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What’s in a Name? ¹
Assignments and Subleases of Mineral Leases Under Louisiana Law
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I. Introduction

A. Preface

To say that exploratory oil and gas wells are rarely, if ever, drilled by the initially named lessee under a mineral lease is an understatement. Either because the mineral lease is obtained by a lease broker (either under contract to an ultimate leasehold owner or for speculative purposes) or the original lessee determines it to be necessary or appropriate to transfer, in whole or in part, the lease to a third party, it is quite common for the mineral lease, during its life, to be the subject of at least one instrument of transfer.

The instrument by which this “transfer” is effectuated is typically called an “assignment.” It is the principal document by which the ownership or operating rights under a mineral lease are conveyed on record.

If an overriding royalty interest—or some other type of revenue interest or right of control—is reserved by the grantor, the “assignment” is, properly speaking, a “sublease.”

While the reservation of an overriding royalty interest is sufficient to characterize an assignment as a sublease, ² it is not necessary. For example, in Prestridge v. Humble Oil & Refining Company, ³ a transfer of mineral leases in which the assignor did not reserve an overriding royalty interest was nevertheless held to be a “sublease” by reason of the inclusion in the transfer document of a “right of reassignment,” a special warranty in the event that the assignee re-assigned the leases to the assignors, and an obligation to pay to assignors the same amount of rentals as the assignee might pay to the prime lessors. Said the court:

We do not find that the cases cited ⁴ require than an over-riding royalty be retained in order that it be a sublease, but rather find that

¹ “What’s in a name? That which we call a rose by any other name would smell as sweet.” Juliet in Shakespeare’s Romeo and Juliet (Act II, Scene ii, 1-2).
³ 131 So.2d 810 (La.App. 3rd Cir. 1961).
⁴ The “cases cited” by the court were Smith v. Sun Oil Co., 165 La. 907, 116 So. 379 (1928); Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46 (1931) and
retention of control (or an interest) suffices as evidenced by the wording of the transfer in question. Therefore, it was a sublease.

All subleases are assignments, but not all assignments are subleases. Thus, as used herein, the generic term “transfer” (or the terms “transferor” or “transferee”) might be used when the context does not require specification of, or differentiation between, the precise type of transaction – assignment or sublease.

Although both the assignment and the sublease will certainly accomplish the transfer of the working interest under the mineral lease (presumably the principal objective of the transaction), certain consequences are presented by one type of transfer or the other. The distinction between an assignment and a sublease has no significant legal consequences in other oil and gas producing states. “In Louisiana, however, the distinction has been of considerable importance.”

This is so because the proper characterization of a transfer document as being either an assignment or a sublease gives rise to a myriad of consequences, not all of which are readily apparent.

While the body of jurisprudence in the oil and gas area tends to be principally devoted to the ownership of minerals or royalties or the mineral lease, the consequences of an imperfectly confected instrument of transfer can give rise to a lack of confidence if for no other reason than that the very purpose of the transfer document is to vest leasehold rights in another person or entity.

Indeed, the case could be made that the “secondary market” which involves the transfer instruments under consideration is “where the action is,” since the contractual rights are being transferred either for the purpose of drilling a well (a good thing) or of buying and selling existing production (a very good thing). In the industry, this is called “Happy Time.”

Although particular aspects of this topic have been the subject of prior commentary, lingering issues persist, new issues are presented and

Stacy v. Midstates Oil Corporation, 214 La. 173, 36 So.2d 714 (1948).


the general notion of mineral lease transfers merits a current examination.

Thus, Part I of this paper examines applicable law relative to the alienability of a mineral lease, including the ability of the lessor to restrict or regulate the lessee’s right to transfer the lease.

The elements and types of transfers are then reviewed in Part II in order to understand the difference between assignments and subleases.

Next, the several consequences which arise from the distinction between an assignment and a sublease are considered in Part III.

The provisions of the Louisiana Mineral Code concerning transactions affecting the mineral lease are studied in Part IV, with the observation that the Code essentially treats both transactions in a similar manner.

The custom of the industry has given rise to certain clauses which are typically contained in both an assignment and a sublease. Certain of those clauses are discussed in Part V with a view toward promoting a better understanding of their import and utility.

Part VI of the paper then examines the principles and methodologies by which one might calculate working interest and net revenue interest resulting from the transfer of a mineral lease. Because there is little or no literature on these matters, it is hoped that some benefit will be gained both by law students and lawyers who are “new to the game.”

Finally, certain concepts or principles of general application to the transfer of immovable property are reviewed in Part VII to determine if they have relevance to the transactions under consideration in this paper. Called “A Few ‘Asides,’” this is the “food for thought” department.

B. Suppletive Law

Article 127 of the Louisiana Mineral Code7 states that the “lessee’s interest in a mineral lease may be assigned or subleased in whole or in part.” However, with the exception of five subsequent articles, the Mineral Code provides little guidance on particular aspects of mineral lease transfers. Thus, it is appropriate to resort to other sources of positive law for edification on certain issues.

As to any issue not covered in the six articles of the Louisiana Mineral Code pertinent to the issue of the transferability of mineral leases, it is appropriate to refer to the articles of the Louisiana Revised Civil Code (and cases interpreting them) on this subject. This referral is directed by Article 2 of the Louisiana Mineral Code which provides, as follows:

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7 LA. REV. STAT. ANN. §§ 31:1, et seq.
The provisions of this Code are supplementary to those of the Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.

The Louisiana law of lease has contributed numerous decisions which provide significant guidance on this issue. This is so because “[m]ineral leases are construed as leases generally and, wherever pertinent, codal provisions applicable to ordinary leases are applied to mineral leases.”

C. Alienability of a Mineral Lease:

A mere century ago, the Louisiana Supreme Court considered — and rejected — a contention that a contract for the exploration and development of minerals was not assignable on the asserted theory that it was “personal on the part of the obligor.” This suggestion was based on the lessor’s contention that “the obligation ‘to drill with a view to finding commercial substances’ is purely personal on the part of the obligor.” The court did not consider this argument because it determined that the “contract does not purport to impose any such obligation on Le Danois.”

The lessor then posited that the contract was not assignable because “no mention is made in it of assigns, or of the right to assign.” This was summarily rejected by the following statement of the court, to-wit:

But, manifestly, there was no need of any such mention, since a man may assign whatever right not purely personal to himself he may be the owner of. The rule is that all things of value, incorporeal as well as corporeal, may be made the subject of sale. Civ. Code art. 2448.

Hence, being a “thing of value,” or an item of commerce, a mineral lease is assignable. This uncontroversial proposition is established by a series of articles in both the Louisiana Mineral Code and the Louisiana Revised Civil Code.

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8 Succession of Doll v. Doll, 593 So.2d 1239 (La. 1992).
9 Anse LaButte (Le Danois) Oil & Minerals Co. v. Babb, 122 La. 415, 47 So. 754 (1908).
10 At the time of this decision, the juridical or legal character of what is now recognized as a “mineral lease” had not been fully determined by the courts. For the history of the development of the mineral lease in Louisiana, see Hall, The Juridical Nature of the Mineral Lease, 11 Ann. Inst. on Min. Law 106 (1964).
To state the obvious, a mineral lease is a "mineral right." As such, a mineral lease "is an incorporeal immovable [which] is alienable and heritable."

Moreover, "mineral rights [including mineral leases] are real rights." "Rights and actions that apply to immovable things are incorporeal immovables. Immovables of this kind are such as . . . minerals rights, . . . ."

Having established that a mineral lease — an incorporeal immovable and a real right — is a "thing of value" and, certainly, an alienable mineral right, the Civil Code affirms the proposition that the mineral lease is susceptible of transfer.

Thus, we are told that "[o]wners of private things may freely dispose of them under modifications established by law." And, "[a]ll things corporeal or incorporeal, susceptible of ownership, may be the object of a contract of sale, unless the sale of a particular thing is prohibited by law."

While, as shown above, Louisiana positive law clearly establishes the right of the lessee to assign the mineral lease (in whole or in part) even if the lease is silent as to that right, nevertheless, the right to assign the lease is either explicit or at least implicit in the forms in common usage in Louisiana.

D. Restrictions on Alienability:

1. Preface

As noted in Part I.C hereof, the working interest in a mineral lease is freely alienable or assignable unless such right has been denied or restricted by the lessor. Louisiana law clearly establishes the right, in the

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11 LA. REV. STAT. ANN. § 31:16.
12 "Incorporeals are things that have no body, but are comprehended by the understanding, such as . . . , obligations, . . ." LA. CIV. CODE ANN. art. 461.
13 LA. REV. STAT. ANN. § 31:18.
14 LA. REV. STAT. ANN. § 31:16.
15 LA. CIV. CODE ANN. art. 470.
16 LA. CIV. CODE ANN. art. 454.
17 LA. CIV. CODE ANN. art. 2448.
18 "The rights of either party hereunder may be assigned in whole or in part . . ." ¶ 10, Bath's Form Louisiana Spec. 14-BR1-2A/12/79; "All provisions hereof shall extend to and bind the successors and assigns (in whole or in part) of Lessor and Lessee." ¶ 9, Form 42 CPM – New South Louisiana Revised Four (4) – Pooling. Revised "A"; "All provisions hereof shall inure to the benefit of and bind the successors and assigns (in whole or in part) of Lessor and Lessee, (whether by sale, . . ., assignment, sub-lease or otherwise) . . ." ¶ 9, Form 42 CPM – New South Louisiana Revised Six (6) – Pooling.
exercise of "freedom of contract,"\textsuperscript{19} of a lessor to regulate or restrict the ability of the lessee to transfer the lease, either by assignment or sublease.

There are a myriad of reasons as to why a lessor would deem it advantageous to regulate, or perhaps restrict, the lessee's right to freely alienate the lease. In the mineral context, a lessor might find it to be in its best interest to control who has the right to enter its property and conduct drilling operations.

If a lessor is aware that a certain operator has a reputation for not paying its bills (resulting in the filing of privileges); or not paying royalties; or not pursuing diligent development, or is haphazard in its approach to environmental concerns, or any other action or inaction which is not conducive to a good lessor-lessee relationship, the lessor would certainly want to keep that company off of its land.

If a counter letter or side letter exists between the lessor and the lessee, a lease provision which requires the lessor's consent to an assignment would afford an opportunity for the lessor to require the proposed assignee to expressly assume the obligations of the unrecorded agreement.\textsuperscript{20}

Although a source of frustration to a party desiring to assign the lease, some lessors look forward to the opportunity to attempt to exact a "toll" or price when its consent to assign is sought at a later date. It is usually the party desiring to assign (or to receive the assignment), not the lessor whose consent is needed, who is the hostage in such circumstances.

2. Codal Authority

Mentioned here only because the early, significant cases were based upon it, La. Civ. Code Ann. art. 2725 provided, prior to its amendment and restatement,\textsuperscript{21} as follows:

The lessee has the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted.

The interdiction may be for the whole, or for a part; and this clause is always construed strictly.

\textsuperscript{19} "'Freedom of contract' signifies that parties to an agreement have the right and power to construct their own bargains. . . . In a free enterprise system, parties are free to contract except for those instances where the government places restrictions for reasons of public policy." Louisiana Smoked Products, Inc. v. Savoie Sausage and Food Products, Inc., 96-1716, 96-1727 (La. 7/1/97); 696 So.2d 1373, 1380.

\textsuperscript{20} See LA. CIV. CODE ANN. art. 1821 discussed in Part V.B.2 hereof.

\textsuperscript{21} Act No. 821 of the 2004 Regular Session of the Louisiana Legislature, effective January 1, 2005.
The very language of this article affirmed the notion that the Civil Code recognized two distinct types of transfer of leasehold rights vested in the lessee—"the right [of the lessee] to underlease, or even to cede his lease to another person."

This subject is now covered in La. Civ. Code Ann. art. 2713, which states, as follows:

The lessee has the right to sublease the leased thing or to assign or encumber his rights in the lease, unless expressly prohibited by the contract of lease. A provision that prohibits one of these rights is deemed to prohibit the others, unless a contrary intent is expressed. In all other respects, a provision that prohibits subleasing, assigning, or encumbering is to be strictly construed against the lessor.

Construing the predecessor article, one court explained its workings, as follows:

In interpreting the second paragraph of the quoted LSA-Civil Code Art. 2725 our jurisprudence consistently has held that a prohibition against subleasing is to be construed strictly against the lessee; the covenant is for the benefit of the lessor because it is regarded as in his interest to determine who shall be a tenant of his property. See Owens v. Oglesby, La. App., 123 So.2d 521, 523.22

But there is an important difference and distinction between an absolute prohibition of any right to sublease, a right which would exist under the article in the absence of a prohibition or express "interdiction", and the provision relative to subleasing in the instant case. Here the lessee is simply not permitted to sublet without the written consent of the lessor. This does not prohibit or interdict subleasing. To the contrary, it permits subleasing provided only that the lessee first obtain the written consent of the lessor. When the lease was entered into the lessee had every reason to believe that he could sublet upon producing a proper subtenant. At the time the lease was entered into the lessee had every reason to believe that he could sublet upon producing a proper subtenant. Otherwise the provision simply would prohibit subleasing. Under these circumstances the lessor cannot unreasonably, arbitrarily or capriciously withhold his consent.

The jurisprudence suggests that, in a proper case, an unauthorized sublease or assignment without the consent of the lessor where required constitutes a breach of the lease.24

23 See also Montecon v. Faures, 3 La.Ann. 43 (1848) ("The covenant in the lease against subletting is for the benefit of the landlord, because it is regarded as for his interest to determine who shall be a tenant of his property.").
24 Cordeviolle v. Fedon, 4 La.Ann. 40 (La. 1849); Owens v. Oglesby, 123 So.2d
Thriftee Oil Company v. Partin\textsuperscript{25} involved a situation wherein the lessee was expressly given the right to assign the lease to a particularly named party, "but otherwise the lessee [did] not have the right or authority to sublease or sublet the [leased premises] in part or in whole without the written consent of the lessor."

Applying the rule of La. Civ. Code Ann. art. 2725 that the lessee has the right to assign or sublease, "unless this power has been expressly interdicted," the court held that the named party (to whom permission to assign was given expressly in the lease) could assign (as distinguished from sublease) the lease without the lessor's consent because, although subleasing was expressly prohibited without the consent of the lessor, assigning was not expressly prohibited.

Contrary to the ruling in Thriftee, the court in Serio v. Stewart Investments, Inc.\textsuperscript{26} held that an express contractual prohibition against subleasing without the lessor's consent also precludes an assignment without the lessor's consent. The court, relying on the rule of strict construction espoused in La. Civ. Code Ann. art. 2725, reasoned, as follows:

'Underlease' or 'sublease' is the transfer of only a part (the lesser) and 'cede' or 'assign' is the transfer of all (the greater). Accordingly, there is only one right which includes the lesser and greater thereof.

Acknowledging that its decision was in conflict with the decision in Thriftee, the court stated, as follows:

We recognize that our decision appears to conflict with Thriftee. That case, of course, is persuasive, but we note that of the three Second Circuit judges on the panel, one concurred and one dissented. Also, it has not been cited as authority in any reported case in our jurisprudence since rendition nearly 15 years ago.

Because a prohibition against subleasing is a provision for the benefit of the lessor, it may be waived by him. In Moore v. Bannister,\textsuperscript{27} the court said, as follows:

The requirement of approval by the lessor in writing contained in the lease is certainly a provision for the benefit of the lessor, and if he chooses to waive it by verbal consent or by his actions, we know of no reason why he could not do so. In previous similar cases we

\textsuperscript{25} 521 (La.App. Or. Cir. 1960) and Major v. Hall, 251 So.2d 444 (La.App. 1st Cir. 1971), partially reversed on other grounds 262 La. 243, 263 So.2d 22 (1972).
\textsuperscript{26} 209 So.2d 557 (La.App. 2nd Cir. 1968).


\textsuperscript{27} 269 So.2d 291 (La.App. 4th Cir. 1972).
have held that a prohibition against the tenant subleasing unless the lessor yield his consent in writing, is clearly a stipulation in the interest of the lessor alone, and of course he may waive it whenever he pleases to do so; and since there is no law which requires such waiver to be in writing, it follows that the waiver may be oral and need not even be expressed. [citations omitted.]


