands for increases after the Commission had issued Opinions 770 and 770-A.

There appears to be no reason to question the holding of the court in *G/O Enterprises, Inc.* However, it is likely that this sort of problem will recur in the future. Many gas purchase contracts have price provisions which reference Commission regulations (either the Federal Power Commission or its successor, the Federal Energy Regulatory Commission) or NGPA ceiling prices. On January 1, 1985, price controls are scheduled to be removed from a substantial volume of natural gas currently flowing under such contracts. Interpretation of these contracts will be a difficult task. Despite the fact that much gas has been subject to federal regulation, the interpretation of the contracts is a matter of state law.[10]

---

8. 444 So. 2d 1279 (La. App. 4th Cir. 1984).
9. 15 U.S.C. §§ 3301-3432 (1982).
10. See Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S. Ct. 697 (1983).

LEASE MAINTENANCE

Four cases worth noting were decided in the past year which relate to lease maintenance and interpretation.

In *Sun Exploration and Production Co. v. Rogers*,[11] a concursus proceeding had been instituted to resolve the ownership of production royalties under a lease covering some 235 acres. The lease in question contained a provision known as an "entirety clause." While such provisions are frequently found in leases in other states, Louisiana courts have seldom had occasion to address the interpretation of such provisions. This clause stated:

> It is expressly understood and agreed that the premises leased herein shall, for all the purposes of this lease, be considered and treated as owned in indivision by the Lessor and shall be developed and operated as one lease, and there shall be no obligation on the part of Lessee to offset wells on separate tracts into which the land covered by this lease may be now or hereafter divided by sale, or otherwise, or to furnish separate measuring or receiving tanks, and all rentals, royalties and other payments accruing hereunder shall be treated as an entirety and shall be divided among and paid to Lessor in the proportion that the acreage (mineral rights) owned by each bears to the entire leased acreage. Lessee may at any time or times pay or tender all rentals or other sums accruing hereunder to the joint credit of Lessor.[12]

The lease containing this provision had been executed in 1972 by Buckley, the common ancestor in title. His wife died in 1978 and he died in 1980; the property burdened by the lease was divided under his will. The will made no provision respecting a division of the mineral rights. Eighty acres came to be owned by Wilburn and 155 acres by Rogers. The producing well maintaining the lease was located on the 80 acre tract of Wilburn. He claimed to have the right to all of the production royalty because that was the intention of the decedent, Buckley. Rogers, the owner of the remaining acreage covered by the lease, contended that the royalty should be apportioned as provided in the lease. The trial court and the appellate court agreed with the position of Rogers, holding that the royalty should be apportioned. Quoting from the Williams and Meyers treatise on oil and gas law, Judge Marvin for the second circuit court of appeal stated that an "entirety clause in a lease will cause royalties to be apportioned despite subsequent subdivisions of the leased premises in the absence of contrary provision in

11. 451 So. 2d 587 (La. App. 2d Cir. 1984).
12. Id. at 588 n.1.

a conveyance subdividing the leased premises."[13] Since there was no express provision to the contrary in a conveyance by the lessor, the entirety clause required apportionment of royalty among each owner who acquires a part of the leased property.

Sun Exploration is no doubt decided correctly. It should be noted, however, that absent an entirety clause in a lease, the royalties would not be apportioned under Louisiana law. That is to say, Louisiana has adopted the "rule of nonapportionment" for the payment of royalty under a lease over property which has been divided subsequent to the creation of the lease.[14]

Concerned about the force and effect of a lease under which they were operating, several oil companies filed suit for a declaratory judgment in 1980 seeking enforcement of the lease in *General American Oil Co. v. Meche.*[15] The defendant lessors filed a reconventional demand alleging that the effective date of the lease had been changed and then recorded in 1977. They sought cancellation of the lease. The oil companies argued that the lessors were asserting a tort claim more than three years after the alleged tortious conduct, and that such actions were limited by a one year prescriptive period. The lessors took the position that their claim arose from a contract, and that a ten year prescriptive period was therefore applicable; alternatively, they asserted that they did not know of the alleged tortious actions until 1980 because of the lessee's conduct. The trial court ruled that the one year prescriptive period applied and dismissed the reconventional demand, finding also that the lessors had reason to know of the alleged tortious conduct for more than a year. The third circuit affirmed the trial court, adopting the trial court's reasons for judgment as its own.

