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Mineral Rights

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I. LEGISLATION—1993 REGULAR SESSION

A. Act 113—Owner

This Act amends Louisiana Revised Statutes 30:3(8) to redefine "owner" as "the person, *including operators and producers, acting on behalf of the person,* who has *or had* the right to drill into and produce from a pool and to appropriate the production either for himself or for others." The term "owner" has significance in several contexts in the Conservation Act, including determining who has responsibility for well cleanup.[1]

B. Act 114—Penalty for failure to get Mineral Board Approval for Transfer

This Act amends Louisiana Revised Statutes 30:128 to provide a $100-per-day penalty for transferring or assigning a state mineral lease without obtaining approval from the Mineral Board. The penalty liability begins on the sixty-first day after confection of the transfer or assignment.

C. Act 404—Louisiana Oilfield Site Restoration Law

This Act establishes an Oilfield Site Restoration Commission and an Oilfield Site Fund. The commission is made up of ten members; they are to include the secretary of the Department of Natural Resources and nine others selected in accordance with criteria specified in the act. The commission is to establish priorities for oilfield site restoration. Funds for this activity are to come from a fee of one cent per barrel on crude oil and one-fifth of one cent on natural gas from a producing well. The act is generally administered through the Commissioner of Conservation. Restoration will be required of a "responsible party" (generally the operator of record), but "orphaned" sites will be restored through the fund established by the act.

D. Act 889—Limitation of Liability

This act amends Louisiana Revised Statutes 2800.4(A)(1) and enacts Louisiana Revises Statutes 2800.4(A)(4) to provide that an owner of an oil, gas,

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1. *See, e.g.*, Chevron U.S.A., Inc. v. Traillour Oil Company, 987 F.2d 1138 (5th Cir. 1993), discussed *infra*.

or mineral property is not liable for damages to any person who unlawfully enters the property unless the damages result from the intentional act or gross negligence of the owner. This act appears to seek to avoid the imposition of liability in a case such as is reported in *Cockerham v. Atlantic Richfield Co.*[2]

II. CONTRACT FORMALITIES

A. Necessity of a Writing; Simulation

The plaintiff Trident in *Trident Oil & Gas Corporation v. John O. Clay Exploration, Inc.*[3] sought specific performance of a contract to assign an interest in certain mineral leases that defendant Clay had acquired from Pentagon Petroleum. There was a written agreement whereby plaintiff and defendant agreed to buy the leases together, but this was then modified by an oral agreement that defendant would acquire the leases and then assign them to plaintiff. When the defendant did not assign the interest, the plaintiff brought this claim and sought to set aside the purchase by defendant from Pentagon as a simulation that disguised plaintiff's interest by showing defendant as the sole owner of the leases. The court ruled that the oral agreement could not be admissible because a contract to acquire immovable property must be in writing. The plaintiff's claim was dismissed.

B. Oral Partnership Valid to Create Obligation; Detrimental Reliance

Tadlock made an oral agreement with Tabco for a partnership for operation of a well in Texas. When it came time for Tabco to participate in the activities, Tabco breached, and Tadlock was forced to rent equipment for a workover. The well became a dry hole, and Tadlock plugged and abandoned it. Tabco brought suit in *Tabco Exploration, Inc. v. Tadlock Pipe & Equipment, Inc.*,[4] against Tadlock for the return of certain drill pipe that had been used in the operations, and Tadlock reconvened seeking damages for breach of the oral partnership agreement. The court held that the oral partnership agreement was proved and was effective to create an obligation on behalf of Tabco to pay one-half of the costs of the venture. Although ownership of an immovable by a partnership requires that the partnership be in writing, such ownership was not at issue. In any event, held the court, the plaintiffs in reconvention had established the elements necessary for detrimental reliance (or promissory estoppel as the doctrine is known in other states) under Louisiana Civil Code article 1967.

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2. 615 So. 2d 547 (La. App. 3d Cir.), *writ denied*, 623 So. 2d 1303 (1993).
3. 622 So. 2d 1191 (La. App. 2d Cir. 1993).
4. 617 So. 2d 606 (La. App. 3d Cir. 1993).