The State Mineral and Energy Board is the state agency which is charged with the responsibility to "administer the state's proprietary interest in minerals."28 As such, it has the "authority to lease for the development and production of minerals, oil, and gas any lands belonging to the state, or the title to which is in the public, including road beds, water bottoms, vacant state lands, and lands adjudicated to the state at tax sale."29

La. Rev. Stat. Ann. § 30:128A provides that "[n]o transfer or assignment in relation to any lease of minerals or mineral rights owned by the state shall be valid unless approved by the State Mineral and Energy Board."30 "Failure to obtain approval of the board of any transfer or assignment of a lease within sixty days of execution of the transfer or assignment shall subject the transferor or assignor to a civil penalty of one hundred dollars per day beginning on the sixty-first day following the execution of the transfer or assignment."31

As noted above, La. Rev. Stat. Ann. § 30:128A requires the consent of the State Mineral and Energy Board for any "transfer or assignment in relation to any lease of minerals or mineral rights owned by the state," while the penalty provided in La. Rev. Stat. Ann. § 30:128B applies to an unapproved "transfer or assignment of a lease." It is not clear if the Legislature intended any significance in the differing terminology used in the statute.

The requirement that a transferee of a State mineral lease must be a "registered prospective leaseholder" was added in 2005.32

28 LA. REV. STAT. ANN. § 30:121D. By Act No. 196 of the 2009 Regular Session of the Louisiana Legislature, the name of the office was changed from State Mineral Board to State Mineral and Energy Board.
29 LA. REV. STAT. ANN. § 30:124.
30 LA. REV. STAT. ANN. § 30:128B.
31 Section 2 of Act No. 114 of the 1993 Regular Session of the Louisiana Legislature provides that the "penalties provided in R.S. 30:128(B) shall be applicable to assignments or transfers confected after the effective date of this Act." This Act became effective on August 15, 1993.
In addition to the statutory restriction on the alienability of a State mineral lease, there is a contractual provision to the same general effect. Paragraph 8 of the current State mineral lease form reads, as follows:

It is further agreed and understood that the rights of Lessee may be assigned or transferred in whole or in part, but no transfer or assignment whether in whole or in part, in relation to this lease shall be valid unless such transfer or assignment be approved by the Lessor.

Additionally, although La. Rev. Stat. Ann. § 30:128C exempts assignments of overriding royalty interests from the statutory requirement to obtain approval of the State Mineral and Energy Board, it is possible that approval of such a transaction is contractually required by the express terms of Paragraph 8 of the State Lease form. Nevertheless, as a matter of practice, the Staff of the State Mineral and Energy Board does not process applications for approval of assignments of overriding royalty interest.

The few decisions which have considered the issue have indicated that an assignment of a State Lease which has not been approved by the State Mineral and Energy Board is "not valid."


However when Transworld commenced action against Texas General, intervenors had no interest in the lease and would not obtain one until after the suit was filed and the lis pendens was recorded. This is so because R.S. 30:128 flatly provides that an assignment like this one is not valid unless approved by the State Mineral Board.

The liability of a party to which had been assigned a State Agency Lease which had not been approved by the plaintiff-lessor was considered in one case. The State Agency Lease form contained the

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34 "A transfer for purposes of this Section shall not be deemed to occur by . . . the transfer of an overriding royalty interest, production, [sic] payment, net profits interest, or similar interest in a mineral lease or sublease."

35 Prior to its amendment by Act No. 114 of the 1993 Regular Session of the Louisiana Legislature.

36 480 So.2d 323 (La.App. 4th Cir.), writ denied 481 So.2d 134 (La. 1985).

37 Terrebonne Parish School Board v. Castex Energy, Inc., 2001-2634 (La.App. 1st Cir. 3/19/04); 878 So.2d 522, reversed on other grounds and rendered 2004-
following clause (which is similar to Paragraph 8 of the State Lease form), to-wit:

It is further agreed and understood that the rights of Lessee may be assigned or transferred in whole or in part but no transfer, whether in whole or part, of the herein leased property shall be valid unless such transfer or assignment be approved by the Lessor.

The court stated that the contractual restriction on alienability contained in the State Agency Lease constituted a "conditional obligation," observing further:

The express terms of the 1963 lease included the conditional obligation, which precluded the validity of an assignment without the lessor's approval. And it is undisputed that TPSB [the lessor] never approved the transfer from Samson to Castex.

Accordingly, the trial court correctly concluded that Samson never validly transferred the lease to Castex and properly dismissed Samson's third party claim.

4. Standard by Which Lessor's Actions to be Measured

"A mineral lessor is bound . . . to perform the contract in good faith." This is not a radical or unique concept as the same duty exists under general law applicable to all contracts.

"When a lease contains the additional proviso that the lessor's consent may not be unreasonably withheld, the lessor's right to refuse will be judicially protected unless the lessor's refusal was unreasonable."

The Louisiana Supreme Court has put forth that withholding consent is "unreasonable" where there are no "sufficient grounds for a reasonably prudent business person to deny consent."

The refusal of the lessor to consent to a sublease was held not to constitute an intentional interference with contractual relationship in Lilawanti Enterprises, Inc. v. Walden Book Company, Inc.

968 (La. 1/19/05); 393 So.2d 789.

The court cited LA. CIV. CODE ANN. art. 1767 ("A conditional obligation is one dependent on an uncertain event.").

LA. REV. STAT. ANN. § 31:119.

"Contracts must be performed in good faith." LA. CIV. CODE ANN. art. 1983 (first sentence omitted).


Caplan v. Latter & Blum, Inc., 468 So.2d 1188, 1191 (La. 1985). To the same effect is La. Casinos Cruises, Inc. v. Capitol Lake Props., Inc., 2002-0364 (La.App. 1st Cir. 2/14/03); 845 So.2d 447, 450.
In Associates Commercial Corp. v. Bayou Management, Inc., the court found that the lessor violated the terms of the commercial lease by refusing to consent to a sublease as proposed by the lessee. Citing Gamble, the court stated that, "whenever a lease provides that the lessor's written consent must first be obtained before subleasing is permitted, such a provision connotes that when the lessee obtains a suitable sublessee, the lessor cannot arbitrarily withhold consent." The court noted with approval the trial judge's finding that the lessee provided the "best proof possible" that the sublessee met all of the requirements of the lessor because the lessor subsequently leased another property to the proposed sublessee.

The Federal diversity case of Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hosp. Service Dist. No. presented the situation in which the original lessor sold the leased premises, subject to the recorded lease, and the successor lessor refused to consent to the assignment. In such a case, whose expectations are to be protected - the original lessor (who no longer owns an interest in the property) or the new lessee (who did not confect the original restriction to protect its interests)? The court discussed this issue, as follows:

No Louisiana cases deal with a situation in which the identity of the lessor changed and the consent to assign was refused for reasons personal to the new lessor. We look for guidance then to treatises and case law from other jurisdictions. Those sources indicate that when determining the reasonableness of a landlord's refusal to consent to an assignment of a lease, the standard is that of a reasonable prudent man and, in applying that standard, the personal taste and convenience of the landlord should ordinarily not be considered . . .

In determining whether a landlord's refusal to consent was reasonable in a commercial context, only factors that relate to the landlord's interest in preserving the leased property or in having the terms of prime lease performed should be considered. . . . A landlord's personal taste or convenience are factors not properly considered. . . . Rather the landlord's objection "must relate to ownership and operation of leased property, not lessor's general economic interest."

43 95-2048 (La.App. 4th Cir. 2/29/96); 670 So.2d 558.
44 426 So.2d 672 (La.App. 1st Cir. 1982).
45 Cited at footnote 22, supra.
46 426 F.3d 738 (5th Cir. 2005).
The court in *Tenet HealthSystem Surgical*\(^{47}\) identified the following circumstances in which a lessor's refusal to consent was judicially upheld:

- If the sublessee's activities do not fall within the permitted uses in the lease or if the sublessee's use would inhibit the lessor's ability to lease other spaces in the leased property;\(^{48}\)
- If the sublessee will not delineate his proposed activities or if the sublease causes the lessor to lose a tenant on the same property;\(^{49}\) and
- If the proposed sublessee or assignee is financially inferior to the present lessee.\(^{50}\)

Conversely, the court noted that a lessor's refusal to consent to an assignment or sublease will be found to be unreasonable under the following circumstances:

- If the proposed sublessee is identical to the lessee in financial status and proposed use of the property,\(^{51}\) and
- If the reasons given for the refusal are pretextual.\(^{52}\)


The court in *Truschinger v. Pak*\(^{53}\) held that the lessor did not unreasonably refuse to consent to a sublease by demanding that he receive one-half (1/2) of the consideration being received by the tenant for entering into the sublease with a third party. Reversing a decision of the appellate court which had affirmed the trial court's decision that the lessor was liable in damages for unreasonably refusing to consent to a sublease, the Supreme Court analyzed the conduct of the lessor under the "abuse of rights" doctrine first announced in *Morse v. J. Ray McDermott & Co., Inc.*\(^{54}\) The Supreme Court found no "abuse of rights" and said, as follows:

We defer to the trial court's finding that [the lessor] informed the [sublessee who had requested the lessor's consent to a further sublease] that he wanted one-half the purchase price (that is,
$40,000), in return for his consent. [The requesting sublessee] refused; [the original or primary lessor] withheld his consent. His refusal does not rise to an abuse of rights. [The lessor's] predominant motive was economic; it was not a wish to harm [the requesting sublessee]. [The lessor's] motive was serious and legitimate. Each lessor or sublessor in this chain received consideration for granting the lease or sublease. Each lessee or sublessee agreed to pay the consideration. The record is devoid of any evidence that such business practice is against moral rules, good faith, or elementary fairness.

In a dissenting opinion at the appellate level in *Truschinger v. Pak,* Judge Ward stated that, in his view, "*Illinois Central*... is controlling here; that is, when the lease requires the written consent of the lessor but does not stipulate that it will not be unreasonably withheld, the proper analysis is to question whether withholding consent is an abuse of rights by the lessor."

The "abuse of rights" doctrine was explained in *Schwegmann Bank and Trust Company v. Dunne* as being "a tort doctrine that has been used sparingly in Louisiana. The doctrine is a civilian concept which is applied only in limited circumstances because its application renders unenforceable one's otherwise judicially protected rights."

E. Law of Registry

While an assignment or a sublease is not, in and of itself, a "mineral right," it is an instrument which effectuates the transfer of a mineral right. An instrument which transfers a mineral lease is subject to the laws of registry. Consequently, unless it is filed for registry, a third person is not bound by the transfer under the general principles of Louisiana's "public records doctrine."

This rather uncontroversial proposition is supported by both the Louisiana Mineral Code and the Louisiana Revised Civil Code.

Article 18 of the Mineral Code tells us that "[a]ll sales, contracts, ... affecting mineral rights are subject to the laws of registry." Clearly, an

55 503 So.2d 208, 211 (La.App. 4th Cir. 1987).
57 96-2410 (La.App. 4th Cir. 4/30/97); 693 So.2d 349, 353.
58 "The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease." LA. REV. STAT. ANN. §§ 31:16. By definition, an instrument which transfers a mineral lease is not one which is "created by a landowner."
instrument which transfers a mineral lease is both a “sale” and a “contract” which “affects” a mineral right. Moreover, both Articles 131 and 132, concerning assignments, make reference to “registry” and prescribe the consequences of the failure to record.

La. Civ. Code Ann. art. 3338 regulates the issue of registry by recordation of instruments creating real rights in immovables. It provides, as follows:

The rights and obligations established or created by the following written instruments are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records pursuant to the provisions of this Title:

1. An instrument that transfers an immovable or establishes a real right in or over an immovable.
2. The lease of an immovable.
3. An option or right of first refusal, or a contract to buy, sell, or lease an immovable or to establish a real right in or over an immovable.
4. An instrument that modifies, terminates, or transfers the rights created or evidenced by the instruments described in Subparagraphs (1) through (3) of this Article. (Emphasis added.).

As noted in Part III.K.2 hereof, there is authority for the filing of a notice of a sublease in lieu of the sublease document itself.

A description of the mineral lease in an assignment by reference to “the lease itself” was held to be a valid description for purposes of the “public records doctrine,” notwithstanding the failure to describe the leased premises covered by the mineral lease. Finding the assignment “sufficient to identify the lease,” the court “gave validity to the transfer of the lease.”

II. Assignments and Subleases

A. Preface

The courts of Louisiana recognized at an early date, in cases not involving oil and gas, the difference between an assignment and a sublease of a lease. These seminal cases involved leases granted for residential or commercial purposes.

The earliest case to consider the distinction between an assignment and a sublease under Louisiana law is Audubon Hotel Co. v. Braunning. There, the Louisiana Supreme Court established the proposition that there is no privity of contract or relationship between the

60 Gulf Refining Co. v. Bagby, 200 La. 258, 7 So.2d 903 (1942).
61 120 Ia. 1089, 46 So. 33 (1908).
prime lessor and the sublessee (the lessee of the prime lessee) in these words, to-wit:

The sublease is a new contract. The old lease does not pass from Denis or the Audubon Hotel (Denis transferor [sic] of plaintiff to Schlieder) to the subtenants (the defendants). The lessor is not a party to the sublease, and the subtenant is not a party to the original lease. There is no contractual tie between the subtenant and the owner or lessor. The lease of the subtenant terminates with the lease of the one from whom he holds as tenant. The lessee of the owner stands between the subtenant and the lessor, the owner. It is to the former, his lessor, that the subtenant must address himself in asserting his rights. The subtenant cannot defeat the original lessor suing to be reinstated in the possession of the property after his lease had expired. It is true that the subtenant has all the lessee’s rights to enjoy the property. This right does not go further. It does not include in addition the right of renewal given by the first lessor to his lessee. This is a separate, distinct right. A subtenant has no action against the owner or original lessor for a renewal of the lease by reason of the fact that there is no contract between him and the original lessor, and no legal tie which he can invoke.

B. So, What is in a Name?:

“The title affixed to a document does not, of itself, control its character. Instead, the character of a document is determined by examining the entire writing.”

As applied to transfers of mineral leases, one court noted that “[i]t has long been the law that transfers though labelled (sic) as ‘assignments,’ are considered in law to be subleases where the lessor (sic) has retained an interest in the lease.”

In the important case of Broussard v. Hassie Hunt Trust, the court observed that, “in the instant case the transfers . . . , though denominated assignments, were, in legal effect, subleases, since overriding royalties as well as various other controls were reserved by the transferor in each instrument.”

Still again, one court noted that, “[i]n Louisiana the obligation to pay an overriding royalty in a transfer of a lease, even though the

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62 Smith v. McKeller, 93-1944 (La.App. 1st Cir. 6/24/94); 638 So.2d 1192.
63 Pepper v. Pyramid Oil & Gas Corp., 287 So.2d 620 (La.App. 3rd Cir. 1973) (“The reservation of an overriding royalty is, of itself, sufficient to stamp the transfer as a sublease.”).
64 231 La. 474, 91 So.2d 762 (1956).
transaction be called an assignment or sale of the lease, characterizes the transaction as a sublease.\textsuperscript{65}

Another court observed that an "instrument through which [the lessee-assignor] conveyed its interest in the [mineral] lease to [an assignee] is styled as an assignment. However, since [the lessee-assignor] reserved an overriding royalty, the instrument was a sublease."\textsuperscript{66}

"The so-called assignment is, in fact, a sub-lease," noted one court.\textsuperscript{67}

In another case, the court observed that "the document executed between Gulf and Mayfield was a sublease though styled an assignment."\textsuperscript{68}

And yet another court stated that "[i]t may be proper to state at the outset that the agreements by which the leases were assigned, although styled and referred to as 'assignments', they are really acts of sub-leases of the various leases which plaintiff had taken on the properties involved, to the defendant who then became a sub-lessee."\textsuperscript{69}

And finally, a court announced that, "[e]ven though called an assignment, the transaction was in fact a sub-lease."\textsuperscript{70}

In the "oil patch," most transfers of mineral leases which are, in fact, subleases (by reason of the reservation of an overriding royalty interest) are nevertheless denominated as "assignments." This practice probably can be explained, at least in part, by the jurisprudential rule – now suppressed by article 128 of the Louisiana Mineral Code – that privity of contract did not exist between the prime lessor and the

\textsuperscript{65} Cockburn v. O'Meara, 155 F.2d 340, 342 fn. * (5th Cir. 1944) (underscoring added).
\textsuperscript{66} Willis v. International Oil and Gas Corporation, 541 So.2d 332, 334 (La.App. 2nd Cir. 1989).
\textsuperscript{67} Serio v. Chadwick, 66 So.2d 9 (La.App. 2nd Cir. 1953). Although this case is one which concerns the parol evidence rule, your author questions the conclusion that the transfer there involved was a sublease, rather than an assignment, where the transferor conveyed "a 2/64th part of the working interest." The holding in this case is in seeming contradiction of the general rule, stated by one Commentator, as follows: "The mere fact that the lessee has not transferred his interest in the entire leasehold does not result in classification of the transfer as a sublease rather than an assignment." Howard R. Williams & Charles J. Meyers, OIL AND GAS LAW § 413.1 (3d. ed. 2008).
\textsuperscript{68} Brown v. Mayfield, 488 So.2d 322 (La.App. 3rd Cir. 1986).
\textsuperscript{69} Wier v. Glassell, 216 La. 828, 44 So.2d 882 (1950).
sublessee. No one desiring to operate on the leased premises wanted to be called a “sublessee.” It sounds so inferior to an “assignee.”