In *Gorenflo v. Texaco, Inc.*,[16] plaintiffs, lessors of oil and gas rights, sought to set aside their lease on several grounds. They asserted that their lease had been pooled with an invalid lease, as the latter had been signed and delivered by a tutrix on behalf of her children before the court had approved it, and the judgment approving the lease by the tutrix was not recorded. They also claimed that the lease had not been maintained by unit operations because the lease provided only for a declaration of a unit for production. The trial court ruled for defendants on each of these points.[17] Plaintiffs appealed. The Fifth Circuit Court of Appeals affirmed the judgment of the district court.

It was the opinion of the Fifth Circuit that under Louisiana law, the lease could be signed and delivered before court approval, but

---

13. Id. at 590, citing H. Williams and C. Meyers, Oil and Gas Law, § 521.3 (1975).
14. See French v. Querbes, 200 La. 654, 8 So. 2d 631 (1942).
15. 442 So. 2d 496 (La. App. 3d Cir. 1983).
16. 735 F.2d 835 (5th Cir. 1984).
17. Gorenflo v. Texaco, 566 F. Supp. 722 (M.D. La. 1983).

execution of the lease occurred only when all of the required formal acts were accomplished. The public records doctrine[18] protects those who rely on the public records in acquiring a real or personal right, privilege, or permit; here plaintiffs in no way relied on the lack of recordation of the court approval, and the fact that the lease itself was recorded was enough to put plaintiffs on notice that an examination of the judicial records was in order. The pooling clause in question allowed pooling before or after production, and thus operations in the pooled area for exploration before the end of the primary term were sufficient to maintain the lease.

Two reported cases decided in the past year involved the operation of a lease provision known as the "Pugh Clause." Both were decided in federal district court, and both were decided in favor of the lessees.

The first of these cases was *Rougon v. Chevron, U.S.A. Inc.*[19] Plaintiffs leased certain land to defendant, Chevron, for a primary term of ten years, and for so long thereafter as oil or gas was produced, with a Pugh Clause which divided the lease if a portion of the leased premises were included in a unit. The Pugh Clause allowed the lessee to maintain its lease of the acreage outside the unit by payment of delay rentals for a period that could be as long as two years past the end of the primary term. A portion of the land was included in a unit created by the state, and the lessors brought suit to obtain cancellation of the lease on the outside acreage. Their claim was that this lease provision would allow the portion of the lease not within the unit to continue for as long as twelve years without any operations. This result, they contended, would violate Article 115 of the Louisiana Mineral Code.[20] The defendant moved for dismissal on the ground that the Pugh Clause provided for the effect of operations on the lease in question, and on the lease (or on land unitized with the lease) there were in fact operations within ten years. The district court granted summary judgment for defendant and dismissed the claim. The court held that the lease provision dividing the lease did not create a lease for a period longer than ten years without operations, and thus did not violate Louisiana public policy. Although the court's ruling is of limited authority as precedent, it seems almost certainly correct.

The second Pugh Clause case was *Morrison v. Conoco, Inc.*[21] Here plaintiffs were lessors of 632 acres covered by the lease acquired by defendants. In 1979, about seven acres of the lease were included in a drilling and production unit from which production was commenced in

18. See La. R.S. 9:2721-22 (1965); Wells v. Joseph, 234 La. 780, 101 So. 2d 667 (1958).
19. 575 F. Supp. 95 (M.D. La. 1983).
20. La. Mineral Code: La. R.S. 31:115 (1975) [hereinafter cited as La. Min. Code].
21. 575 F. Supp. 876 (M.D. La. 1983).

1981. The lease contained a Pugh Clause allowing maintenance of the acreage outside the unit by drilling operations or by payment of delay rental for a period of five years. The lease also contained a typed provision requiring the lessee to make reasonable efforts to develop oil and gas, and to drill offset wells as a reasonably prudent operator. Lessees tendered delay rentals for the 624.6 acres outside the unit.