III. CONTRACT INTERPRETATION

A. *Servitude Owner Could Give Soil Rights*

The case of *Fowler v. T.L. James & Company, Inc.*,[5] required interpretation of two agreements. The first was a 1985 servitude over a 48.77-acre tract granted by the Fowlers to a conservation district established by the Department of Transportation and Development (DOTD) for a water reservoir project; the servitude was for the flooding of an area below the 138.50-contour line. In 1990, the defendant, James, contracted with the DOTD for work on the reservoir project and needed fill dirt for road embankment. James entered a second agreement, a mineral lease that James signed with the Fowlers to excavate soil from their property above the 138.50-contour line. The defendant removed 150,000 cubic yards of soil from the property, and the Fowlers made demand for unpaid royalty. James's defense was that most of the soil was from below the 138.50-contour line and was thus from the area on which the servitude existed and for which the conservation district (and the defendant by virtue of an agreement between the district and defendant) had the right to excavate. The appellate court reversed a trial court judgment for the plaintiffs. Under the 1985 servitude, the district and DOTD had the right to excavate soil below the 138.50-contour line. Full compensation was paid for the servitude, and there was nothing in the servitude agreement that indicated or required that any additional money had to be paid to the landowners for any excavation done under the servitude. Although the servitude was subject to a reservation in the landowner of all oil, gas, and other minerals, the court held that this reservation was only meant to apply to those minerals the Fowlers had not given the servitude owner the right to remove. It was also clear that the 1990 mineral lease from the Fowlers to the defendant only related to soil above the 138.50-contour line that was not included in the servitude.

B. *Interpretation of Liability for Costs*

The plaintiff in *Blue/Gray Pipe & Supply, Inc. v. Inland Bay Drilling & Workover, Inc.*,[6] brought a contract action for certain costs of drilling of a well. The plaintiff contended that under the written contract the defendant had promised to pay for the well costs. The defendant argued that the written contract was ambiguous and that the parole testimony at trial established that the intent of the parties was that the claimed costs were excluded from the contract. The court held that the written contract was unambiguous and that it clearly imposed the costs on the defendant.

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5. 621 So. 2d 638 (La. App. 2d Cir. 1993).
6. 614 So. 2d 285 (La. App. 3d Cir.), *writ denied*, 618 So. 2d 404 (1993).

C. Contract for Pipeline Relocation

United acquired a pipeline right-of-way from Belle Isle Corporation in 1959. The following year Belle Isle granted a salt and surface lease to defendant Cargill, and Cargill promised in this agreement and amendments to it that it would not interfere with United's operations. In 1984 Cargill ceased its mining operations on the property and informed United that there had been some subsidence. After inspecting the property, United concluded the pipeline would have to be relocated. United relocated the pipeline after allegedly getting an agreement with Cargill that Cargill would pay for the relocation. A suit, filed in 1990, followed when Cargill refused to pay.[7] United claimed both tort and contract recovery; the contract claim was based both on an assertion that the Belle Isle/Cargill was a stipulation pour autrui in favor of United and on the alleged oral agreement. The trial court dismissed the claim on an exception of prescription of one year applicable to tort and United appealed. The appellate court affirmed as to the prescription for a tort-based claim but reversed and remanded for the breach of contract claims.

D. Agreement for Overriding Royalty

The case of *Sloane v. Davis*[8] is a further appeal in a case previously reported under the same name in 1981.[9] It concerns the interpretation of an agreement for the purchase of overriding royalty. The plaintiff worked as a geologist for defendant, and the contract between them provided that plaintiff could purchase "an overriding royalty on all oil, gas and mineral leases" acquired by defendant as a result of plaintiff's services. The cost was to be ten dollars per prospect. The plaintiff performed certain work and defendant acquired a mineral lease. This gave rise to the right to purchase; the 1981 decision held that plaintiff's failure to provide registered mail notice of his election to purchase as an override did not defeat the right to purchase, and that plaintiff was entitled to purchase overriding royalty on land on which he reviewed and interpreted data, not just on the leases "generated" by plaintiff's services. On remand the trial court held that plaintiff had the right to purchase the override over the entire lease, not just the portion or "prospect" that he had worked on. The trial court based its decision in part on the wording of the earlier opinion by the court of appeal that had found the contract unambiguous. This appeal ensued. The court now holds that there is ambiguity in the employment contract that contains the right to purchase an overriding royalty because the contract uses the terms "lease" and "prospect"; these two could differ such that plaintiff would have the

7. United Gas Pipe Line Co. v. Cargill, Inc., 612 So. 2d 783 (La. App. 1st Cir. 1992).

8. 619 So. 2d 585 (La. App. 3d Cir. 1993).

9. Sloane v. Davis, 397 So. 2d 1376 (La. App. 3d Cir. 1981), *writ denied*, 440 So. 2d 756 (1983).

right to purchase an overriding royalty on only a portion of the lease. The earlier decision had not been concerned with this portion of the contract and had not declared it unambiguous. The case was remanded for the introduction of extrinsic evidence for resolution of this controversy.