A sublease can be found to exist where a mineral lease is assigned (without reservation) in one instrument and an overriding royalty interest is reassigned by the “assignee” to the “assignor” by a separate document. Taken together, the court in one case deemed the transaction as a whole to be a sublease. Seemingly, it was noteworthy to the court that the two documents were “executed simultaneously,” “on the same date.”

In Del-Ray Oil & Gas, Inc. v. Henderson Petroleum Corporation, certain mineral leases were assigned, but the assignor reserved “an undivided 50% of 1/8 of 8/8 Carried Working Interest in each of the Leases until Payout as more fully defined in the Agreement . . . together with the additional rights provided for in the Agreement.” The court held that the “interest that Krutzer reserved when he transferred to Henderson amounted to an overriding royalty. Reservation of that royalty made the transfer a sublease, despite the language of assignment employed in the transfer documents.”

There are a couple of ways for an assignor to reserve an overriding royalty interest in the assignment and thereby make the transfer a sublease. The assignor could simply state that it is reserving a specified overriding royalty interest, say, five (5%) per cent (of 8/8) of production.

Another way is to state that the assignor reserves the arithmetic difference between existing burdens and a stated amount, say, twenty-five (25%) per cent (of 8/8). In such a case, if the lease provides for a twenty (20%) per cent lessor’s royalty, with no other burdens, the overriding royalty interest effectively reserved by the assignor is five (5%) per cent (of 8/8) of production [twenty-five (25%) per cent minus twenty (20%) per cent, or five (5%) per cent (of 8/8)].

Your author has encountered an instrument – labeled as a sublease – which utilized the latter formulation, but in which one of the leases (among many being transferred) provided for twenty-five (25%) per cent lessor’s royalty, such that no overriding royalty interest was effectively reserved as to such lease – 25% minus 25% is zero. In such a case, as to that lease, was the lease assigned (properly speaking) or subleased? As will be seen, the issue can have importance for a variety of reasons, not the least of which is the idea of divisibility of the lease. If the only basis for characterizing the transfer as a sublease was the reservation of an overriding royalty interest, and the transfer document had no other contractual right of control reserved by the transferor, it is submitted that

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71 Iberian Oil Corporation v. Texas Crude Oil Company, 212 F.Supp. 941 (W.D. La. 1963), aff’d 328 F.2d 832 (5th Cir. 1964).
72 797 F.2d 1313 (5th Cir. 1986).
the transfer – as to that particular lease – should be construed as an assignment, not a sublease (and this, despite its title).

C. Essential Elements of an Assignment and Sublease

The terms "assignment" or "sublease" are not defined in the Louisiana Mineral Code. Article 127 of the Louisiana Mineral Code simply states that the "lessee's interest in a mineral lease may be assigned or subleased in whole or in part." The Comments to that article indicate the intention of the redactors to "leave[] undisturbed the developed jurisprudence concerning the distinction between an assignment and a sublease in Louisiana."

Thus, in order to understand the effect and import of articles 127-33, it is necessary to review the jurisprudence of this state, starting first with the codal foundat on for these transactions.

Because the essential codal elements for a sale73 are the same as for a lease74 – "the thing, the price and the consent" – an essential difference between a sale and a lease arises from the manner in which the purchase price is paid. In the sale, the price "must be fixed . . . in a sum either certain or determinable."75 In contrast, in the lease, the price "may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased.76

"The codal requirements for a sublease are the same as for the lease since a sublease is a lease between the original lessee and a third party. A lease is a contract by which one party gives to another the enjoyment of the thing for a fixed price. La. Civ. Code arts 2669, 2674. A lease, which may be oral (La. Civil Code art. 2683), requires an object, a certain and determinate price, and consent. La. Civ. Code arts. 2670, 2671."

In the civil law, a sublease is a new lease engrafted or superimposed on the prime lease78 whereas an assignment is an alienation or sale of the

73 LA. CIV. CODE ANN. art. 2439.
74 LA. CIV. CODE ANN. art. 2668 (formerly art. 2670).
75 LA. CIV. CODE ANN. art. 2464.
76 LA. CIV. CODE ANN. art. 2675 (formerly art. 2671).
77 Phoenix Associates Land Syndicate, Inc. v. E. H. Mitchell & Co., L.L.C., 2007-0108 (La.App. 1st Cir. 9/14/07); 970 So.2d 605; writ denied 2007-2365 (La. 2/1/08); 976 So.2d 723.
78 "A sublease is one lease engrafted on another." Baudry-Lacantinerie et Wahl, Traité de droit civi, XX, De louage (3e éd. 1906) n° 1052-1053, p. 616. "The sub-lease is a lease, that is to say, a contract of the same nature as the principal contract between the lessor and the first lessee. The assignment of a lease is a transfer of the credits: it is the sale . . . of the right to the lease, with the condition of assuming all the charges. The two contracts differ from each other by their nature." Planiol, Treatise on the Civil Law, Vol. 2, Part 2, No. 1748.
prime lease. The concept is significant because of the differences in legal implications between a sublease and an assignment. In Harrell v. United Carbon Co., the court followed the Louisiana authorities and held that an assignment, not a sublease, results where the transfer document effects an absolute transfer of leased acreage with the reservation of neither a reversionary interest nor an overriding royalty interest.

As stated by a distinguished commentator:

Unfortunately in Smith v. Sun Oil Company, the court referred to some common law authorities, as well as the French commentators. It repeated the common law test of a sub-lease—the retention of a reversion. Later in the Roberson v. Pioneer Gas Co. case, it explained that the term "reversionary interest" was used in the broadest sense, and that all that was necessary was the retention of an interest in the lease in the form of overriding royalty.

In Ascher v. Midstates Oil Corp., following two adverse decisions between the same parties concerning the same property, the plaintiffs sought to have a certain mineral lease declared to be null and void. The mineral lease was affected by a transfer that, in the Bond case, was held to be a sublease because the assignor (sublessor) reserved a certain overriding royalty interest. In this suit, the plaintiffs contended that the reserved overriding royalty interest—"which was responsible for the instrument's being so characterized" as a sublease—had been extinguished by liberative prescription or by "voluntary relinquishment." Hence, plaintiffs asserted that the "sublease" ceased to be a "sublease" upon such extinction and, therefore, became a "mere assignment" which was, therefore, sufficient to divide the lease.

The court rejected the suggestion that the overriding royalty interest was a "royalty" interest of the type or nature as was involved in Vincent v. Bullock. The court held that the "sublease" ceased to be a "sublease" upon such extinction and, therefore, became a "mere assignment" which was, therefore, sufficient to divide the lease.

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79 Tomlinson v. Thurmon, 189 La. 959, 181 So. 458 (1938) (the "sale of a mineral lease is manifestly the sale of an incorporeal thing or right.").
81 52 F.2d 790 (5th Cir. 1931).
83 222 La. 812, 64 So.2d 182 (1953).
85 192 La. 1, 187 So. 35 (1939) [landowner who reserved "a one-sixteenth (1/16th) royalty of all the oil, gas and other minerals produced and saved" from the land "imposed on the property a real obligation which passed with the property into the hands of the present owner." This is called a mineral royalty.
lease, not to the property itself. Its existence therefore, depends on the pendency and duration of the lease.” “Viewing an overriding royalty in this light clearly the ten year non-user prescription doctrine of Vincent v. Bullock could have no application to one attached to a lease terminating in less than ten years, say in three years.”

Since the overriding royalty interest was not extinguished by prescription, as contended, the character of the transaction did not convert or transform itself from a sublease to an assignment, and the doctrine of divisibility did not become operative.

In *McDonald v. O'Meara*, it was observed that the “courts have differentiated between the assignment of lease and a sublease. An assignment is where all of the mineral interest owned by the assignor is transferred, and a sublease is one in which the lessor retains a portion of the minerals from the land subject to the leases.”

An assignment passes all rights and interests in the mineral lease to the third party, whereas, in a sublease, the sublessor retains some rights and passes only part of his rights to the sublessee.

**D. Particular Types of Assignments and Subleases**

1. **Partial Assignments and Subleases.**

An assignment which does not transfer the totality of the mineral lease (as to acreage and depths covered thereby) is said to be a “partial” assignment and, if an overriding royalty interest is reserved, a “partial” sublease.

By way of illustration, a “partial” assignment exists where the owner of a mineral lease transfers the mineral lease, but only as to, say, the south half of the leased premises, or some other specified portion (less than all) of the leased premises. If, in such a limited transfer, an overriding royalty interest is reserved, it is a sublease, but a “partial” sublease. Such a transfer might be called a “partial” assignment (or sublease) “as to acreage.”

A “partial” assignment “as to acreage” is not a sublease on the theory that the transferor has not conveyed all of its interest in the mineral lease. To be a sublease – whether of the whole or “partial” – the transferor must reserve some interest (most usually an overriding royalty interest) *as to the interest conveyed or transferred*, which reserved interest persists for the life of the interest conveyed or transferred.87

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86 139 So.2d 282 (La.App. 1st Cir. 1962).

87 “The retention by the transferor of some economic interest in the production from the transferred acreage, e.g., an overriding royalty, may lead to the classification of the transfer as a sublease rather than as an assignment.” Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* § 413.4 (3d. ed. 2008).
The right of a co-owner of a mineral lease to convey a portion of its working interest is affirmed by article 171 of the Mineral Code which states that a "co-owner of the lessee's interest in a mineral lease . . . may . . . transfer all or part of his undivided interest." An assignment of a fractional undivided interest is also called a "partial" assignment, even if it affects the geographical entirety of the leased premises.

2. Horizontal Assignments and Subleases.

If the mineral lease covers all subsurface depths — "from the surface to China" — but the transferor retains, and does not assign, any particular subsurface depth, zone or stratum, such a transfer is also a "partial" assignment (or perhaps sublease), but is said to be "partial" "as to depths" or "zones" or "strata." This is, in actuality, a subset of the partial assignment (or sublease) previously discussed.

However, no case has found a transfer of a mineral lease as to a particular subsurface strata or zone to be a partial assignment. In Scurlock Oil Company v. Getty Oil Company, the Third Circuit (prior to a subsequent reversal by the Supreme Court on other grounds) considered a transfer of a mineral lease (which contained no reservation of overriding royalty interest) as to a particularly defined sand to be a horizontal sublease, rather than a horizontal assignment. Most significant in a series of lease transfers was an instrument by which Tidewater transferred to Alladin certain mineral leases, but limited to the portion of the leased premises within a certain unit, "and insofar only as those leases affected or related to the Cockfield No. 2 Sand." Subsequent to this transfer, Alladin "conveyed or transferred those interests" to

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88 278 So.2d 851 (La.App. 3rd Cir. 1973), affirmed in part, reversed in part on other grounds 294 So.2d 810 (La. 1974).

89 It is your author's experience that there is not a universally accepted understanding of the difference between a "vertical" limitation and a "horizontal" limitation — whether it be in the context of a "Pugh clause" or "depth limitation clause." On more than one occasion, your author has encountered a discussion wherein one party alludes to a "vertical" limitation or restriction, or has stated that a mineral lease has expired "vertically," only to be asked, "don't you mean 'horizontally'?!" The confusion or misunderstanding resides in the fact that "vertical" means, and in a visual sense runs, "north to south," while horizontal means, and visually runs, "east to west." Nevertheless, in the jargon of the industry, while "horizontal" might allude to a specific stratum under the earth, is not such stratum reached "vertically" from the surface of the earth? And conversely, the term "vertical" — such as in a "vertical" "Pugh clause" [the obvious opposite of a "horizontal" "Pugh clause" of the type involved in Sandefer Oil & Gas, Inc. v. Duhon, 961 F.2d 1207 (5th Cir. 1992)] — conjures the notion that the exterior perimeters of a unit are, in a sense, extended into the earth, vertically, "from the surface to China." Yet to some, that seems to deal with the "horizontal" because it is running "north to south," into the earth's subsurface.
Waterbury “who contends in this proceeding that he still owns the leases, insofar as they cover the property included in the 320 acre unit and insofar as those leases affect the Cockfield No. 2 Sand.”

Tidewater then executed a release of “all of its right, title and interest in and to” the Waterbury leases. The issue was framed by the Supreme Court, as follows:

The basic controversy revolves around the validity of the leases from which the Waterbury Group derive their rights. If these leases are valid, the Waterbury Group is entitled to the funds on deposit in the registry of court. Under these circumstances the Main lease, from which the Bauman Group derives its rights, must be considered a top lease; it can have no effect, therefore, during the life of the Waterbury lease. Conversely, should the Bauman Group succeed in its effort to have the Waterbury lease declared invalid, the Main lease becomes effective, and those deriving their rights from that lease are entitled to the fund in concursus.

In the view of the Third Circuit, if the transfer from Tidewater to Alladin of the leases as to a specific sand was an assignment, it was urged that it would have divided the leases, such that the subsequent release by Tidewater could not have affected the interest assigned to Alladin (and later to Waterbury). On the other hand, if such transfer was to be characterized as a sublease, the release by Tidewater would have also released the leases as to the interest held by its sublessee, ultimately Waterbury.

The court observed:

We agree that under some circumstances a mineral lease can be horizontally segregated, and that the principal lessee conceivably could effect a partial assignment of the lease insofar as it covers only a particular sand or stratum. We have concluded, however, that regardless of what might have been legally possible, there has been no horizontal segregation of the leases in the instant suit, and that the 1961 transfer from Tidewater to Alladin was in fact a sublease, and not a partial assignment, of the Waterbury lease.

The rationale for the decision is that, because the transferor retained the right to enter upon the land (in order to explore the retained, or unassigned, zones), such constituted the reservation of an “interest” sufficient to stamp the transaction as a sublease under the rules of Smith v. Sun Oil Co.,90 Roberson v. Pioneer Gas Co.,91 and other cases to the effect that the reservation of an “interest” renders the transaction a sublease.

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90 Cited at footnote 4, supra.
91 Cited at footnote 4, supra.
The second reason for the court’s conclusion that the partial transfer did not divide the leases was that it found that “the original leases did not authorize the horizontal segregation or division of either of those leases.” Referring to the “division of rental clause” which has been judicially construed as authority for the division of the lease in the case of a partial assignment,92 the court placed emphasis on the words, “according to surface area,” saying:

This indicates to us that the term “segregated portion of the land,” was intended to refer to a segregation or division of the lease according to surface acreage. We do not believe that the parties contemplated that the lessee could assign the lease as to a particular sand or stratum, and thus segregate the lease horizontally.

The Supreme Court reversed,93 but based its opinion upon its construction of Tidewater’s release document, choosing to pretermit the “question whether horizontal segregation of a mineral lease is an assignment or a sublease.” It did not expressly repudiate the appellate court’s analysis of the issue of whether the transfer was a sublease or an assignment, but found that it “need not reach that question.”

3. Term Assignments and Subleases.

While uncommon, it is permissible for a mineral lease to be assigned or subleased, in whole or in part, for a stated term. Such a transfer is called a “term” assignment (or sublease). If this is done, the term is usually measured in time – “I hereby assign this lease for a term of two years from this date” – but the term of the transfer might also be measured by the value or quantity of production to be secured from the lease by the transferee.94

All of these are but examples of the “freedom of contract” enjoyed by contracting parties generally.95

4. Borehole Assignments and Subleases.

A “borehole” assignment (or sublease) is a transfer of a physical borehole of a formerly drilled well without any rights to drill any

92 See Part III.B.1 hereof, infra.
93 294 So.2d 810 (La. 1974). In a concurring opinion, Justice Barham stated that, in his view, “it is necessary to determine that there can be a horizontal segregation of a mineral lease,” stating further that, “In my opinion it has been so determined. In my opinion it has been correctly determined.”
94 Waller v. Midstates Oil Corporation, 218 La. 179, 48 So.2d 648 (1950) (involving “oil payment” of 1/16 of 7/8 as an overriding royalty interest which, by its express terms, “shall cease and ipso facto without further act, pass to and become absolutely vested in Lessee when the well or wells . . . ceases to flow oil without being pumped or produced by other artificial means.”).
95 See case cited at footnote 19, supra.
additional wells on the lease and to produce from any leased acreage, other than out of the borehole itself. As a "borehole" assignment does not transfer any mineral lease or acreage covered by a mineral lease, the rights of the "borehole" assignee are not clear. To illustrate, even assuming that the assignee has the right to produce from the assigned borehole, it does not have the ability to drill another well in order to protect against drainage from a draining well.