In November 1981, counsel for plaintiffs made demand on the defendants for further development of the leased land. After defendants declined to undertake further drilling, plaintiffs sought cancellation of the portion of the lease outside the unit. Defendants moved for summary judgment, which was granted by the court. It held that the typewritten paragraph of the lease requiring the lessee to reasonably and adequately develop the lease did not conflict with the printed paragraph authorizing payment of Pugh Clause delay rentals for the portion of the lease not in a unit. The typewritten paragraph did not increase the burden on the lessee beyond that obligation already imposed on the lessee by operation of the Louisiana Mineral Code. Payment of the delay rental authorized by the Pugh Clause excused any additional drilling by the lessee. As to a claim that defendants had failed to protect the lessors against drainage, the court found that plaintiffs had failed to put the lessee in default by a proper claim as required by the Mineral Code.[22]

PARTITION

The mineral servitude doctrine of Louisiana mineral rights law is quite complicated. The area of partition of mineral rights is particularly difficult. This can be seen in *Allied Chemical Corp. v. Dye*,[23] recently decided by the second circuit court of appeal.

Allied, as lessee of certain mineral rights, initiated a concursus proceeding to determine who owned interests in certain producing units. The owners identified by the court as Group A contended that they were owners of mineral rights under a mineral servitude created in 1971 by reservation of Dye in a conveyance of the land to the predecessor in title of Group B. The Group B parties claimed that Dye's rights were created in a 1967 partition that created an undivided mineral servitude in which Dye was a co-owner, and thus when Dye conveyed the property in 1971 it was subject to an outstanding mineral servitude. As a result, they argued, Dye could not create a new mineral servitude by his reservation of mineral rights. Since prescription of the mineral rights created in 1967 had not been interrupted by 1977, they took the position that the rights had expired, and, as landowners, they claimed the right to all minerals produced which were attributable to their land.

22. La. Min. Code arts. 135-36 (Supp. 1984).
23. 441 So. 2d 776 (La. App. 2d Cir. 1983).

The trial court ruled in favor of the Group A claimants and the landowners appealed.

The second circuit affirmed the judgment of the trial court. In the 1967 partition of several non-contiguous, co-owned tracts, Dye, who had owned 207/320ths of the land (and minerals), acquired full ownership of the land in question, but it was provided that the partition would not cover or affect minerals. The intent of the parties and the effect of the transaction was to create a 113/320ths servitude in the other parties, and not an undivided servitude covering 100 percent of the minerals co-owned with Dye. Thus, when Dye conveyed the land in 1971 he was able to reserve the minerals not subject to the 113/320th servitude; a new servitude was then created. This servitude was still in effect when production occurred, and the Group B owners could not receive the production attributable to the land covered by the servitude.

The Mineral Code clearly allows an owner of land to be a co-owner of a mineral servitude burdening his property, contrary to the usual rule of confusion of rights in Louisiana law.[24] However, whether a landowner has in fact created a co-owned mineral servitude on his property may be an issue of fact, as is illustrated by *Allied Chemical.* The difficult problem with this case is that from the facts stated by the court, there seem to be no words in the 1967 conveyance actually creating a mineral servitude in the other parties. For additional guidance in this area, one should review carefully two other cases on related points, *GMB Gas Corp. v. Cox,*[25] and *Wall v. Leger.*[26]

The second partition suit to be noted is *Steele v. Denning,*[27] also decided by the second circuit. In this case, plaintiff landowner brought suit for partition of land and mineral interests by licitation. Defendants were the owners of a mineral servitude burdening plaintiff's interests in the land, a mineral lessee, and other co-owners of the property whose undivided interests were not subject to any mineral servitude. The trial court found that the mineral lease had been conveyed by all co-owners and was thus attributable to the entire property; therefore the lease was not subject to partition. However, the trial court ordered a partition by licitation of the other interests of the parties. Defendants appealed. The appellate court reversed insofar as the judgment applied to the defendant who owned the mineral servitude; it affirmed the trial court's judgment as to the other defendants, subject to the exclusion of the mineral servitude from any partition by licitation.

---

24. See La. Min. Code arts. 66-67 and the comments to these articles of the Mineral Code.

25. 340 So. 2d 638 (La. App. 2d Cir. 1976); see also Cox v. Sanders, 421 So. 2d 869 (La. 1982).

26. 402 So. 2d 704 (La. App. 1st Cir. 1981) discussed in detail in Martin, Developments in the Law, 1980-1981—Mineral Rights, 42 La. L. Rev. 374, 383-84 (1982).

27. 445 So. 2d 94 (La. App. 2d Cir. 1984).