E. Effect of Division Order

JFD, Inc., the broker for payment of royalties under a division order, instituted a concursus proceeding to resolve a dispute between lessors as to the proper distribution of royalties. In 1960, three sisters had purchased a tract of land; one sister owned a one-half interest, and the other two each owned a one-quarter interest. When they granted an oil and gas lease over the tract, they signed a division order providing for each to receive an equal one-third of royalties. After the two sisters who each owned a one-quarter interest died, the living sister with the one-half interest made demand for the broker to change the amount of royalties paid to reflect her one-half interest. The court in *JFD, Inc. v. Chappuis*[10] upheld a trial court judgment that the remaining sister could revoke the division order without the consent of a successor in interest to one of the other sisters. The division order was bilateral as between the lessor and lessee, but unilateral as between the lessors, held the court. The court's decision followed well-established principles governing division orders.[11]

F. Farmout Agreement

The Weavers assigned fifty-eight oil and gas leases to Florida Exploration in a farmout that required Florida Exploration to drill "commercial producers" to retain the leased acreage. The trial court interpreted this term as something different from "paying quantities," a term that was also used in the agreement. None of the seven wells drilled by Florida Exploration was a "commercial producer" under the court's test. Therefore, Florida Exploration was required by the agreement to reassign the acreage to the Weavers. However, reassignment had become impossible, and the trial court awarded damages to the plaintiffs of $36,564.72, representing the costs necessary for reacquisition by the plaintiffs. The court of appeals in *Weaver v. Florida Exploration Co.*[12] upheld the trial court, ruling that whether one used "commercial producer" or "production in paying quantities," the wells did not meet the agreement's requirements to earn any acreage. A claim for the value of overriding royalty was rejected as too speculative and uncertain.

10. 615 So. 2d 492 (La. App. 3d Cir. 1993).
11. 4 Howard R. Williams & Charles J. Meyers, Oil and Gas Law §§ 701-711 (1993).
12. 608 So. 2d 1034 (La. App. 3d Cir. 1992), *writ denied*, 612 So. 2d 99 (1993).

IV. LEASES

A. *Assignment and Sublease*

The case of *Chevron U.S.A., Inc. v. Traillour Oil Co.*[13] presents the interesting problems resulting when a lessee assigns a lease to relieve itself of the potential for future liability arising from its operations on the lease. Typically when a lessee assigns a lease it seeks to have the assignee assume all burdens of the lease and to have the assignee hold it harmless and indemnify it for liability under the lease. In this case, Gulf (now Chevron) assigned a certain lease with producing wells, and the assignees (Traillour and Marsh) agreed in the assignment to be responsible for proper plugging and abandonment of the wells. The agreement provided for the assignees to present a letter of credit for two million dollars to secure the plugging and abandonment obligations of the assignees. The assignees made a side agreement with a third party (Rocky Mountain) to raise the purchase money for the lease assignment and the money for the letter of credit. The assignment was made. There were then further transactions and assignments by the assignees to additional investors, and in time the letter of credit expired before any plug and abandonment work had been undertaken. Chevron brought suit to obtain a replacement letter of credit and to determine the plug and abandon obligations of the successors in interest of the assignees. The Fifth Circuit held that there was no obligation for defendant Rocky Mountain under the side agreement to keep a letter of credit in force as the side agreement was not a *stipulation pour autrui* designed to benefit Chevron. The additional investors who had succeeded in interest to Traillour were not liable for a letter of credit for the plug and abandonment obligation because Traillour's agreement to keep in force a letter of credit was never recorded and because it was a personal obligation rather than a real obligation that would burden (run with) the lease. As to the liability of Rocky Mountain and the additional investors to indemnify Chevron for any plug and abandon obligations, the court held that the liability issue had not been made moot by a conservation statute amendment providing that only an "owner" may be held liable for plugging and abandoning wells on an oil and gas lease. In doing so, the court recognized that despite the amendment the Commissioner of Conservation may be able to hold a prior owner liable[14] and that the Louisiana Mineral Code makes an assignor liable for lease obligations unless the lessor has discharged him in writing.[15] Nevertheless, the court held that the investors are not liable to Chevron for indemnification for plug and abandonment. The court observed that under Article 128 of the Louisiana Mineral Code, as applied by a Louisiana appellate court,[16] a lessee-

13. 987 F.2d 1138 (5th Cir. 1993).

14. The court was prescient in that the legislature has apparently confirmed that prior owners can be held liable for such obligations. *See* 1993 La. Acts No. 113 of 1993 discussed *supra*.

15. La. R.S. 31:129 (1989).

16. Robinson v. North American Royalties, Inc., 463 So. 2d 1384 (La. App. 3d Cir.), *judgment amended*, 470 So. 2d 112 (1985).

sublessor may enforce obligations created in its sublease against a sublessee once-removed. But the court resurrected the assignment/sublease distinction that had largely been eliminated by the Mineral Code to rule that Article 128 does not apply to the investors and Chevron because Chevron was an assignor, not a sublessor. Thus the investors would not be liable to indemnify Chevron for plugging and abandonment of the wells, though they might independently have the obligation to plug and abandon under duty to: (i) the original lessor, under Article 128 of the Louisiana Mineral Code; (ii) Traillour, under the terms of their subleases; and (iii) the Louisiana Commissioner of Conservation, under Louisiana Revised Statutes 30:4(C)(1)(a)(iv).