In *Esso Standard Oil Company v. Nesbitt,*96 Nesbitt assigned a mineral lease to two parties, reserving an overriding royalty interest. The reserved overriding royalty interest was to be 3/16 of the oil, gas and minerals produced “as to each well completed on the leased premises during which such well produces an average of 100 barrels of oil per day.” Further, the reserved overriding royalty interest was to be reduced from 3/16 to 1/8 of the oil, gas and minerals produced “from any well located on the leased premises [which] is below 100 barrels per day.”

The operator dually completed a well and produced oil from both sands. “The allowable production from each sand was less than 100 barrels daily but the combined production was well over that amount.”

The assignees contended that “the withdrawal of the oil from the different sands constituted production from two separate wells,” such that the reserved overriding royalty interest should be reduced.

“Nesbitt, on the other hand, took the position that there was but one well from which production exceeded 100 barrels per day and that the circumstance that the oil was being withdrawn from separate horizons was of no consequence.”

The court interpreted the contract in favor of Nesbitt and held that the total production from the well was to be considered, notwithstanding that it was produced from different sands. Nesbitt was entitled to the greater overriding royalty interest.

In a case arising out of Arkansas,97 it was held that an assignment limited to a described “well” did not include any mineral lease.

Because of the uncertainties associated therewith, and the potential for conflict, “borehole” assignments should, as a general proposition, be avoided.

5. *Carried Working Interests.*

A working interest is, of course, a cost-bearing interest, and, subject to contractual arrangements, its owner is responsible for its proportionate share of costs associated with the development of the mineral lease. A carried interest is a working interest which is assigned to a party, but in

96 222 La. 661, 63 So.2d 417 (1953).
respect of which the costs are borne either out of production allocable to the carried interest or by another party. Thus, the assignee of a carried working interest has all of the benefits of the interest, but is relieved of the responsibility for costs, which are borne either out of production allocable to the carried interest or by another. One court embraced the definition that “carried interest means the person carried pays his share of costs out of production.”

Typically, the owner of the carried working interest is said to be “carried” to a specific point in time, such as “casing point.”

III. Consequences Arising from the Distinction Between Assignments and Subleases

A. Preface

“Louisiana law is well settled to the effect that an assignment of an oil, gas and mineral lease disposes of all of the rights of the transferor in the lease of contract, constituting the transferee sole owner thereof...”. Hence, a proper characterization of an assignment of a mineral lease as being “manifestly the sale of an incorporeal thing or right” invokes the body of law of sale as being applicable to such types of transfer. In other words, an assignor, properly speaking, is a vendor of immovable property.

At the same time, an understanding that a sublease of a mineral lease is a “lease of a lease,” makes applicable the body of law of lease as being pertinent to alienations of that kind. Hence, a sublessor, properly speaking, is akin to a lessor of immovable property for all purposes of the laws applicable to such a person.

As shown below, certain consequences arise from a recognition that a sublease is in all cases an assignment, but an assignment is not always a sublease. In developing these distinctions, classification is made as to an assignment as contrasted with a sublease. The assignment is perhaps easier to consider as it is a sale — not “essentially” or “in essence” a sale, but, in reality, a sale. As a consequence, the assignee (in a sale, the


99 “Casing point” is a “term used in a joint operating agreement to refer to the time when a well has been drilled to the objective depth stated in the initial notice, appropriate tests have been made, and operator notifies drilling parties of his recommendation with respect to the running and setting of a production string of casing and completing the well.” Williams and Meyers, Manual of Oil and Gas Terms.


101 Tomlinson v. Thurmon, 189 La. 959, 181 So. 458 (1938) (“The sale of a mineral lease is manifestly the sale of an incorporeal thing or right.”).
vendee) becomes the owner of the lease (or the assigned interest therein) and certain consequences flow therefrom.

The examples of the consequences set forth below are not an exclusive listing, but are intended to illustrate the proposition asserted—that, in Louisiana, there are real and material differences between an assignment of a mineral lease and a sublease thereof. Other illustrations include the tax treatment to be accorded one type of transfer as opposed to the other, and the treatment of the transfer in bankruptcy.

In other words, there is "something in a name."

B. Divisibility of Lease

1. Assignment.

a. General.

The concept of divisibility of a mineral lease has reference to circumstances under which one mineral lease is turned into two (or more) mineral leases—the lease is said to be "divided" in certain situations. Necessarily, in the case of such a "division," activities which would maintain in force and effect one of the mineral leases, would not result in the perpetuation of the second lease because, in essence, they are now separate and distinct leases, albeit each being regulated under the same contractual terms as specified in the original lease document.

Divisibility might result, if at all, only if the lessor has consented to such result. However, any language varying the import or effect of the typical "habendum clause" must be clear and unmistakable.

As demonstrated herein, a partial assignment might, under certain circumstances, effect a division of the mineral lease—it might, as stated in the Comment to article 130, "have the effect of creating two leases where but one existed before." On the other hand, and as discussed

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102 As a result of the decision of the United States Supreme Court in Palmer v. Bender, 287 U.S. 551 (1933), and the subsequent enactment of tax legislation, the distinction, for Federal tax purposes, between an assignment and a sublease under Louisiana law is greatly minimized if not eliminated.

103 For example, an assignment by a bankrupt debtor might be addressed under the rules of the trustee's avoidance power, 11 U.S.C.A. § 548, while a sublease might be treated under the power of a "trustee, subject to the court's approval, [to] assume or reject any executory contract or unexpired lease of the debtor," 11 U.S.C.A. § 365.

104 See, e.g., Massie v. Inexco Oil Co., 798 F.2d 777, 780-81 (5th Cir. 1986), citing Dawes v. Hale, 421 So.2d 1208 (La. App. 2d Cir. 1982). In Dawes, the Second Circuit cites other cases for the general proposition that any provision upon which one might rely as having the effect of altering the general import of the mineral lease must be "clearly intended," or "very clear and unmistakable," and a "clear and unequivocal clause."
elsewhere, a sublease will generally not have that result, unless the language of the lease leads to that conclusion.

In Roberson v. Pioneer Gas Co., a mineral lease was granted on 125 acres and the lease was thereafter transferred (with no reservation sufficient to render the transaction a "sublease") as to 40 acres. A well was drilled on the 40 acres which were transferred, but no development was had on the remaining 85 acres. The lease contained a "division of rental" or "rental apportionment" clause. The court noted that such a clause "made the lease a divisible one," citing Swope v. Holmes. Thus, the assignment divided the lease and the "drilling of a well by the assignees on that part of the land on which the lease was assigned to them did not have the effect of keeping the lease in force on that part of the land on which the Pioneer Gas Company retained its lease." In speaking to the distinction between an assignment and a sublease, the court stated that:

The distinction between an assignment of a lease and a sublease is that, in an assignment, the assignor transfers his entire interest in the lease in so far as it affects the property on which the lease is assigned; whereas, in a sublease, the original lessee, or sublessor, retains an interest in the lease in so far as it affects the property subleased – by imposing some obligation upon the sublessee in favor of the sublessor, such as an obligation to pay additional rent to the sublessor.

In Swope v. Holmes (on which the Roberson court relied), the clause which, according to the court, "made the lease a divisible one," read, as follows:

It is hereby agreed in the event this lease shall be assigned as to part or as to parts of the above described lands, and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which said lessee or assignee thereof shall make due payment of said rental.

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105 See Part III.B.2 hereof, infra.
106 Illustrative of this point is Johnson v. Moody, 168 La. 799, 123 So. 330 (1929) where the court held that, even though the transfer was a sublease, the language of the lease effected a forfeiture of the lease as to any portion which the lessee failed to develop.
107 Cited at footnote 4, supra.
108 169 La. 17, 124 So. 131 (1929). Seemingly, Swope is the first case to announce this notion of divisibility based upon this clause. Hence, the author attributes paternity to Swope for this proposition.
It is, to this author, a bit curious that such an effect would be ascribed by the Supreme Court to this clause—typically called a "division of rental" or "rental apportionment" clause. The clause, by its language, does not straightforwardly state that a partial assignment would divide the lease. Rather, it purports to ameliorate the consequences to one assignee as to a specific portion of the leased premises who timely and properly pays delay rentals, from the failure of another assignee of a different portion of the leased premises to timely or properly pay delay rentals allocable to its portion. Yet, Swope and its progeny attribute a greater effect to this language.

The notion of divisibility was next considered in *Tyson v. Surf Oil Co.* in which a mineral lease was partially assigned. There, the court cited language in the mineral lease to the effect that the default in the payment of rentals by one to whom has been assigned a "part or parts" of the leased premises, "shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands" upon which proper payment was made. In reference to a clause of this type, the court stated that "[i]t has always been held in this State that a lease contract which contains such language was thereby rendered divisible and that, upon assignment, independent leases resulted." 0

In another case, the lessor contended that the lessee had abandoned the mineral lease by executing and placing of record certain partial releases, a right which lessor contended the lessee did not possess. The court noted the following in response to this contention:

Before the lease was granted, that provision which gave the right to assign in part—the segregated portion to pass unaffected by default by the owner or owners of the other acreage—was deleted from the lease contract. This, in our opinion, had the effect of making it indivisible. But such fact did not prevent the appellant from assigning a portion of the premises to others or from releasing, as it attempted to do, a portion of the premises to the appellee.

The distinction between an assignment and a sublease was again considered in *Stacy v. Midstates Oil Corporation.* The plaintiff was the owner of a mineral lease that covered fifty acres of land. The defendants were the owners of a prior recorded lease that covered the same fifty

109 195 La. 248, 196 So. 336 (1940).
110 Id. at 344.
111 Shell Oil Co. v. Coastal Club, Inc., 141 F.2d 382 (5th Cir. 1944).
112 Footnote 3 on Page 384 of 141 F.2d cites to Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906); Cochran v. Gulf Refining Co. of Louisiana, 139 La. 1010, 72 So. 718 (1916) and Nabors v. Producers' Oil Co., 140 La. 985, 74 So. 527 (1917) for the proposition stated by the court.
113 214 La. 173, 36 So.2d 714 (1948).
acres, plus additional acreage totaling 320 acres. The validity of plaintiff's lease depended upon the expiration of the defendants' lease, at least as it covered the fifty acres claimed by plaintiff. The defendants filed an objection of no cause or right of action, claiming that the allegations of the plaintiff's petition failed to allege either the absence of production from any of the lands covered by the original lease or that the original lease had become divided. The exception was overruled and, after a trial on the merits, there was judgment for the plaintiff.

On original hearing, the court found the transfer of the lease to defendants to be an assignment, not a sublease, even though the transferee reserved an overriding royalty interest. This was because the transfer also relinquished to the transferee "the exclusive right to forfeit the lease on the 200 acres to the original lessor at any time."

The court also rejected the contention that "a division of the lease was not legally possible because mineral leases are, essentially, indivisible." The court, citing Swope v. Holmes,114 observed that "a mineral lease can be made divisible into separate leases on separate parts of the land covered by it by agreement of the parties to the lease."

On rehearing, the court observed that the defendants' contention was that the plaintiffs predicated the validity of their lease upon the alleged nullity of a portion of an indivisible prior existing lease embracing a larger area because of failure of production on this portion in paying quantities, without having alleged the failure or lack of production on the remaining acreage." The court reversed its original decision and dismissed the plaintiffs' suit on an objection of no cause of action. Because the original decision was withdrawn on rehearing, the finding of the court that the transaction (in which an overriding royalty interest was reserved) was an assignment was not precedential.

Finally, the permissibility of contractually providing for the divisibility of a mineral lease was next recognized in Noel Estate, Inc. v. Murray.115 There, the court stated that, "[b]y an express contractual (sic) provision [the lessee] possessed authority to assign her rights under the lease in whole or in part."116 In so doing, the court stated that the lessee, "as the result of her action and as she had the right to do, divided a divisible lease, creating in favor of Smith an independent lease on the north 10 acres."

Division of the leased premises has also been found as a result of a compromise agreement to which the lessor is a party.117

114 Cited at footnote 108, supra.
115 223 La. 387, 65 So.2d 886 (1953).
116 The reported decision does not reveal the specific contractual provision on which the court relied as having this effect.
117 Smith v. West Virginia Oil & Gas Co., 365 So.2d 269 (La.App. 2nd Cir.)
consequence of this division, it was held in the cited case that production from one portion of the original leased premises "cannot be considered for purposes of determining whether West Virginia's lease is producing in paying quantities" since the "lease was effectively divided by the compromise agreement executed by the owner of the land subject to the lease and the owners of the lease."

A slight digression. *Banner v. GEO Consultants International, Inc.* is a case which is widely considered as having been wrongly decided as a matter of the law pertinent to the workings of a "Pugh clause." Briefly, the *Banner* court held that a "Pugh clause" was operative where Devon reassigned a lease to GEO — its original assignor — except for a 160-acre tract of land on which was situated a gas well drilled by Devon. The plat attached to the "Partial Assignment and Conveyance" indicated, erroneously, that the retained acreage was a "160.00 acre unit." The court, relying on the official comment to article 213(6) of the Louisiana Mineral Code, to the effect that the statutory definition of 'unit' "includes conventional units of all kinds," held that the 160-acre tract of land constituted a "unit" for purposes of the "Pugh clause," thereby limiting the lease maintenance effect of the gas well to that portion of the leased premises included within the 160-acre tract of land retained by Devon.

The court did not recognize that, by its literal terms, the "Pugh clause" only applied to a unit formed "in any manner with other lands." In this case, no conventional unit — declared or voluntary — was ever formed. All of the lessors [under four (4) counterpart leases] were co-owners of the leased premises, both as to the entirety of the 1,220.6 acres originally under lease and as to the 160 acres on which the gas well was drilled by Devon. Consequently, there were no "other lands" involved, even if the 160-acre tract of land was to be deemed a "unit." Nevertheless, the court invoked the "Pugh clause" and held that the lease lapsed as to the "exterior" acreage.

Courts and commentators alike have criticized the decision and this author agrees that it is, to be kind, flawed in terms of the law.

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1978), reversed and remanded 373 So.2d 488 (La. 1979).
118 593 So.2d 934 (La.App. 4th Cir. 1992).
119 As noted by then Judge Tate in Fremaux v. Buie, 212 So.2d 148 (La.App. 3rd Cir. 1968), the "clause is named after its creator, the late Lawrence G. Pugh, Sr., a distinguished attorney of Crowley, Louisiana. Its purpose is to avoid the consequences of the holding of Louisiana mineral law, see Hunter Co. v. Shell Oil Co., 211 La. 893, 31 So.2d 10 (1947) and following, that production from a unit including a portion of a leased tract will maintain the lease in force as to all the lands covered by the lease."
120 Will-Drill Resources, Inc. v. Huggs Incorporated, 32,179 (La.App. 2nd Cir. 8/18/99); 738 So.2d 1196, writ denied 99-2957 (La. 12/17/99); 751 So.2d 885.
pertinent to “Pugh clauses.” However, your author believes that the result is correct for a reason not even considered by the parties or the court. The Banner lease contained a “division of rental” clause which read, as follows:

In the event of an assignment of the lease as to a segregated portion of the land, delay rentals shall be apportioned among the several leasehold owners according to the surface area of each, and default in payment by one shall not affect the rights of others.

Thus, since the transfer of the lease as to the 160-acre tract was an assignment, the lease was divided and the balance of the leased premises lapsed for lack of maintenance. The court was right for the wrong reasons.

b. The Commercially Printed Lease Forms.

In view of the consequences which the courts attribute to clauses which have been construed as resulting in a lease division, it is appropriate to examine the commercially printed lease forms in popular usage in Louisiana to determine when a division might occur under such forms.

The so-called “Bath 6” lease form – which is customarily considered the “lessee’s form” – contains the following provision:

In the event of an assignment of the lease as to a segregated portion of the land, delay rentals shall be apportioned among the several leasehold owners according to the surface area of each, and default in payment by one shall not affect the rights of others. (Emphasis added).