Although the Louisiana mineral servitude doctrine precludes the creation of a "mineral estate" independent of full title to the land, land subject to a mineral servitude may not be partitioned by licitation with respect to the servitude because the landowners do not hold a common element of ownership with the servitude owner. But partition may be ordered with respect to other co-owners of land because all the landowners have a common element of ownership in the property exclusive of the right to search for minerals.

CONCURSUS PROCEEDINGS

In *Chevron U.S.A. Inc. v. Lorio*,[28] the first circuit court of appeal considered the issue of the right of a mineral lessee to contest liability to claimants, and to seek a refund of money in a concursus proceeding. The lessee, Chevron, had taken a lease from the Lorios for a one-eighth royalty on a tract of land and had taken another lease on the same land from the State of Louisiana for a one-sixth royalty.[29] After production had commenced, Chevron invoked a concursus proceeding to determine to whom it actually owed royalties, and reserved its rights to seek a refund of the money it had deposited in court (at the higher royalty rate payable under the state lease) if it were determined that the Lorios were the proper claimants. The state and the Lorios compromised their differences and moved for summary judgment to dismiss the proceedings. Chevron opposed the motion, seeking instead a determination of its rights and a refund. The trial court granted summary judgment dismissing the proceedings, and Chevron appealed. The first circuit reversed and remanded for further proceedings. It was the court's opinion that under the Louisiana Code of Civil Procedure,[30] a party can invoke a concursus proceeding and still deny liability to a claimant. The compromise between the state and the Lorios did not resolve all issues of fact and law in the case.[31] Thus, it was improper to grant summary judgment.

PUBLIC RECORDS: MORTGAGE FORECLOSURE

Florida Gas Exploration Co. v. Bank of St. Charles & Trust Co.[32] involved a collateral mortgage on certain property subject to a mineral lease. Mason and Smith owned property in St. Charles Parish. In May 1974, they executed a collateral mortgage on the property in favor of

---

28. 442 So. 2d 1157 (La. App. 1st Cir. 1983).

29. The Mineral Code specifically allows a lessee to "take leases from persons claiming the leased land or mineral rights or interests therein adversely to his lessor." La. Min. Code art. 121.

30. La. Code Civ. P. art. 4652.

31. See La. Code Civ. P. art. 966.

32. 435 So. 2d 535 (La. App. 5th Cir. 1983).

the Bank of St. Charles & Trust Company (the "Bank"). This mortgage was recorded promptly, but contained an incomplete description of the property because an exhibit referred to was not attached to the mortgage as recorded. In November of the same year, Mason and Smith executed a mineral lease on the same property; this lease was recorded on July 7, 1975. The same month, the Bank brought foreclosure proceedings against the debtors, and the property was sold at public auction to the Bank in September 1975. In March 1978 the Bank notified the lessees that their lease had been terminated by the sale. They, in turn, filed a declaratory action seeking to have a cloud on their title removed, and their rights in the lease confirmed. They claimed that the property description in the collateral mortgage was inadequate to put third parties on notice.

The trial court held in favor of the lessees. The judgment was affirmed by the court of appeal. Under the public records doctrine of Louisiana[33] third parties need look only to the public records to determine the existence of adverse claims. Here the property description recorded with the collateral mortgage was insufficient to put third parties on notice of the adverse claim.

SERVITUDES: INTERRUPTION OF PRESCRIPTION

A second circuit case, *Bass Enterprises Production Co. v. Kiene*,[34] decided an issue of interruption of prescription of a mineral servitude. In 1968 the Graves sold land (110 acres) to Kiene, reserving a mineral servitude for one-half of the minerals. In 1974, the Graves leased their one-half to Durham, and Kiene leased his interest to Bradco. No drilling took place on the servitude within the ten year period of liberative prescription. But, in 1974 a well was spudded on a nearby tract. The well was drilled under a permit to go to the Smackover Formation. After the well reached 10,746 feet, another company took it over and drilled to 11,520 feet. The Smackover sand was not productive. The company tested other, shallower sands, including the McFearin Sand. About forty acres of the servitude were included in a McFearin Sand unit with the land on which this well was tested. The well was perforated, acidized, and fractured in the McFearin Sand, but was unsuccessful and was plugged and abandoned.