The conclusion from all this is that Chevron may end up liable for the plugging and abandonment of the wells in question. The surest way of getting the money for the plugging and abandonment responsibilities is by getting it up front when the assignment is made in the first instance. This makes the assignment that much more expensive, so the suggestion made here may not be very practical.

B. Lease Had Not Continued

Based on stipulated facts, the trial court in *G.B.M., Inc. v. Juna Corp.*[17] granted an involuntary dismissal of plaintiff's claim that an oil lease had survived foreclosure. The plaintiff apparently claimed that the lease had been continued by certain operations, but, looking solely to the plaintiff's evidence, the court of appeals could find no basis for plaintiff's claims and awarded damages to the three defendants for frivolous appeal by the plaintiff.

C. Interpretation of Acreage Retention Clause

Lessors in *Goodrich v. Exxon Co., USA*,[18] sought partial cancellation of an oil and gas lease for the lessee's failure to develop it as a prudent operator. The trial court ordered the horizontal cancellation of the lease, less and except those areas located within 40 acres (as provided for by the acreage retention clause of the lease) of the bottom hole of each producing well to the base of the deepest producing sand as well as areas presently held by unitized production. The court reviewed six factors to be considered in applying the reasonable development covenant: "geological data; number and location of wells drilled on or near the leased property; productive capacity of existing wells; cost of drilling compared with profit reasonably expected; time interval between completion of last well and demand for additional operation; and acreage involved in the lease under consideration."[19] Reviewing the trial court's application of the legal standard using these factors, the appellate court upheld the partial cancellation of the lease.

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17. 611 So. 2d 825 (La. App. 3d Cir. 1992).
18. 608 So. 2d 1019 (La. App. 3d Cir. 1992), *writ denied*, 614 So. 2d 1241 (1993).
19. *Goodrich*, 608 So. 2d at 1023.

Excepted from cancellation were those areas located within forty acres, as provided for by the acreage retention clause of the lease, of the bottom hole of each producing well to the base of the deepest producing sand as well as areas held by unitized production. The appellate court upheld this determination even though units established by the Commissioner of Conservation were in some instances smaller than forty acres; the acreage retention clause controlled even if the area actually drained by a well was smaller.[20] The appellate court modified the judgment to the extent that the trial court required additional activity to maintain each 40-acre area once production had ceased thereon; instead the appellate court held that proper application of the 40-acre retention clause required that the 40-acre tracts all be considered part of a single lease. The court put it thus: "The lease no longer covers a contiguous 686 acre area. It now covers a series of 40 acre tracts, all of which fall under one maintenance obligation. Accordingly, we reverse that portion of the trial court's judgment which provides for separate lease obligations on each retained area."[21] The trial judge allowed Exxon to maintain its lease as to those unitized sands located on the leased property that are produced from wells located on lands adjoining the leased property. It was unclear whether the trial judge intended to except from lease cancellation just the unitized sands, or all depths from the surface of the earth to the base of the unitized sands, and the court remanded for clarification.

D. No Injunction for Denial of Right to Use Roadway for Lease Purposes

Goodrich took an oil and gas lease from Community Bank of Lafourche. It then formed a 40-acre unit with others for exploring for oil and gas and secured a permit to drill a well. Community denied Goodrich access to the well site by use of an existing roadway on the leased land, contending that the roadway was for access to a mobile home park owned by Community and was not subject to use by Goodrich under the terms of the lease. Goodrich sought judicial relief to gain access to the site via the roadway. The trial court in *Goodrich Oil Co. v. Community Bank of Lafourche*[22] denied Goodrich an injunction, finding that Goodrich would not suffer irreparable injury from an inability to use the roadway. The appellate court affirmed without discussing the lease terms. It held that the damages allegedly suffered by Goodrich were ascertainable by a pecuniary standard and thus there was no abuse of discretion in the denial of an injunction. The fact that the court does not discuss the lease terms is troublesome. If the lessee's lease gave rise to a property right in the use of the roadway, then the landowner's denial of access is something more than a breach of contract for which damages would be an adequate remedy. The court's failure to focus on the property right aspect of the lessee's interest could muddy the jurisprudence for future cases.

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20. The court limited Dawes v. Hale, 421 So. 2d 1208 (La. App. 2d Cir. 1982).
21. *Goodrich*, 608 So. 2d at 1029.
22. 612 So. 2d 1071 (La. App. 1st Cir. 1992).

E. Presumption of Community Property Overcome

The plaintiff in *Harvey v. Amoco*[23] sought to cancel a lease held by Amoco, claiming that Amoco had not paid royalty properly. The trial court granted summary judgment to Amoco, holding that Amoco was justified in relying on the presumption that all property acquired during marriage is presumed to be community property. The appellate court reversed, finding that in the document of cash sale, by which the plaintiff acquired her 10% interest in the property in question, there was a declaration that all of the purchasers were purchasing "with their separate paraphernal funds, under their separate management and control and for their separate estate." This, the court held, was enough to put Amoco on notice that the property was plaintiff's separate property. The case was remanded for further proceedings.