The commercially printed lease form in common usage in North Louisiana – the so-called “North form” – is of the same formulation as the “Bath 6.”

("...to the extent Banner is inconsistent with our decision, we decline to follow it.")

121 Patrick H. Martin, Review of Recent Developments: 1991-92, Mineral Rights, 53 LA. L. REV. 891, 910-11 (“The Banner court apparently completely misunderstood the nature of a unit, failing as it did to understand that a unit merges or integrates separate rights to produce.” ... “Under the approach adopted by the court, any sublease or assignment of a portion of a lease may be treated as a unit for Pugh clause purposes. This is clearly erroneous.”).

122 The analysis of the three printed forms discussed herein presupposes that the forms have not been modified in a manner which would result in a contrary result.

123 ¶ 9, Bath 6 (the so-called “lessee’s form”).

124 “In the event of an assignment of this lease as to a segregated portion of said land, or as to an undivided interest therein, the rentals payable hereunder shall

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By contrast, the so-called “Bath 4A” lease form – which is customarily viewed as the “lessor’s form” – states it this way, to-wit:

In the event of the assignment of the lease, either as to a segregated portion of the land or as to an undivided interest in the lease contract, delay rentals shall be apportioned among the several leasehold owners according to the surface area of the undivided interest of each, and default in payment by one shall affect the rights of others.

Because both the “Bath 6” and the “North form” state that default in the payment of rentals by one assignee “shall not affect” the rights of the other owners of the same lease, as to different lands, this essentially means that the lease has been separated into distinct tracts, each standing alone, unaffected by a breach by the other party. Said another way, the aforequoted language in the “Bath 6” and in the “North form” would seemingly “divide” the mineral lease, upon a partial assignment as to distinct acreage, under the rationale of Swope and its progeny.

In contrast, no division would seemingly result under the “Bath 4A” since it provides that default in payment by one lessee (as to rentals attributable to its distinct tract) “shall affect the rights of others.” A partial assignment of a mineral lease under the “lessor’s form” would not result in a division of the mineral lease under the rationale of precedent noted above.

If this consequence were to follow in the event of a partial assignment, it would be a rare, if not singular, example in which (assuming no modification to the printed form) the “Bath 6” lease form would be more favorable to the lessor than to the lessee, and the “Bath 4A” is more favorable toward the lessee than to the lessor.

That is to say, a division is favorable to the lessor (under an unmodified “Bath 6” lease form and under the “North form”) because it requires the lessee to take additional action to maintain the divided lease. Conversely, a non-division is favorable to the lessee (under an unmodified “Bath 4A” lease form) because it does not deprive the lessee of the benefit of lease maintenance which would hold the entire lease.

c. An Example.

An example will illustrate this issue. Suppose a lessee holds a mineral lease on 500 acres of land; the lease contains a “Pugh clause”

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be apportioned as between the several leasehold owners ratably according to the surface area of each, or according to the undivided interest of each, and default in rental payment by one shall not affect the rights of other leasehold owners hereunder.” ¶ 10, Bath’s Form Louisiana Spec. 14-BRI-2A/12/79 (the so-called “North form”). (Emphasis added).

¶ 9, Bath 4A (i.e. so-called “lessor’s form”).

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which, albeit uniquely, provides for “Pugh clause” rentals based on one-half (1/2) of the amount stipulated in the lease as delay rentals. Not desiring to conduct operations, the lessee is approached by a company which desires a farm-in of the mineral lease to support a well which the farmee intends to drill at a location to the south of the leased premises. A farm-out agreement is executed whereby the southern half (250 acres) of the mineral lease is farmed-out.

A well is drilled on a different mineral lease held directly by the farmee and is successfully completed, with the farmee earning twenty acres (of the farmed-out 250 acres) which are included in a compulsory unit formed for the well. The lessee assigns to the farmee all of its interest in the twenty (20) acres included in the unit, with the balance of the (unearned) acreage being returned to the lessee, free of the farm-out. Admittedly a bit unconventional, the transfer is a partial assignment, not a partial sublease, as no overriding royalty interest was reserved by the farmor-lessee.

All of this occurs within the first year of the primary term. Before the first anniversary date, a “Pugh clause” rental is timely paid on the 480 acres outside of the farmee’s unit based upon one-half (1/2) of the delay rentals specified in the lease.

Has the mineral lease been maintained in force and effect as to the non-unitized acreage? It depends.

If the mineral lease is executed on a “Bath 6” or the “North form,” the answer is “no,” as the mineral lease has been divided. Thus, the unit does not affect the portion of the prime lease which contributes no acreage to the unit by virtue of such division. There are now two separate leases where there was but one before the partial assignment. Since the “Pugh clause” rental paid by the lessee is based upon one-half (1/2) of the amount stipulated in the lease as delay rentals, an improper delay rental on the 480-acres outside of the unit has been paid and the mineral lease has terminated, ipso facto, by its own terms as to the non-unitized acreage.

If, on the other hand, the mineral lease is executed on a “Bath 4A,” the answer is “yes,” as the mineral lease has not been divided, and the lease’s “Pugh clause” would require the payment of a “Pugh clause” rental in order to maintain the mineral lease as to the non-unitized acreage.

126 “A farmout agreement is a contract to assign oil and gas lease rights in acreage upon the completion of a drilling obligation and performance of the other provisions contained therein.” Robinson v. North American Royalties, Inc., 509 So.2d 679 (La.App. 3rd Cir. 1987). See also footnote 247, infra.

127 “A mineral lease terminates at the expiration of the agreed term or upon the occurrence of an express resolutory condition.” LA. REV. STAT. ANN. § 31:133.
Who said that there is nothing in a name?

d. Describing the Two Leases Resulting from a Division.

The previously noted observation that a partial assignment might, under certain circumstances, “have the effect of creating two leases where but one existed before,” gives rise to the question, how does one describe the (now) two leases which grow out of one lease? The prime lease, before the partial assignment, would be described in a transfer instrument something like this:

Oil, Gas and Mineral Lease executed by __, as Lessor, in favor of __, as Lessee, dated __, recorded __, in COB __, Folio __, under File No. __, of the public records of __ Parish, Louisiana.

It is that document, recorded at the cited place in the public records, where a third party would go to determine the terms of the mineral lease. If either of the (now) two leases which result from a division effected by a partial assignment, were to be further transferred, it would be necessary to indicate the discrete portion of the leased premises being transferred, so as to distinguish one lease from the other. This would be accomplished by using the lease description noted above, followed by something like this:

. . . INSOFAR BUT ONLY INSOFAR as said Lease covers and affects the following portion of the leased premises, to-wit:

[Specific geographical description follows]

e. Consequences of Reuniting Two Divided Leases.

It is unclear as to what would happen if both of the (now) two leases were reacquired by one person, say, the original lessee who initially executed the partial assignment which resulted in the first division. Are the two distinct leases now merged or reunited into one single lease? Do we still have two independent and separate leases, or one lease under its original terms?

The issue is of obvious importance for lease maintenance purposes. Unless the two leases were deemed to have been reunited or reconstituted as one single mineral lease, operations on or production from one portion of the leased premises would not serve to maintain leasehold rights as to the other portion of the leased premises.

Insofar as can be ascertained, this issue has not been presented for judicial determination in Louisiana. It is suggested that, without some confirmatory action by the lessor – with whose contractual consent the mineral lease was deemed to have been divided in the first instance – the two leases remain as two distinct leases, notwithstanding that they are held of record by one person.128

128 One respected Commentator characterized as “of doubtful propriety” a line of cases in Texas holding that mineral leases, previously divided, would be
2. Sublease.
   a. General.

In contrast to a partial assignment, the jurisprudence does not find a division if the transfer is a sublease.

The important case of Smith v. Sun Oil Co.\textsuperscript{129} presented a plaintiff-lessee who sued for cancellation of a mineral lease as to 180 acres out of a 200-acre lease tract. The lessee had transferred rights to twenty (20) acres of the leased premises to a third party, who drilled a well and obtained production. The issue was whether the well maintained the entire lease, which, in turn, presented the issue of whether the transfer was an assignment or a sublease of the twenty (20) acres.

In the instrument of transfer, the lessee reserved an overriding royalty interest and a “right of reversion,” that is, a clause providing that the assigned lease would “revert” to the assignor if the assignee failed to drill a well timely.

The lease contained a “divisibility clause” that was interpreted to have given to “the original lessee the right to divide the lease into two or more leases, by assigning the lease on any part or parts of the 200 acres of land.” Therefore, if the transfer were an assignment, the lease would be deemed to have been divided and production from the 20-acre tract would not inure to benefit of the defendant-lessee that held the lease as to the 180-acre tract.

After conducting an extensive review of French Commentators on the subject, the court held that the transfer was a sublease, and that the production on 20 acres inured to the benefit of, and maintained the lease as to the 180 acres held by, the defendant-lessee. The fact that the words “grant, convey, transfer and assign” were employed in the “granting clause” “did not of itself, make the contract an assignment merely, or deprive it of the character of a sublease.”\textsuperscript{130}

Although the issue of divisibility vel non did not appear to be presented, the court in Mangham v. Southern Carbon Co.\textsuperscript{131} approved the prior jurisprudence and stated the consequence of production by a sublessee, as follows:

It is true that the gas was produced by a sublessee, but the effect in favor of the original lessee was the same as if the gas had been produced by him.

\textsuperscript{129} Cited at footnote 4, supra.
\textsuperscript{130} Id. at 380.
\textsuperscript{131} 169 La. 935, 126 So. 429 (1930).
In Bond v. Midstates Oil Corp., the identical parties and facts as involved in Stacy v. Midstates Oil Corporation were presented to the court. The court again considered the character of the instrument whereby the underlying mineral lease was transferred and found it to be a sublease. As stated by the court:

It would seem therefore, that regardless of any other rights which the lessee may retain or reserve, whether it be a right to control the forfeiture or the preservation of the lease, or the right of reversion, if there is the retention and reservation of an overriding, or excess royalty that is sufficient of itself to stamp the transfer as a sublease.

Because the transfer was a sublease, it did not have the effect of dividing the lease pursuant to the lease provision (which only mentioned "assignments") and, consequently, production from any portion of the leased premises would serve to maintain the entire lease in force and effect.

b. Timing Might be Everything!

There is both a qualitative and a temporal component to the analysis of whether a mineral lease has been divided by a partial transfer. The qualitative component is the threshold determination as to whether the instrument of partial transfer is to be characterized as a sublease or an assignment. If the former, the inquiry stops there. If the latter, the resulting issue is whether the transferred mineral lease contains a "division of rental clause," "rental apportionment clause," or other contractual provision of the type involved in Swope v. Holmes. If the lease does not contain such a clause, the inquiry stops there; the lease remains intact, not divided.

132 219 La. 415, 53 So.2d 149 (1951).
133 Cited at footnote 84, supra.
134 Professor Merrill, in his article cited in footnote 128, supra, commented on this case by noting that, "[i]n Louisiana, under a lease 'divisible' according to the standards of the local law, a sublease, unlike an assignment, does not produce division, so that production upon the transferred portion will keep the lease in effect as to the retained portion." 20 Tex. L.Rev. 298, 322.
135 If the seminal transfer which segregates a portion of the leased premises is a sublease, no division results vis-à-vis the lessor, and this conclusion is not altered by the fact that subsequent transfers as to that segregated portion of the leased acreage would be characterized as partial assignments, since such assignments would be "by, through and under" the partial sublease. Conceivably, because a "sublessor, . . ., assumes all rights, interest, obligations, penalties, etc., enjoyed by and granted to the original lessor;" (see text accompanying footnote 199, infra), a division might result as between the sublessor and the sublessee, but no case has considered this issue.
136 Cited at footnote 108, supra.
As to the temporal component, if the current lessee as to a distinct, segregated portion of the original leased premises is holding under a partial assignment which is predated by a series of successive transfers of the mineral lease relating to such portion of the leased premises, it is necessary to determine if each preceding transfer in the succession of transfer instruments was a (partial) sublease or a (partial) assignment.

Professor Daggett in her important work has alluded to the relevance of this temporal consideration in the context of a series of transfers of a mineral lease. In discussing *Smith v. Sun Oil Co.*, and after stating that the Supreme Court had found the seminal transfer to be a sublease, Professor Daggett observed that the "[subsequent] transfer from Elliott to Autrey, the producer, was not in question and was referred to definitely as an assignment." 138

Not only is it important to determine if any prior transfer (as to the distinct, segregated portion now held by the current operator) was a sublease (so that the Swope-line of cases would not become operative to effectuate a division of the lease), as to, say, the northern 150 acres. That assignee, A, later assigned the lease

Your client, Opek Oil Production Syndicate ("OOPS"), comes to you and asks for your opinion as to the status of its mineral lease covering 150 acres — has it been maintained in force and effect? OOPS informs you that its net revenue interest is seventy-five (75%) per cent. You are also advised that a mineral lease was granted in 1980 for a primary term of three (3) years, covering several thousand acres; the lessor reserved a twenty (20%) per cent lessor's royalty 140 and the mineral lease contains no "Pugh clause." 141

One or more wells were drilled in the southern portion of the lease in the first year of the primary term of the lease. In the second year of the primary term, the original lessee assigned the lease to A, with no reservation of interest sufficient to "stamp" the transfer as a sublease, as to, say, the northern 150 acres. That assignee, A, later assigned the lease

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137 Cited at footnote 4, supra.
139 *Smith v. Sun Oil Co.*, cited at footnote 4, supra.
140 Because OOPS informed you that its NRI is seventy-five (75%) per cent, you immediately know that there is, in the aggregate, a five (5%) per cent overriding royalty interest burdening the mineral lease held by OOPS as to the 150 acres. Is this burden indicative of the presence of a sublease in the chain of title?
141 *LA. REV. STAT. ANN.* § 31:114.
as to the same 150 acres to B who, a year later, assigned to C who, a year later, assigned to D who, a year later, subleased to OOPS [reserving a four (4%) per cent overriding royalty interest to D]. At this point, we are about three years after the expiration of the primary term, and no rental was paid prior to the second anniversary date of the lease (which would be the beginning of the last year of the primary term of the lease).

What is the status of the lease as to the northern 150 acres? Has it been maintained in force and effect? It depends on several things.

The first issue is that, as you are informed, OOPS has a seventy-five (75%) per cent NRI, but its sublessor, D, had only reserved a four (4%) per cent overriding royalty interest. Where did the other one (1%) per cent overriding royalty interest arise? Was there a prior sublease in which that one (1%) per cent was reserved? It turns out that B had assigned a one (1%) per cent overriding royalty interest to its geologist and that does not constitute a sublease, so that there was, under the fact pattern presented to you, only one sublease — the last transfer from D to OOPS — all other transfers being, properly speaking, assignments.

It is clear to you that OOPS believes that, because it holds under a sublease, the lease is being maintained in force and effect as to its acreage by the production still being obtained from the southern portion of the lease by the original lessee. While this might be the result, in a proper case, it must be observed that OOPS's acquisition — by way of a sublease — was preceded by a series of four (4) prior partial assignments — (1) original lessee to A, then (2) A to B, then (3) B to C, and finally (4) C to D. So, prior to the third year after the expiration of the primary term, the question necessarily arises as to whether the original partial assignment to A (in the second year of the primary term) effectuated a division of the lease such that the production from the wells from the southern portion of the lease by the original lessee would not have served to maintain all acreage originally covered by the lease — including the northern 150 acres.

As we have seen, if the lease contains the "division of rental clause," "rental apportionment clause," or other contractual provision of the type involved in Swope v. Holmes, the division of the lease would result from the first partial assignment (from the original lessee to A). The later execution of a partial sublease would not resurrect the lease to the extent that the now divided lease had previously expired (assuming, of course, that the lease is not being otherwise maintained as to the 150 acres affected by the partial assignment).

The point to be made is that it is not sufficient to merely find a partial sublease at some point in a successive chain of title to a mineral lease, from which one might draw the conclusion that no division has resulted. Rather, if the partial sublease was predated by any one or more partial assignments (but not by an earlier sublease), that earlier
transaction—predating, as it does, the partial sublease—would itself invoke the Swope rationale, resulting in a division of the lease, and the lease might have thereby lapsed well before the partial sublease is executed.

Can we again ask: Who said that there is nothing in a name?

C. Warranty of Grantor

1. Assignment.

As noted above, to assign a mineral lease is to "cede" or "sell" it.\textsuperscript{142} Thus, the grantor in an assignment of a mineral lease is a vendor within the meaning of the rules pertinent to the sale of immovable property.