In 1979, another well was drilled which successfully produced from the Cotton Valley Formation, and the same forty acres included in the McFearin unit were included in the Cotton Valley unit. The operator of the well filed a concursus proceeding to determine to whom to pay the share of production attributable to the forty acres. Kiene, as land-

33. See La. Civ. Code arts. 3342 & 3347; La. R.S. 9:2721 (1965); McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909).

34. 437 So. 2d 940 (La. App. 2d Cir. 1983).

owner, claimed that the Graves' servitude had prescribed because of the lack of production or good faith drilling operations in the years since it had been created. The servitude owners contended that the efforts to obtain production from the McFearin Sand were sufficient operations in good faith to interrupt prescription as to the portion of the servitude tract included in the McFearin unit. The trial court agreed with the contentions of the servitude owners. On appeal the second circuit affirmed this opinion.

The court found that the operations to test the McFearin Sand had been a good faith effort to secure production in paying quantities from land with which a portion of the servitude had been unitized. Under Article 33 of the Mineral Code[35] such activity is sufficient to interrupt prescription as to that portion of the servitude included in the unit. A further issue was raised over the fact that the McFearin Sand location had not been a legal location for completion of a well under the rules of the Office of Conservation. Thus, said the landowner, the claim that the operations in the McFearin Sand had been a good faith effort to obtain production was a collateral attack on the orders of the Commissioner of Conservation. The court rejected this argument on the basis that a representative of the Office of Conservation had testified that exceptional locations can be and often are granted in circumstances such as were presented by the facts of this case. In addition, two permits had been obtained from the Office of Conservation specifically permitting the testing done in the McFearin Sand.

CONSERVATION[36]

Two decisions on judicial review of orders of the Commissioner of Conservation were rendered in the past year. Both involved a question as to the time in which suit must be brought to challenge such orders.

In *Corbello v. Sutton*,[37] plaintiff sought judicial review of an order of the Commissioner some seven months after the order was issued. Applying the doctrine of laches as set forth by the first circuit in *Jordan v. Sutton*,[38] the trial court dismissed the claim, and the court of appeal affirmed.[39] The Louisiana Supreme Court granted writs and upheld the dismissal of the claim, but held that the courts below had dismissed on the wrong basis. The court declared that the equitable doctrine of laches has no place in the law of Louisiana. The court thus rejected the rationale

35. La. Min. Code art. 33.

36. For the discussion under this heading, the author should point out to the reader that he is not a disinterested observer. When the cases were argued or decided he was serving as commissioner of conservation, and was in fact the party defendant in the litigation.

37. 446 So. 2d 301 (La. 1984).

38. 401 So. 2d 389 (La. App. 1st Cir. 1981).

39. Corbello v. Sutton, 442 So. 2d 610 (La. App. 1st Cir. 1983).

of *Jordan v. Sutton*. Instead, the court held that a specific time limit was found in the statutory provisions for judicial review,[40] and that the claim had not been brought within the specified time period. While correct, the decision is of limited effect with respect to conservation matters as the statute had already been amended to remove any doubts caused by the ruling in *Jordan v. Sutton*.[41]

Despite the ruling in *Corbello*, the first circuit has decided still another round in the litigation of *Jordan v. Sutton*.[42] The suit challenged an order of the Commissioner issued in 1979, and was originally brought more than a year after the order was issued. In one appeal, the first circuit ruled that although laches barred a challenge to the finality of the order, plaintiff was not barred from seeking an order directing that tests be performed on a well to determine its capacity to produce hydrocarbons nor from seeking an order directing the Commissioner to produce and allow the plaintiff to inspect certain information.[43] On remand to the trial court, the judge dismissed plaintiff's suit. This was error, the first circuit has now held. Although the trial judge was correct in finding that mandamus would not lie because the Commissioner has discretion to order a test of a well, the first circuit, ordered a testwell but gave no explanation of its rationale.

40. The Court held that La. R.S. 30:15 provided a time limit for suits brought under La. R.S. 30:12 (1975). The position adopted by the court was argued for in Martin, Developments in the Law, 1980-1981—Mineral Rights, 42 La. L. Rev. 374, 378-81 (1982).

41. 1983 La. Acts, No. 409, amending La. R.S. 30:12.

42. 450 So. 2d 1041 (La. App. 1st Cir. 1984).

43. Jordan v. Sutton, 424 So. 2d 305 (La. App. 1st Cir. 1982).