V. PRESCRIPTION

A. Imprescriptible Mineral Servitudes

The plaintiffs in *Heirs of Viator v. Tri-Parish Investors, Ltd.*,[24] sought a declaration that they were the owners of mineral servitudes on land now owned by defendants. They sought to establish that the liberative prescription of ten years nonuse did not apply to the servitudes in question because the land had been expropriated by the federal government in 1956 and then returned to private ownership in 1969 when the government sold the land in question. The court upheld the trial court's determination that the mineral servitudes were imprescriptible under a statute[25] that existed prior to the Mineral Code and under Louisiana Mineral Code article 149.[26] Although the latter makes it clear that when expropriated land is returned to private ownership the prescription of nonuse then applies to the mineral right that was imprescriptible while held by the government, the court held that this article will not be allowed to operate retroactively to divest servitude owners of a vested right.

The ruling of the court is troublesome. The court seems on solid ground in determining that a statute should not be allowed to divest one of a vested right. But the proper application of this would seem to be limited to saying that prescription would not be found to have run from 1969 to January 1, 1975, the effective date of the Mineral Code; after this date, the servitude owner should at most have ten years in which to exercise the servitude. Instead, the court rules that the vested right is that the servitude is forever imprescriptible. It is most doubtful that a property owner can be said to have a vested right that may never be made subject to a rule

23. 620 So. 2d 401 (La. App. 1st Cir. 1993).
24. 618 So. 2d 36 (La. App. 3d Cir.), *writ denied*, 625 So. 2d 167 (1993).
25. La. R.S. 9:5806 (1940 La. Acts No. 315) (Repealed) (1989).
26. La. R.S. 31:149 (1989).

of prescription. The expectation that laws concerning liberative prescription will not change is not a vested right.[27]

B. Three-Year Prescription for Royalty Claims

The court in *Acadia Holiness Ass'n v. IMC Corp.*[28] affirmed a determination that the plaintiff lessor/royalty owners' claim was for underpayment of royalty and thus was limited by a three-year prescriptive period rather than the ten-year period applicable to contract claims. The facts set forth in the opinion do not make clear what the claims of breach of contract were. Apparently the plaintiffs sought to establish that the defendant lessee had not acted as a prudent administrator and that the breach of this implied obligation gave rise to a contract claim for damages that was subject to the ten-year prescriptive period.[29] But the plaintiffs styled their petition as lease cancellation and an accounting of royalties, payment due, and damages, and they prayed for a money judgment, including double the amount of royalty due under Louisiana Revised Statutes 31:140. This, the court held, was a claim for underpayment of royalty subject to a three-year prescriptive period.[30]

C. Prescription of Nonuse

A question of mineral rights arose in a partition of community property in *Reeves v. Reeves*.[31] The husband and his mother had each acquired a one-half interest in Elmly Plantation from a partition of land in 1951 (during husband's marriage), with such partition being subject to a reservation of all minerals. In April, 1966, the mother sold her son (the husband) her one-half of the tract of land, again subject to a reservation of all minerals;[32] this one-half fell into the community of the husband, though the other half was his separate property. The

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27. *See* Anadarko Prod. v. Caddo Parish Sch. Bd., 455 So. 2d 699, 701 (La. App. 2d Cir.), *writ denied*, 460 So. 2d 610 (1984) ("An expectancy founded upon the premise that an applicable law of liberative prescription will not be legislatively modified is not regarded as a 'vested' or fundamental right that is entitled to constitutional protection."); Producers Oil & Gas Co. v. Nix, 488 So. 2d 1099 (La. App. 2d Cir.), *writ denied*, 493 So. 2d 641 (1986). Curiously, the *Viator* case does not even mention these cases. *See also* Texaco, Inc. v. Short, 454 U.S. 516, 102 S. Ct. 781 (1982).

28. 616 So. 2d 855 (La. App. 3d Cir.), *writ denied*, 620 So. 2d 842 (1993).

29. La. Civ. Code art. 3499.

30. La. Civ. Code art. 3494; Parker v. Ohio Oil Co., 191 La. 896, 186 So. 604 (1939). *See also* Matthews v. Sun Exploration and Prod. Co., 521 So. 2d 1192 (La. App. 2d Cir. 1988); Hankamer v. Texaco, Inc., 387 So. 2d 1251 (La. App. 1st Cir. 1980), *appeal dismissed on joint motion of the parties*, 403 So. 2d 651 (1981); Board of Comm'rs v. Pure Oil Co., 167 La. 801, 120 So. 373 (1929); Edmundson v. Amoco Prod. Co., 924 F.2d 79 (5th Cir. 1991).