La. Civ. Code Ann. art. 2475 specifies the "Seller's obligations of delivery and warranty," as follows:

The seller is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use.

In \textit{Lockwood Oil Co. v. Atkins},\textsuperscript{143} an assignee who was evicted from a portion of the assigned leased premises was entitled to recover the proportionate part of the purchase price, but not "the increased value of the property which has been caused by the fluctuation in the estimated value of it." This denial was based upon the established law that damages may not be based on speculative evidence, the court saying:

The fluctuation in prices, dependent on the production or nonproduction of oil or gas in the neighboring territory, is too great and too uncertain to serve as a legal basis for an allowance as damages for loss of profits to an evicted purchaser of an oil or gas lease.

\textit{St. Landry Oil & Gas Co., Inc. v. Neal}\textsuperscript{144} involved a mineral lease which was acquired by Eastham from Emma Garrett and others. The lease was assigned to the defendant by Eastham, the lessee. Thereafter, the defendant assigned the lease to the plaintiff for $10 thousand cash and an oil payment in the amount of $15 thousand. The plaintiff-assignee drilled two wells on the lands, one of which was a dry hole and the other of which produced a sum of money and then ceased to produce.

The lessors instituted a suit against Bridgeman—a third party who claimed to own the land—to have recognized as valid a correction deed

\textsuperscript{142} Pine Tree Associates v. Subway Restaurants, Inc., 93-603 (La.App. 5th Cir. 9/14/94); 643 So.2d 1271, \textit{writ denied} 94-2537 (La. 12/9/94); 647 So.2d 1120 ("To assign a lease is to sell it.").

\textsuperscript{143} 158 La. 610, 104 So. 386 (1925).

\textsuperscript{144} 166 La. 799, 118 So. 24 (1928).
or, in the alternative, to be decreed as the owners of the property. The demands of plaintiffs in that suit were rejected, and the court recognized Bridgeman as the owner on the lands "upon which Emma Garrett and others had granted the lease that was acquired by plaintiff."

The defendant – the assignor of the plaintiff – then obtained from Bridgeman a ratification and confirmation of the lease which had been granted by the lessors. The defendant recorded the instrument of ratification and confirmation and so notified the plaintiff, who "refused to accept the confirmation."

The plaintiff-assignee – who had drilled wells on the lands covered by the Garrett lease, but later determined in the separate suit to be owned by Bridgeman – then contended that it had been evicted by the judgment decreeing Bridgeman, and not Emma Garrett, as the owner of the land on which the plaintiff-assignee had drilled the wells. The assignee sued Neal, its assignor, for return of the consideration which it had paid for the lease.

Neal resisted on the grounds that, when he obtained from Bridgeman the ratification and confirmation of the Garrett lease, it "immediately accrued to the plaintiff, and gave him a perfect title to the lease, thereby destroying any right plaintiff might have had to rescind the sale of the lease to it, and recover the purchase price with damages."

The court, noting that "[a]t no time was plaintiff or its associate actually disturbed in their operations on the lease," agreed with Neal's contention and stated, as follows:

In our view, at least in the absence of an actual eviction working substantial injury, where one purchases from another without title before a suit to rescind is commenced, the title thus acquired vests immediately in the vendee of the one acquiring it, and the vendee cannot sue for a rescission of the sale by which he purchased. He should not then be permitted to sue, because his vendor, under these circumstances, would have fulfilled all of his obligations to him. However, after he has instituted suit to rescind, his suit cannot be defeated by a title acquired by his vendor after the institution of the suit. The new title does not vest in him then, unless he accepts it, for he cannot be forced to retract his steps and dismiss his suit by an after occurrence.

The Louisiana Supreme Court In Tomlinson v. Thurman rejected a contention that an "assignment . . . was not subject to the laws of warranty." Finding that a "sale of a mineral lease is manifestly the sale of an incorporeal thing or right," the court applied La. Civ. Code Ann. art.

\[145\] Cited at footnote 79, supra.
2501 and held that the plaintiff, "having been so evicted in this case, is entitled to recover . . . the purchase price of $600 paid for the lease, with legal interest."147

Where title failed to certain of the lands covered by certain mineral leases, the assignee of such leases was allowed to rescind partially the assignment of the mineral leases and to recover a proportionate part of the consideration paid for the assignment.148

Because an "assignment of a lease is a sale of a real right," the assignee may avail the warranty rights of the lessee as against the lessor. Thus, in Berwick Mud Company v. Stansbury, Berwick Mud received an assignment of certain mineral leases which purported to be "100% leases," but a title examination revealed an outstanding interest in certain minor children. The assignee brought an action in warranty against the lessor. Confirming the right of the assignee to do so, the court made the following observations, to-wit:

Therefore, Berwick Mud has become 'subrogated to the seller's rights and actions in warranty against all others.' C.C. Art. 2503. Furthermore, the act of assignment itself specifically subrogates Berwick Mud to all the rights and actions of [its assignors]. As a result, Berwick Mud stands in the shoes of [its assignors] as the original lessees. So, the rights and obligations of the plaintiff and defendants are to be governed by the mineral lessor-lessee relationship and are to be determined from the lease agreement itself insofar as is possible.

In Del-Ray Oil & Gas, Inc. v. Henderson Petroleum Corporation, the court considered certain warranty claims between parties to two (2) discrete transfers of mineral leases. Finding one transfer to be an assignment because it was accomplished "without reserving any interest whatsoever," the court concluded that the "assignment of a lease is subject to the warranty provisions in the Civil Code." Citing Carter Oil Company v. King, the court observed that "the sale of a mineral lease

146 See now L.A. CIV. CODE ANN. art. 2500 ("The seller warrants the buyer against eviction, which is the buyer's loss of, or danger of losing, the whole or part of the thing sold because of a third person's right that existed at the time of the sale. The warranty also covers encumbrances on the thing that were not declared at the time of the sale, with the exception of apparent servitudes and natural and legal nonapparent servitudes, which need not be declared.").
147 Id. at 461.
149 205 So.2d 147 (La.App. 3rd Cir. 1967).
150 Cited at footnote 72, supra.
151 797 F.2d at 1317.
152 134 So.2d 89 (La.App. 2nd Cir. 1961).
is subject to the laws of warranty." One "law of warranty" was (then) La. Civ. Code Ann. art. 2505 which, prior to its amendment and restatement in 1993,153 provided, as follows:

Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of the eviction, and purchased at his peril and risk.154

2. Sublease.

The Del-Ray court, finding a separate transaction between different parties to be a sublease,155 held that the "transfer is thus subject to article 120 of the Mineral Code, which allows mineral lessors to exclude warranty of title, rather than the conflicting articles of the Civil Code on which the district court relied."

Commenting on the proposition that a sublease is the "lease of a lease," the court stated that the "provisions in the Louisiana Mineral Code that control the rights and obligations of lessors and lessees of mineral rights also control the rights and obligations of sublessors and sublessees of mineral rights."156

D. Securing Court Authority for Succession Representative to Execute the Transfer

1. Assignment.

If a succession representative desires to convey a mineral lease which is an asset of the estate in a negotiated transaction, she must comply with the requirements of the Code of Civil Procedure relative to the securing of court authority. An assignment, being a sale, brings into play article 3281 which states that a "succession representative who desires to sell succession property at private sale shall file a petition setting forth a description of the property, the price and conditions of and the reasons for the proposed sale."

Under article 3282 of the Code of Civil Procedure, notice of the application for authority for a private sale must be published "at least twice."

2. Sublease.

If, rather than "selling" the lease, the succession representative chooses to convey the mineral lease and reserve an overriding royalty

155 "Reservation of that royalty made the transfer a sublease, despite the language of assignment employed in the transfer documents." 797 F.2d at 1317.
156 797 F.2d at 1316.
interest, she will be executing a sublease. This requires compliance with article 3226 of the Code of Civil Procedure which provides that "the court may authorize a succession representative to grant a lease [including mineral lease] upon succession property after compliance with Article 3229."

Under article 3229 of the Code of Civil Procedure, notice of the application for authority to grant a lease — and, hence, by analogy, a sublease — must be published only once.

E. Ability to Release Lease

1. Assignment.

Since "an assignment vests title in the transferee," the assignee becomes the owner of the mineral lease and, as such, has the full ability to release the mineral lease. Most commercially printed lease forms in common usage have a "surrender clause" which recognizes the right of the lessee to release the mineral lease (in whole or in part) and thereby be relieved of obligations under the lease.

However, even if the mineral lease were silent in this regard, general law recognizes the right of an obligee to extinguish a debt by remission. But who is the obligor and who is the obligee in a lease relationship? A "lease is a synallagmatic contract," which means that it is a "contract by which each of the contracting parties binds himself to the other." Hence, each party — lessor and lessee alike — is both an

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157 Portions of this subsection are drawn from Ottinger, After the Lessee Walks Away — The Rights and Obligations of the Unleased Mineral Owner in a Producing Unit, 55 Ann. Inst. on Min. Law 59 (2008).
158 Mahayna, Inc. v. Poydras Center Associates, 96-2089 (La.App. 4th Cir. 4/30/97); 693 So.2d 355.
159 "Lessee may, at any time prior to or after the discovery and production of minerals on the land, execute and deliver to Lessor or file for record a release or releases of any portion or portions of the lands or any stratum or strata and be relieved of all requirements hereof as to the land, stratum or strata so released, . . ." ¶ 3, Form 42 CPM — New South Louisiana Revised Six (6); "Lessee may, at any time prior to or after the discovery and production of minerals on the land, execute and deliver to Lessor or place of record a release or releases of any portion or portions of the lands and be relieved of all requirements hereof as to the land surrendered, . . . ." ¶ 9, Form 42 CPM — New South Louisiana Revised Four (4) — Pooling, Revised "A"
160 LA. CIV. CODE ANN. art. 1888 ("A remission of debt by an obligee extinguishes the obligation. That remission may be express or tacit.").
161 LA. CIV. CODE ANN. art. 2668 ("Lease is a synallagmatic contract by which one party, the lessor, binds himself to give to the other party, the lessee, the use and enjoyment of a thing for a term in exchange for a rent that the lessee binds himself to pay.").
162 Sheridan v. Le Quire, 15 So.2d 118, 121 (La.App. 1st Cir. 1943).
obligor and an obligee, one to the other. Thus, there can be no doubt that the lessee, as an obligee, can release the lease and thereby terminate any duties owed to the lessor, as an obligor. A more significant issue becomes whether the lessee, by releasing (remitting) the lease, can unburden himself of his duties to the lessor without the concurrence or release by the latter.

Clearly, a lessee – while having the lessor’s contractual permission to release the lease, in whole or in part – cannot thereby avoid, or “wash its hands of,” obligations which have already been incurred.

The notion that an obligor (the lessee) cannot unilaterally unburden itself of liabilities which have accrued to or in favor of the obligee (the lessor) is not at all radical. It is, in fact, consonant with a similar rule pertinent to transfers, now expressed in article 129 of the Louisiana Mineral Code, that an “assignor or sublessor is not relieved of his obligations or liabilities under a mineral lease unless the lessor has discharged him expressly and in writing.”

An issue might arise as to when, in point of time, an obligation is deemed to have “accrued” for purposes of this rule. Your author was involved in litigation wherein it was contended that a plugging and abandonment obligation had “accrued” at the time of an assignment of a producing lease with the contended result that, unless released, the assignor remains liable for such (accrued) obligation, even though no P&A operations had yet taken place.

An example of when an obligation is deemed to have “accrued,” for regulatory purposes, is set forth in the regulations of the Minerals Management Service where it is provided that the “obligations to plug and abandon wells, remove platforms and other facilities, and to clear the seafloor of obstructions accrue when a well is drilled or used, a platform or other facility is installed or used, or an obstruction is created.” The word “front-loading” comes to mind.

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163 See LA. REV. STAT. ANN. § 31:119 (“A mineral lessor is bound to deliver the premises that he has leased for use by the lessee, to refrain from disturbing the lessee’s possession, and to perform the contract in good faith.”). See also In re WRT Energy Corporation, 202 B.R. 579, 583 (W.D. La. 1996) (discussing the nature of duties owed by each party to a mineral lease, noting that the “obligations of the lessor under Louisiana law are not affirmative duties,” but are “essentially obligations not to act in a certain manner.”).

164 As stated by one distinguished Commentator, “a wise lessor will insist that the surrender clause be modified so as expressly to forbid the avoidance of accrued liability by its exercise.” Merrill, The Oil and Gas Lease – Major Problems, 41 Neb. L.Rev. 488 at 513 (1962).

165 See Part IV.D hereof, infra.

166 MMS NTL No. 93-2N dated October 6, 1993. “Although federal
A comparable rule exists in the policies of the Louisiana Office of Conservation.167

The court in Shanks v. Exxon Corporation ("Shanks I") noted that "[e]xecution of the release pursuant to this ['surrender clause'] prospectively relieved the lessee of all obligations as to the land released."168 (Emphasis in original).

In subsequent litigation under the same name ("Shanks II"),169 the plaintiffs continued to posit the notion that a release of the mineral lease would not absolve the original lessee of its obligation to pay well costs. As in Shanks I, the court rejected this contention, as follows:

As stated in Shanks [I], and as acknowledged by plaintiffs in brief, through Exchange’s exercise of the right to release the interests in the leases at issue, plaintiffs became unleased landowners of a one-half interest in their tracts. This release entitled them to eight-eighths of production, but also obligated them to pay any prospectively accruing well costs that became chargeable from their proportionate share as the well continued to produce. See Shanks [I], 674 So.2d at 478. The position taken by plaintiffs would require post termination enforcement of the released leases as to the former lessee’s (Carden’s) responsibility for drilling costs, but would treat as released or terminated the former lessee’s (Carden’s) contractual right to seven-eighths of production, a proposition previously described by the United States District Court as “Heads-I win-Tails-you lose.” See Browning v. Exxon Corporation, 848 F.Supp. 1241,

167 See Enforcement Policy – Abandoned Wells & Pits, Memorandum by J. Patrick Batchelor, Commissioner of Conservation, dated July 24, 1990, providing that a prior operator may be responsible for remediation after a determination that “the operator of record no longer exists (bankruptcy, etc.).” If the operator of record no longer exists, the Office of Conservation “will pursue a line of succession from [the] current operator of record down to [the] original generator” to determine responsibility for remediation.

168 95-2164 (La.App. 1st Cir. 5/10/96); 674 So.2d 473, at 478, writ denied 96-1475 (La. 9/20/96); 679 So.2d 436.

169 Shanks v. Exxon Corporation, 2007-0852 (La.App. 1st Cir. 12/21/07); 984 So.2d 53.
In *Anderson v. Tenneco Oil Company*,\(^{170}\) it was held that the "surrender clause" in the State mineral lease meant that, "once the lease was terminated, all obligations associated with said lease also terminated." Consequently, the court held that the lessee was absolved of liability for certain pilings and that the "State assumed full responsibility for the land and anything attached thereto."\(^{171}\)

2. Sublease.

Because a sublease is a "lease of a lease," under general circumstances, the only interest which a sublessee might be able to release is the sublease itself—not the prime lease which it does not "own," but which it merely enjoys "for a term."\(^{172}\)

This was precisely the issue presented in *Scurlock Oil Company v. Getty Oil Company*.\(^{173}\) Although later reversed by the Supreme Court on other grounds, the Third Circuit considered whether a release executed by a transferor of certain mineral leases was effective to release the rights of the transferee. In turn, the decision hinged on whether the transfer was an assignment or a sublease, for if it was an assignment, the release would not be effective to release the rights of the transferee, whereas, if the transfer was a sublease, it would extinguish the rights of the transferee. Finding the transfer of rights in and to specified subsurface strata without the reservation of an overriding royalty interest, to be a *sublease*, it was held "that the parties intended for the release to cancel the Waterbury leases in their entirety."\(^{174}\)

The following case reached a result contrary to the general rule, based upon a construction of the sublease involved.

In *Cameron Meadows Land Company v. Bullard*,\(^{175}\) the court construed a certain transfer document as a "sublease," saying that "[w]e have no quarrel with the trial judge in his finding that the transfer was a sublease."

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\(^{170}\) 2001-0295, 2001-0296 (La.App. 4th Cir. 5/22/02); 826 So.2d 1143, *writ denied* 2002-2035 (La. 11/1/02); 828 So.2d 585.

\(^{171}\) *Id.* at 1149.

\(^{172}\) *La. CIV. CODE ANN.* art. 2668.

\(^{173}\) Cited at footnote 88, *supra*.

\(^{174}\) *See* text accompanying footnote 88-93, *supra*. Finding a "contrary result . . . both harsh and not expressive of the intent of the parties," the Supreme Court found that "it is not reasonable to say that Tidewater intended to cancel those rights."

\(^{175}\) 348 So.2d 193 (La App. 3rd Cir. 1977).
The issue was whether the sublessee had the power to release the lease, effectively back to the lessor, or whether a release of a mineral lease by a sublessee inured to the benefit of the sublessee.

The court acknowledged that, "under ordinary circumstances a Sublessee has no authority to grant a release of the original lease, such right being reserved to the original lessee." However, the court interpreted the sublease as granting to the sublessee "the right to grant an effective release of said lease covering all or any part of the acreage covered thereby."

In reaching this conclusion, the court took cognizance of certain matters which were not in the sublease, as follows:

(a) No obligation on the part of the Sublessee "to pay rentals or to develop the leased acreage";
(b) Sublessor retained "no right to control the manner in which the Sublessee would conduct operations under the lease"; and
(c) Sublessor did not "reserve any right to a re-assignment of the lease in the event the Sub-lessee determined not to continue the lease in effect as to all or any part of the leased acreage."

The court particularly found noteworthy that the sublessor and his heirs, for "a period of over 43 years, took no active interest in the lease or the operations being conducted on the leased acreage by the Sublessees but rather were content to sit back and merely collect the royalties accruing under the sublease agreement."

Because the court found that the sublessee had the power to grant an effective release of the lease to the landowner, "it necessarily follows that the overriding royalty interests, insofar as this acreage is concerned, owned by the Henshaw heirs and the other defendants likewise terminated. An overriding royalty interest is an appendage of the working interest and dependent upon it." 177

The court recognized that the mere reservation of an overriding royalty interest in an assignment of a mineral lease is sufficient to characterize the transfer as a sublease. The court quoted the Comments under article 127 of the Louisiana Mineral Code, as follows:

It is not required, however, that there be a retention of any right of reversion or of any right of control on the part of the transferor over the operations of the transferee. It is necessary only that the lessee retain some interest which runs for the life of the lease, such as an overriding royalty or a perpetual or unlimited net profits interest.

176 To this author, it seems a bit strange to construe a contract on the basis of what it does not say. See Patrick S. Ottinger, Principles of Contractual Interpretation, 60 LA. L. REV. 765 (Spring 2000).
177 348 So.2d at 200.
Notwithstanding that the court viewed the transfer document as a sublease, and acknowledged that, "under ordinary circumstances a Sublessee has no authority to grant a release of the original lease, such right being reserved to the original lessee," the court construed the sublease "as impliedly granting to the Sublessee the right, power and authority to release all or any part of the leased acreage."

Fast forward thirty-plus years; same mineral lease, same transfer transaction. In *Dorie Energy Corporation v. Carter-Langham, Inc.*,' the court found the identical transfer construed in *Bullard* as a sublease, to be an assignment rather than a sublease.

Until *Dorie*, the courts have consistently and repeatedly recognized the distinction between an assignment and a sublease. As previously noted, in no other energy-producing state is the distinction of as great a consequence as Louisiana.

The decision in *Dorie* is unsettling to Louisiana law because practitioners and the industry would no longer be able to enjoy the predictability which the law should provide and, until this decision, has provided for a century.

Curiously, the court observed that the "fact that Henshaw maintained an override did not change the parties' intent to assign the lease." If this is an accurate observation, there would never be a sublease since, as stated above, all subleases are assignments, but not all assignments are subleases.

If, as seemingly determined by the Court of Appeal in *Dorie*, the reservation of an overriding royalty does not result in the characterization of an assignment as a sublease, it is no longer possible to anticipate and contract with regard to the fundamental consequences to be ascribed to one type of alienation as distinguished from the other.

The United States Court of Appeal, Fifth Circuit, commented on the contradictory rulings on the characterization of the Cameron Meadow lease transfer document, in considering the right of a lease owner - whether an assignee or a sublessee - to release the lease. In *Dorie Energy Corp. v. Prospective Investment & Trading Co. Ltd.*, the court noted, as follows:

Another much more recent case cited to us also concerns this same lease. See *Dorie Energy Corp. v. Carter-Langham, Inc.*, 997 So.2d 826 (La. Ct. App. 2008). The court found that a jury could have reasonably concluded that the predecessors to the current lease owners held an assignment, not a sublease. Under the 1977 *Bullard*

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173 08-645 (La.App. 3rd Cir. 11/5/08); 997 So.2d 826, writ denied 2008-2863 (La. 3/13/09); 5 So.3d 118.

179 570 F.3d 219 (5th Cir. 2009).
decision we just discussed, the court had already held that a
sublessee under this lease could release land without the overriding
royalty owners’ consent. Under Louisiana law, an assignee acquires
all the rights of the lessee, which would include the right to
Therefore, regardless of whether this is a sublease or an assignment,
the lease owners can surrender the leased land without it reverting
back to the overriding royalty interest owners.

At issue in Brown v. Mayfield\textsuperscript{180} was whether a quit-claim deed
executed by a transferor of a mineral lease had the effect of releasing the
entire mineral lease (including the interest of its transferee) or only the
interest of the party executing the deed. Finding the transfer to be a
"sublease though styled an assignment," the court then noted that, "[a]s a
consequence of this finding, the rules pertaining to sublease in general
apply. One such rule is that the rights under a sublease are secondary to
the primary lease, and a sublease ceases to exist at the moment the
primary lease is dissolved."

Distinguishing the facts as involved in Scurlock Oil Company v.
Getty Oil Company,\textsuperscript{181} the court determined that "Gulf’s intent was
clearly to release not only its retained rights in the lease but also all full
rights it had in the lease including the rights held
by its sublessee, the
Mayfield interests."

In another case,\textsuperscript{182} the Willises, as lessors, granted a mineral lease to
McCook who then subleased it to International. At a later date,
International executed and recorded a release which “purported to
relinquish to the Willises all rights, title, and interest in and to the lease
executed by the Willises to McCook.” At issue was whether the release
executed solely by International, the sublessee, was effective to terminate
the mineral lease with the result that McCook, the lessee-sublessor, was
no longer responsible to the plaintiffs for royalties on production from
the unit in which the lease was situated.

The trial court “declared that International’s release effectively
terminated, as of January 31, 1984, all interests of International and
McCook in their mineral lease, and that after that date the Willises were
to have the status of unleased owners with respect to the unit well. Court
costs were assessed to International.”

On appeal, the issue was “whether the plaintiffs’ sublessee, while in
default, could execute a valid release of the mineral lease, thereby

\textsuperscript{180} 488 So.2d 322 (La.App. 3rd Cir. 1986).
\textsuperscript{181} Cited at footnote 88, \textit{supra}.
\textsuperscript{182} Willis v. International Oil and Gas Corporation, 541 So.2d 332 (La.App. 2nd
Cir. 1989).
avoiding the payment of future royalties.” Said differently, what was the status of the lessee and sublessee after the release by the sublessee, as it relates to continuing liability to the lessors for royalties and/or proceeds of production?

The court addressed the issue of the effectiveness of the release by a sublessee and held, as follows:

Because McCook subleased its rights under the lease to International, a question exists with regard to whether the release executed by International served to release only International’s rights, or the rights of both International and McCook. However, it is not necessary for us to answer that question here, nor would it be appropriate to adjudicate rights and/or obligations of McCook, who is not a party to this lawsuit. It is sufficient to note that Paragraph 4 of the Willis lease specifically provided for execution of a release at any time:

Lessee may at any time execute and deliver to Lessor . . . a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered . . .

The McCook sublease, according to its language, transferred to International the “rights incident” to the lease. Moreover, a sublessee acquires the rights and powers of the lessee. LSA-R.S. 31:128.

Thus, as sublessee under the Willis lease, International had the right to execute a release which prospectively relieved at least International, if not McCook, of all obligations as to the acreage at issue. Nor was International’s right to execute a release impliedly conditioned on its timely payment of royalties. Instead, the plain wording of the lease specifically created the right to execute a release at any time. Moreover, the Louisiana Mineral Code grants specific remedies to a mineral lessor for nonpayment of royalties. See LSA-R.S. 31:137-141. Indeed, the Willises have pursued a remedy under those pertinent articles, and have obtained a judgment for double the amount of royalties due. Upon satisfaction of that judgment, their remedy for nonpayment of royalties will be complete.

The court’s reliance on the contractual right of release as stated in the mineral lease is of dubious validity, and actually begs the question of whether – article 128 notwithstanding – a sublessee is a “lessee” (at least vis-à-vis the prime lessor) for purposes of that clause.

In its consideration of this issue, the court cites no jurisprudential authority whatsoever. Moreover, the reluctance of the court to explicitly
and unequivocally embrace the effectiveness of a release by a sublessee, coupled with the tentative nature of the language employed by the court (the release “prospectively relieved at least International, if not McCook”), as well as the absence of any discussion whatsoever of the nature of a sublease under Louisiana law, and the further recognition of other remedies available to the lessor (almost a “no harm, no foul” argument), do not argue strongly that this case is particularly authoritative on the issue involved.

F. Remedy for Unpaid Purchase Price

1. Assignment.

As stated above, the fundamental difference between a sale and a lease arises from the manner in which the purchase price is paid. In the sale, the price “must be fixed . . . in a sum either certain or determinable.”

La. Civ. Code Ann. art. 2561 provides, as follows:

If the buyer fails to pay the price, the seller may sue for dissolution of the sale. If the seller has given credit for the price and transfers that credit to another person, the right of dissolution is transferred together with the credit. In case of multiple credit holders all must join in the suit for dissolution, but if any credit holder refuses to join, the others may subrogate themselves to his right by paying the amount due to him.

If a promissory note or other instrument has been given for the price, the right to dissolution prescribes at the same time and in the same period as the note or other instrument.

Additionally, since the unpaid assignor in a credit sale is a vendor, it is entitled to the vendor's privilege afforded by La. Civ. Code Ann. art. 3249(1) which recognizes that “[c]reditors who have a privilege on immovables, are . . . [t]he vendor on the estate by him sold, for the payment of the price or so much of it as is unpaid, whether it was sold on or without a credit.”

2. Sublease.

In contrast to the purchase price in a sale, in the lease, the price “may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased.”

Because the overriding royalty interest reserved in a transfer of a mineral lease constitutes “rent,” the requirements of prior notice of

183 See Part II.C hereof, supra.
184 LA. CIV. CODE ANN. art. 2464.
185 LA. CIV. CODE ANN. art. 2675 (formerly art. 2671).
186 LA. REV. STAT. ANN. § 31:123.
nonpayment would be applicable. Article 137 of the Louisiana Mineral Code reads, as follows:

If a mineral lessor seeks relief for the failure of his lessee to make timely or proper payment of royalties, he must give his lessee written notice of such failure as a prerequisite to a judicial demand for damages or dissolution of the lease.

Moreover, security is afforded to a mineral lessor — including a sublessor — under article 146 of the Louisiana Mineral Code, providing, as follows:

The lessor of a mineral lease has, for the payment of his rent, and other obligations of the lease, a right of pledge on all equipment, machinery, and other property of the lessee on or attached to the property leased. The right also extends to property of others on or attached to the property leased by their express or implied consent in connection with or contemplation of operations on the lease or land unitized therewith.

A sublessor should be able to avail the right of pledge granted by this article to a “lessor of a mineral lease” because, as noted elsewhere herein, a “sublessor...assumes all rights, interest, obligations, penalties, etc., enjoyed by and granted to the original lessor.”

If this article were not applicable, La. Civ. Code Ann. art. 2707 provides the following security to a lessor (sublessor), as follows:

To secure the payment of rent and other obligations arising from the lease of an immovable, the lessor has a privilege on the lessee's movables that are found in or upon the leased property.

Finally, concerning the right of pledge afforded by the cited article of the Mineral Code, one should remember that Section 545(3) of the Bankruptcy Code allows a debtor to avoid a lien for “rent.” In one case, an unpaid sublessor argued that, because it had reserved a “net profits interest,” and not an overriding royalty interest, the transfer was an assignment, not a sublease, and, hence, that its privilege was not security for “rent.” Rather, the sublessor argued that the payment of the NPI was an independent “obligation of the [sub]lease,” for which the sublessor had an article 146 privilege which was not subject to

187 See Part III.H.2 hereof, infra.
189 See 11 U.S.C.A. § 545(3) (“The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien...is for rent.”).
190 Duck Lake Acquisition Partners, L.P. v. WRT Energy Company, 169 F.3d 306 (5th Cir. 1999). In the interest of full disclosure, your author represented the sublessor in this suit.
avoidance. Rejecting that argument, the court allowed the sublessee-debtor to avoid the privilege under article 146.

G. Prescriptive Period Applicable to Claim for Unpaid Purchase Price

1. Assignment.

By definition, any monies due to the assignee as a part of the purchase price would not be owed in respect of an overriding royalty interest for, if it were, the transaction would be a sublease and not an assignment.

Not being payable in respect of "rent," a claim for monies owed for any unpaid portion of the purchase price for the assignment would be subject to a prescriptive period of ten (10) years.¹⁹¹

2. Sublease.

In contrast, the courts have recognized that, when the purchase price is the overriding royalty interest reserved by the assignor, it constitutes "rent" in the context of a sublease.

In Hankamer v. Texaco, Inc.,¹⁹² the owners of an overriding royalty interest sued the lessee-operator for an accounting of unpaid overriding royalty for a period of the previous ten years of production and for a money judgment for the royalties due to the plaintiffs.

The operator interposed an objection of prescription. The court noted that the overriding royalty interest was created by reservation in the instrument whereby the mineral lease was transferred to the defendant. The court stated:

Even though called an assignment, the transaction was in fact a sublease. Bond v. Midstates Oil Corp., 219 La. 415, 53 So.2d 149 (1951). The payment of overriding royalty thus created is the payment of rent. Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46 (1931). Three year prescription is therefore applicable. La.C.C. Art. 3538 [now 3494(5)]; Caddo Levee District v. Pure Oil Co., 167 La. 801, 120 So. 373 (1929).

The court sustained the objection of prescription,¹⁹³ saying "the claims for unpaid royalties accruing more than three years prior to the filing of the suit are prescribed."

¹⁹¹ LA. CIV. CODE ANN. art. 3499 provides: Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years.
¹⁹³ See former LA. CIV. CODE ANN. art. 3538; now LA. CIV. CODE ANN. art. 3494(5), providing: "The following actions are subject to a liberative prescription of three years: . . . An action to recover underpayments or overpayments of royalties from the production of minerals, provided that nothing herein..."
H. Duties Owed to the Grantor

1. Assignment.

Because an assignment transfers title to the mineral lease to the assignee, there are no continuing duties to the assignor imposed upon the assignee unless they are created by contract.

A case illustrative of this proposition is *Richey v. Moore* where the plaintiff assigned a mineral lease to the defendant. In the assignment, it was provided that the defendant-assignee was obligated to file the appropriate change of ownership forms with the Louisiana Office of Conservation, and "to restore the lease to its original condition, as near as practicable, including the obligation to plug wells and abandon the lease in accordance with applicable governmental rules and regulations."

The assignee "failed to file necessary documentation with the Louisiana Office of Conservation to reflect the change in record ownership of the lease to the defendants." When the Louisiana Office of Conservation made demand upon the plaintiff— as operator of record— to plug and abandon certain wells and to remove equipment and fill certain pits, the assignor sued the assignee for damages arising from its breach of contract.

The court ruled for the assignor, finding that the assignee had failed to comply with its obligations under the assignment.  

2. Sublease.

In distinct contrast to an assignment, the sublessor and sublessee enter an ongoing contractual relationship which, by its inherent nature, gives rise to continuing duties and obligations between the parties. In

applies to any payments, rent, or royalties derived from state-owned properties." The courts have consistently held that this prescriptive period applies to claims for royalties due under a mineral lease. See Board of Commissioners of Caddo Levee District v. Pure Oil Co., 167 La. 801, 120 So. 373, 377 (1929) ("We think... that the demand for the royalty or rent is governed by the prescription applicable to arrearages of rent, which is the one pleaded here.").