31. 607 So. 2d 626 (La. App. 2d Cir.), *writ denied*, 608 So. 2d 1010 (1992).

32. The 1966 reservation stated that the mother "reserves unto herself, her heirs and assigns, all of oil, gas, and other mineral rights which she presently owns under the property hereinabove described (being 13/60 of the whole of the oil, gas and other minerals under Elmly Plantation) . . . ." The court held that this was a reservation of all her minerals even though she incorrectly believed that she owned only 13/60 of the minerals. *Id.* at 631.

question presented was whether the wife was entitled to one-half interest in minerals from Elmly Plantation based on prescription of the mineral servitude(s) created in 1951 and 1966. The court held that even though there was no evidence of interruption of prescription by any operations in the ten years from 1951 to 1961, this was irrelevant to the proceeding: the minerals would have reverted to the land that was owned by the husband (as his separate property) and his mother, and the 1966 reservation of all minerals was effective to vest the minerals in the mother's one-half interest in Elmly Plantation in the mother though the land as to this one-half interest became community property. When the husband later acquired his mother's interest in the minerals, it remained his separate property.

VI. PUBLIC LANDS

A. Sharing of OCS Oil and Gas Revenues by Parish

In *St. Mary Parish v. Parker*,[33] the plaintiff parish sought a share of royalty and other funds received by the state from the federal government under so-called 8(g) lands of the outer Continental Shelf.[34] Under the Louisiana Constitution,[35] one-tenth of all royalties from mineral leases on state-owned land must be remitted to the governing authority of the parish in which severance or production occurs. The court of appeal dismissed the parish's petition on an exception of no right of action on the basis that the 8(g) area was not a state-owned water bottom, and the production or severance took place in the 8(g) area and not in St. Mary Parish.[36] The Louisiana Supreme Court set aside and remanded, holding that the governing body of the parish was the proper plaintiff to assert the parish's interest in the claim; whether the parish was entitled to any of the funds was an issue to be decided on the merits and not on an exception of no right of action.

B. Failure of Mineral Board to Approve Parish Lease

In *Plaquemines Parish Government v. State Mineral Bd.*,[37] the Plaquemines

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33. 615 So. 2d 327 (La. 1993).

34. 43 U.S.C.A. § 1337(g) (West 1986), the Outer Continental Shelf Lands Act of 1953, was amended in 1978 to provide for a fair and equitable distribution of funds derived from federal leases within the area three miles seaward from the seaward boundary of coastal states. The rationale for such sharing of "8(g)" funds is that this three-mile zone may contain oil and gas pools underlying both federal and state lands.

35. La. Const. art. VII, § 4(E): "One tenth of the royalties from mineral leases on state owned land, lake and river beds and other water bottoms belonging to the state or the title to which is in the public for mineral development shall be remitted to the governing authority of the parish in which severance or production occurs." See generally on parish rights I. Jackson Burson, Jr., *Not Endowed by Their Creator: State Mandated Expenses of Louisiana Parish Governing Bodies*, 50 La. L. Rev. 635 (1990).

36. 610 So. 2d 875 (La. App. 1st Cir. 1992).

37. 615 So. 2d 1051 (La. App. 1st Cir.), *writ denied*, 617 So. 2d 934 (1993).

Parish Government had sought bids for a mineral lease on a 640-acre tract. Exxon submitted a bid with a cashier's check (as required for the bid) for $511,200. Exxon's bid provided that it was subject to certain conditions including approval of the lease by the state of Louisiana as trustee for the Plaquemines Parish School Board. The parish accepted the bid and negotiated the check on June 28, 1990. Eleven months later, the state, through the Mineral Board, rejected the lease because of a dispute over the proper party to issue a lease on school board (Sixteenth Section) lands. The parish brought suit for review of the Mineral Board's rejection. Exxon intervened in this proceeding and sought refund of its $511,200. The court upheld separate treatment of Exxon intervention from the principal demand by the parish, holding that the condition asserted by Exxon for its bid had not been fulfilled, and Exxon was entitled to a return of its money after a reasonable period had expired; eleven months had elapsed and Exxon's offer was revoked by its intervention.

C. Oyster Harvesting Is Not a Mineral Right

The plaintiffs in *Jurisich v. Hopson Marine Service Co., Inc.*,[38] were holders of oyster leases from the state of Louisiana who filed suit for damages alleged to have been suffered from activities of defendants.[39] One defendant, Phibro, filed exceptions claiming inter alia that the oyster leases were invalid. The defendant relied in part on *Sierra Club v. Dept. of Wildlife*,[40] which held that the Wildlife and Fisheries Commission was required to comply with public bidding procedures before granting shell-dredging leases because such shell dredging was the removal of minerals. The court here distinguished removing live oysters from removing oyster shells. Harvesting live oysters is not the exercise of a mineral right, and therefore the public bidding requirements that pertain to granting of mineral leases do not apply to oyster harvesting. Moreover, because the lessees had their own valuable property right in their oyster beds, their lessor, the state of Louisiana, was not an indispensable party to the litigation.

D. Reformation of State Lease

The case of *Greer v. State of Louisiana*[41] is a further proceeding growing from the facts of *Cities Service Oil and Gas Corp. v. State of Louisiana.*[42] The *Cities Service* case arose due to a shift in the bed of the Red River between 1972 and 1979. The river moved, in part, from Bossier Parish to Caddo Parish until its movement was halted by the Army Corps of Engineers, but the Corps' rescue did

38. 619 So. 2d 1111 (La. App. 4th Cir. 1993).

39. *See* Pace v. Chevron, U.S.A., Inc., 579 So. 2d 494 (La. App. 4th Cir. 1991), recognizing the right of oyster lessees to maintain such actions.

40. 519 So. 2d 836 (La. App. 4 Cir.), *writ denied*, 521 So. 2d 1151 (1988).

41. 616 So. 2d 811 (La. App. 2d Cir. 1993).

42. 574 So. 2d 455 (La. App. 2d Cir.), *writ denied*, 578 So. 2d 132, 136 (1991).

not come in time for some owners. The suit was filed as a concursus proceeding to determine ownership of revenues produced from a unit established by the Commissioner of Conservation that included riverbed land leased by the state. Seven different groups of litigants claimed an interest in the proceeds from unit production, including the state of Louisiana, the state's lessee under a 1972 lease of the riverbed, the unit operators, several groups of landowners, and their lessees. As to the state's lessee, the trial court held that the state lease did not move westward with the river. The appellate court agreed, holding that the state lease remained with the former riverbed and did not move to the new bed. The lease stated that it covered land "now or formerly" constituting the riverbed owned by the state on a specific date, September 1, 1972.[43] It did not provide that the lease would follow the movement of the river. The state's lessee (the Greer group) then brought the *Greer* case to reform the state lease to establish that the lease covered the new bed of the Red River. The state filed an exception of res judicata, and the trial court sustained it, dismissing the plaintiffs' suit. The court in this latest case held that the doctrine of res judicata did not apply to this proceeding as there was not an identity of the parties, of "cause," and of the thing demanded from the previous proceeding. In the present proceeding, the parties were aligned differently from the first suit; the state had initially taken the position favorable to the plaintiffs herein that the state lease moved with the bed of the Red River; thus the state and the plaintiffs were not truly adverse to one another in the earlier litigation. Moreover, the earlier litigation did not involve any issue of reformation of the state lease, and no issue of mutual mistake was presented in the first case. Thus the appellate court remanded for further proceedings.

VII. CONSERVATION

A. Prescription on Conservation Unit

The cases of *Taylor v. Smith*[44] and *Taylor v. David New Operating Co., Inc.*,[45] both grew out of certain of the same facts reported in *Taylor v. Woodpecker Corp.*[46] The issue involved was whether an unleased mineral interest owner has a right or cause of action against a purchaser of unit production to recover the value of his share. The unit involved in the litigation was a 40-acre unit established in 1942 by Order No. 24-D. In 1979, a well was drilled on acreage within the 1942 unit by E. C. Wentworth, and Ashland purchased production from the well. In 1986, the lessor-plaintiffs (Taylors) filed a lawsuit against their lessee, Woodpecker

43. The state lease covered the following: "All the lands now or formerly constituting the beds and bottoms of all water bodies of every nature and description and all islands and other lands formed by accretion or reliction, except tax lands, owned by and not under mineral lease from the State of Louisiana on September 1, 1972, situated in Bossier and Caddo Parishes. . . ." *Id.* at 458.

44. 619 So. 2d 881 (La. App. 3d Cir. 1993).

45. 619 So. 2d 1251 (La. App. 3d Cir. 1993).

46. 562 So. 2d 888 (La. 1990).

Corporation, and against Wentworth, the well operator, which led to the Supreme Court decision noted above. This phase of the litigation arose in 1991 when the plaintiffs filed a suit against Smith-Wentworth, an unincorporated association, and a suit against David New Operating Company, Inc. The plaintiffs appealed from summary judgments granted to the defendants in both. In *Taylor v. Smith*, the appeal was on the ground that Smith was not the operator, and that in any event any claims against him had prescribed under a one-year prescriptive period; in *Taylor v. David New Operating Company, Inc.*, the same ruling on prescription was made. The defendant Smith maintained that he was never the operator because the drilling permit had been sought in 1979 in the name of Smith-Wentworth on behalf of H. & N. Operating Co., whose name was later changed to David New Operating Company. However, the court ruled that the drilling permit was held in the name of Smith-Wentworth as operator from 1979 to 1983; thus there was genuine issue of material fact so that summary judgment for Smith was inappropriate. The second issue before the court in both cases was prescription. The defendants claimed, and the trial court so held, that the claim was governed by a one-year prescriptive period applicable to conversion. The court of appeals reversed, holding that the obligation of the unit operator to a nonoperator under the pooling statute gives rise to an action in quasi-contract.[47] The court said that since the operator had the legal right to sell the production of the nonoperator, it would not be appropriate to apply the prescriptive period that governs the wrongful taking or conversion.

B. Retroactivity of Conservation Order; Tort Liability

In *Cockerham v. Atlantic Richfield Co.*,[48] the Louisiana Department of Conservation promulgated a rule through Order 29-B that required well casings to be cut at a minimum of two feet below plow depth. The order was issued in 1974 but made effective as of August 1, 1943. Arco was successor in interest to the operator of a well that was plugged in 1945; the lease was released in the same year. The plaintiff was injured in 1990 while riding an off-road vehicle. Plaintiff asserted a negligence cause of action, based on the failure of the operator of the well to cut the casing two feet below plow depth. The court found that the purpose of the order with its retroactive effective date was to protect persons and property from injury and concluded that Arco owed a duty to protect the plaintiff. Arco was operating other wells in the state and therefore should have been aware of the order and its obligations. Thus Arco knew or should have known of the dangerous condition caused by its abandoned wells throughout the state, according to the court. The dissenting judge noted that under the majority's analysis, the present owner of the mineral estate as well as the landowner would also be liable, which should have required the reversal of the trial court's granting the landowner a

47. La. R.S. 30:10(A)(3) (1989); La. Civ. Code arts. 2292-2295.

48. 615 So. 2d 547 (La. App. 3d Cir.), *writ denied*, 623 So. 2d 1303 (1993).

summary judgment dismissing the claims against him. This case and *Magnolia Coal Terminal v. Phillips Oil Co.*,[49] are two more reasons why it appears that a company buying old properties in Louisiana does so at great peril.[50]

C. Venue for Conservation Litigation

When a claimant relying on an order of the Commissioner of Conservation seeks an injunction against a third party whom the plaintiff claims is in violation of the order, the venue for the litigation is in the parish of the defendant, not the parish where the principal office of the Commissioner of Conservation is located. This was the holding of *Total Minatome Corporation v. Parish of Caddo*.[51] In this case, the Commissioner of Conservation issued a permit to Total Minatome for the drilling of an oil and gas well within one thousand feet of Cross Lake, the city of Shreveport's water supply. Under the zoning ordinances of Shreveport and the Parish of Caddo, no one may extract minerals from Cross Lake or from within five thousand feet of Cross Lake without a special exception from the Metropolitan Shreveport Zoning Board of Appeals. The board refused to grant an exception and the permittee sought an injunction against the Parish of Caddo, the Caddo Parish Commission, and the Metropolitan Shreveport Zoning Board of Appeals in East Baton Rouge Parish, the parish in which the principal office of the commissioner is located. The Louisiana First Circuit Court of Appeal ruled that this was not the proper venue. While it would be the proper venue for an aggrieved party seeking to appeal an order of the commissioner under Louisiana Revised Statutes 30:12, the proper venue for a person seeking to enforce an order of the commissioner is the district court in the parish of the residence of any one of the defendants or in the parish where the violation is alleged to have occurred or is threatened under Louisiana Revised Statutes 30:14, 16. Since the plaintiff was aggrieved by the defendants' alleged threat of a violation of the commissioner's drilling permit, the suit should have been brought in Caddo Parish, not East Baton Rouge Parish.

D. No Implied Contract for Use of Land in Unit That Would Give Rise to Compensation

The Louisiana Supreme Court ruled in *Nunez v. Wainoco Oil & Gas Company*[52] that where a unit operator has drilled the unit well in accordance with the orders and regulations of the Commissioner of Conservation at the optimum location in the unit, such a well will preclude a suit by the landowner in trespass even though the well bore may enter the landowner's property at a subsurface

49. 576 So. 2d 475 (La. 1991).

50. The Louisiana legislature apparently was prompted by this case to limit liability in similar circumstances to intentional acts and gross negligence. *See* 1993 La. Acts No. 889 discussed at the beginning of this article.

51. 618 So. 2d 1088 (La. App. 1st Cir. 1993).

52. 488 So. 2d 955 (La. 1986).

location. In the most recent phase of this case, *Nunez v. Wainoco Oil & Gas Co.*,[53] the Louisiana appellate court upheld a trial court judgment based on a jury verdict that the landowner had suffered no subsurface or surface damages from the unit operations. The trial court's determination that the landowner had no implied contract with the unit operator in granting judgment notwithstanding the verdict on this issue (the jury had found the operator liable for $57,000 as rent on an implied contract) was also affirmed.

53. 606 So. 2d 1320 (La. App. 3d Cir.), *writ denied*, 608 So. 2d 1010 (1992).