*36,785* (La.App. 2nd Cir. 3/7/03); *840 So.2d 1265,* *writ denied* 2003-0987 (La. 5/30/03); *845 So.2d 1054.*

The appeal concerned only the award by the trial court of attorney’s fees in the amount of $50,000.00. On appeal, that award was reversed based upon the well-established rule in Louisiana that attorney’s fees are only recoverable if provided for by contract or statute, neither of which was present in this case. See Chauvin v. La Hitte, 229 La. 94, 85 So.2d 43 (1956) ("On numerous occasions this court has said that ordinarily attorney’s fees are not assessable as an item of damages unless provided for by law or contract.") and Hernandez v. Harson, 237 La. 389, 111 So.2d 320 (1959) ("It is well recognized in the jurisprudence of this Court that as a general rule attorney’s fees are not allowed except where authorized by statute or contract.").
other words, the "rights [and duties] of a sublessee are governed by the terms of the sublease." 96

In Wier v. Grubb,97 a sublessor sued his sublessee, seeking cancellation of the sublease because of the sublessee's failure to "sufficiently and diligently develop the tract of land affected thereby." 98 The trial court granted the requested relief, finding that the sublessee "had breached their obligation to develop the property prudently and reasonably." The court cancelled the sublease except as to an area of five (5) acres around certain wells which were producing.

The court reviewed the development of the lease and found that defendant had not developed the (sub)leased premises in the manner of a "reasonable prudent operator" under the circumstances.

Consistent with the notion that a sublease is a "lease of a lease," the Supreme Court stated that a "sublessor, as in the case at bar, assumes all rights, interest, obligations, penalties, etc., enjoyed by and granted to the original lessor." 99

One court200 — in a non-oil and gas case — said it thusly:

It is axiomatic that when a lessee subleases the res he becomes the lessor for the purposes of the sublease and to him accrues the same rights and privileges as would accrue if he had been the owner.

In Frankel v. Exxon Mobil Corporation,201 the court recognized that the nature of the relationship between a sublessor and its sublessee was analogous to the relationship between the prime lessor and lessee, saying, as follows:

Under the sublease, the Frankels stood in the position of lessors to Exxon and Taylor. As such, Exxon and Taylor were bound to perform the contract in good faith and develop and operate the leased property as reasonably prudent operators for the mutual benefit of themselves and the Frankels. See La. R.S. 31:122.

196 Neomar Resources, Inc. v. Amerada Hess Corporation, 94-0216 (La.App. 1st Cir. 12/22/94); 648 So.2d 1066, 1069, writ denied 95-0216 (La. 3/17/95); 651 So.2d 277.

197 Cited at footnote 188, supra.

198 Your author wonders why the prime lessor did not take up the cause advanced by the sublessor and seek lease dissolution based upon the failure to develop the mineral lease as established successfully by the sublessor in his suit against his sublessee.

199 82 So.2d at 7.

200 Magnolia Petroleum Co. v. Carter, 2 So.2d 680 (La.App. 2nd Cir. 1941).

201 2004-1236 (La.App. 1st Cir. 8/10/05); 923 So.2d 55. Frankel is more fully discussed at the text associated with footnote 256, infra.

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Therefore, insofar as duties are concerned, a sublessor enjoys the same powers, rights and relationship vis-a-vis its sublessee as are existent between a lessor and lessee.

**I. Privity of Contract Between Prime Lessor and Transferee**

1. **Assignment.**

The natural consequence of a sale (assignment) is that the vendee (assignee) "stands in the shoes" of its vendor (assignor). The assignee replaces the assignor in the relationship with the prime lessor. Hence, there is privity of contract between the lessor and the assignee. This result of an assignment was noted by one court, as follows:

The lease between the [lessors] and Continental was a recorded lease which attached a bundle of rights and obligations to the property. In the same way Continental could pass its rights along to successor lessees, its obligations would be passed along and would benefit the successors to the [lessors] as owners of the property.

2. **Sublease.**

In *Broussard v. Hassie Hunt Trust*, plaintiffs granted a mineral lease to Stanolird Oil & Gas Company which later assigned it to the defendant, reserving an overriding royalty interest. After certain wells were drilled, the plaintiffs made demand on the defendant requesting development of tracts contiguous to the producing well. When the defendant failed to conduct further operations in compliance with the plaintiffs' demands, the plaintiffs sued the defendant for lease cancellation.

The defendant filed objections of no right and no cause of action, which were denied. After a trial, the trial court cancelled the sublease.

On appeal, the defendant again urged the exceptions. The defendant contended that, because the transaction was a sublease, and not an assignment, "there is neither privity of estate nor of contract between a lessor and a sublessee."

Applying the test of *Bond v. Midstates Oil Corp.*, the Supreme Court found that, since an overriding royalty interest was retained, the transaction was a sublease. Thus, the plaintiffs, not being in privity with defendant, could not sue the sublessee on lease obligations.

"[N]o action can be maintained by the lessor against the [sublessee], upon any covenant contained in the lease, since there is neither privity of estate nor of contract between himself and the [sublessee]."

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203 231 La. 474, 91 So.2d 762 (1956).

204 219 La. 415, 53 So.2d 149 (1951).
The Supreme Court sustained the exception of no right of action and dismissed the plaintiffs' suit against the sublessee.

As will be seen,205 Broussard has been overruled by article 128 of the Louisiana Mineral Code.

J. Party to Whom Lessor Must Send Notice of Default or Legal Demand:

1. Assignment.

As an assignment transfers ownership of the assigned mineral lease, to the end that the assignor no longer has any interest in the lease, notice of default must be given to the assignee, but not to the assignor.206 As will be discussed below, this is subject to the requirements of article 132 of the Louisiana Mineral Code as to the timing of a default notice as it relates to the filing for registry of the assignment and the providing of notice thereof to the lessor.

Since, by definition, the assignor who has divested the entire lease (with no reservation) no longer owns any interest in the lease, any decree of cancellation would not normally be of any concern to it with the result that, with regard to a suit for dissolution, the assignor would not be a "party needed for a just adjudication" within the meaning of the Code of Civil Procedure.207

2. Sublease.

Article 132 of the Louisiana Mineral Code – discussed below208 – does not dispense with the need for notice to a sublessor in the event that the lessor wishes to seek dissolution of the mineral lease.

In Massey v. TXO Production Corp.,209 the plaintiff-lessee wrote certain lessees demanding cancellation of leases for nonpayment of royalties. Lessor did not give notice or demand to Amoco, who (as sublessor) owned an interest in the lease.

When lessor filed suit against certain defendants, including Amoco, Amoco filed a dilatory exception raising the objection of prematurity, which was sustained.

205 See Part IV.C hereof, infra.

206 An obvious exception to this statement is in the situation of a "partial" assignment, in which case the assignor remains the owner of some interest in the lease, subject (if the assignment is partial "as to acreage") to the possibility of a division resulting therefrom. See Part III.B.1 hereof, supra.

207 LA. CODE CIV. PROC. art. 641.

208 See Part IV.G hereof, infra.

209 604 So.2d 186 (La.App. 2nd Cir. 1992).
Lessor then wrote a demand letter to Amoco which was received on July 30, 1990. Two days later, on August 1, 1990, the lessor amended the suit to include Amoco.

Amoco filed a second dilatory exception raising the objection of prematurity, which was sustained.

On appeal, the lessor argued that, under article 132, Louisiana Mineral Code, "timely notice to TXO, the sublessee, was timely notice to Amoco," TXO's sublessor. The court rejected this contention, saying:

However, the plain meaning of art. 132 is that if a sublease is properly recorded and notice thereof is given to the lessor, the lessor may not give art. 137 notice of cancellation to the original lessee only. Notice of cancellation must be given to the sublessees as well, to affect them. The article neither provides nor implies that in the event of a properly recorded and "noticed" sublease, the lessor may omit notice of cancellation to the original lessee. This conclusion would be inconsistent with the general theory of art. 132 to give notice of cancellation to all concerned parties.

K. Filing of Notice of Transfer in Lieu of Recording Transfer Itself
1. Assignment.

The general rule in Louisiana is that, in order for a transaction affecting immovable property (such as a transfer of a mineral lease) to serve as notice and be effective as to third parties, it must be recorded.210

As a corollary to this general rule, it has been held that a third person is not bound by an unrecorded instrument even though reference thereto is made in a recorded instrument.211

Hence, an assignment—that is to say, a sale—of a mineral lease must itself be recorded, and the recording of a declaration or memorandum of an assignment would not constitute valid notice to third persons.

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210 "The rights and obligations established or created by" "[a]n instrument that transfers an immovable" "are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records pursuant to the provisions of this Title." LA. CIV. CODE ANN. art. 3338(1).

211 Judice-Henry-May Agency, Inc. v. Franklin, 376 So.2d 991 (La.App. 1st Cir. 1979) ("Jurisprudence to the effect that unrecorded acts will have no legal effect on a third person, even where the third person has actual knowledge of the unrecorded acts, is of long standing.") and Sklar Producing Co., Inc. v. Rushing, 262 So.2d 115 (La App. 2nd Cir. 1972) ("The letter agreement, even though referred to in the recorded instrument, is not itself recorded and insofar as third parties . . . are concerned has no effect on Rushing's ownership.").
2. Sublease.

A different rule exists with respect to leases and subleases.

In 1986, La. Rev. Stat. Ann. § 9:2721.1 was enacted as an exception to that rule "[w]ith respect to leases of immovable property . . ." in order to allow for something other than the instrument itself to be recorded and, nevertheless, have the binding effect of such instrument upon third parties. Consequently, this is an exception to a well-established and long recognized rule of law and will, therefore, be strictly construed in accordance with recognized Louisiana jurisprudence to that effect.212

La. Rev. Stat. Ann. § 9:2721.1 was repealed in 2005 by legislation which enacted a precursor to La. Rev. Stat. Ann. § 9:2742, effective January 1, 2006.213 This statute provides that, "[i]n lieu of recording a written lease or sublease or any amendment or modification thereof, as provided by Civil Code Article 3338, a party may record a notice of lease or sublease, signed by the lessor and lessee of the lease or sublease." "Recordation of a notice makes the lease or sublease and any subsequent amendment or modification thereof effective as to third persons to the same extent as would recordation of the instrument evidencing it."

The statute sets for the information which must be contained in the notice. Notably relevant to a sublease, "the notice shall also contain reference to the recordation information of the primary lease or notice of lease that is subleased; however, the omission of this information does not affect the efficacy of the notice."214

Therefore, there is statutory authority for the filing of a notice of a sublease – sometimes called a declaration, extract or memorandum – instead of filing the sublease itself, provided, of course, that the requirements of the statute are met in terms of the necessary contents of such a notice.

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212 It has been held by the Louisiana Supreme Court that, "[w]here exceptions are provided for in a statute laying down a general rule, the exceptions must be strictly construed." State ex rel. Murtagh v. Department of City Civil Service, 215 La. 1007, 42 So.2d 65 (1949). LA. REV. STAT. ANN. § 44:104E would be an exception to the general rule set forth in LA. CIV. CODE ANN. art. 3338(2), which requires the filing of the "lease of an immovable."


214 LA. REV. STAT. ANN. § 44:104A(3) (e).
L. Authority to Execute Transfer Pursuant to Power of Attorney

1. Assignment.

"The authority to alienate, . . ., or lease a thing must be given expressly" to the mandatary.\(^{215}\) Because a sale is not a lease, and a lease is not a sale, the conferral of authority to execute one transaction is not necessarily the express conferral of authority to execute the other transaction.

Under the principle that the greater includes the lesser, it has been held that the "power to sell, . . ., necessarily includes the lesser authority to lease."\(^{216}\) Hence, unless the act of mandate (power of attorney) provides otherwise, an agent operating under a mandate to "sell" should be empowered to execute an assignment as well as a sublease under the rationale of that case.

2. Sublease.

But the converse is not true; self-evidently, the lesser does not include the greater. A power to grant a lease, while including the power to grant a sublease of a mineral lease, would not confer the power to sell, or assign, the lease. Thus, an agent who is authorized to grant a lease might be able to execute a sublease (a "lease of a lease"), but probably not an assignment containing no reservation of overriding royalty interest.

M. Right and Power to Exercise Renewal or Extension Option

1. Assignment.

A relatively new development – particularly in trend plays – is to encounter a mineral lease which contains a provision whereby the lessor authorizes the lessee to renew or extend the lease, usually by providing written notice to the lessor of an intent to exercise the right of renewal or extension and paying a payment (akin to a new bonus).

For reasons previously noted, since the assignee (properly speaking) is the owner of the lease, it is the successor lessee and, as such, has the right to invoke all rights and benefits granted by the lease to the lessee. This would include the right to exercise the right of renewal or extension.

\(^{215}\) LA. CIV. CODE ANN. art. 2996.

\(^{216}\) Louisiana Assn. for Mental Health v. Edwards, 322 So.2d 761, 767 (La. 1975). See also Serio v. Stewart Investments, Inc., cited at footnote 26, supra. ("'Underlease' or 'sublease' is the transfer of only a part (the lesser) and 'cede' or 'assign' is the transfer of all (the greater). Accordingly, there is only one right which includes the lesser and greater thereof.").
2. Sublease.

It was held in one case, not involving a mineral lease, that the "right to renew the lease was held by the lessee and not by the sub-lessee." This holding was further justified by the court's observation that the "rights of the sub-lessee are derived only from the terms of the sublease," and that the "sub-lessee is not considered as an original lessee, and may only exercise rights under the original lease through the original lessee."

IV. Provisions of Louisiana Mineral Code Concerning Assignments and Subleases

A. Preface

Articles 127 through 132 of the Louisiana Mineral Code address the transfer of mineral leases. Each of these articles is considered in the sections which follow, with the text of the article being set forth in bold print immediately after the section heading.

In developing these provisions, the Redactors "ultimately determined that it would be simpler to leave that basic law [concerning the distinction between an assignment and a sublease] undisturbed and to provide in Articles 128 through 132 that regardless of whether the transaction in question be held to be an assignment or a sublease, there are certain common consequences flowing from the execution of either an assignment or a sublease."

B. Article 127

The lessee's interest in a mineral lease may be assigned or subleased in whole or in part.

While this article seemingly announces a general proposition - while it "states the obvious" - there are, as noted above, consequences which arise from the proper characterization of the transfer. Beyond those consequences - which are neither insignificant nor merely academic - the articles which follow article 127 do not differentiate between the two types of transfers. Without exception, each article applies equally to the assignment and the sublease.

Ducote v. Callico, 307 So.2d 644 (La.App. 4th Cir.), writ denied 309 So.2d 337 (1974). See also Hebert v. Hines, 615 So.2d 44 (La.App. 3rd Cir. 1993) ("The sublessee is not considered as an original lessee and may only exercise rights under the original lease through the original lessee.").

Id. at 645.

These articles appear in Part 5 of Chapter 7 of Title 31 of the Revised Statutes, entitled "Transactions Involving the Lessee's Interest."

Comment to LA. REV. STAT. ANN. § 31:127.

See Part III hereof, supra.

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C. Article 128

To the extent of the interest acquired, an assignee or sublessee acquires the rights and powers of the lessee and becomes responsible directly to the original lessor for performance of the lessee’s obligations.

Article 128 seems simple enough, but the courts have not easily understood the opening phrase—“to the extent of the interest acquired”—particularly as it relates to the rules governing solidary obligations.

An unreported decision has considered the import of this article as it might apply among assignees being sued on an obligation of the mineral lease.222 After engaging in an analysis of existing authorities on the subject, the trial judge stated, as follows:

In short, it is one thing for R.S. 31:130 to say that a partial sublease does not divide a lease—does not, in the words of the Comment, “have the effect of creating two leases where but one existed before.” It is quite another, distinct thing to say that all obligations of the lease are indivisible, and that a partial sublessee is therefore liable for 100% of all lease obligations. R.S. 31:128 (consistent with Civ.Code art. 1796 against solidarity) dictates the opposite conclusion: it imposes upon a sublessee or assignee direct responsibility to the lessor that under other law might not exist, but it does so only “[t]o the extent of the interest acquired” by the assignee or sublessee in the lease.

There will therefore be partial summary judgment declaring that solidarity exists only as between lessee and any sublessee (including assignee), and only for that sublessee’s share; and as between them and any sub-lessee of that sublessee, for that sub-lessee’s share, etc.

The significant Supreme Court case of Broussard v. Hassie Hunt Trust223—which had held that “no action can be maintained by the lessor against the [sublessee], upon any covenant contained in the lease, since there is neither privity of estate nor of contract between himself and the [sublessee]”—has been overruled by article 128 of the Louisiana Mineral Code.

In Chevron U.S.A., Inc. v. Traillour Oil Co.,224 it was held that “section 128 does not run in favor of assignors.” “Thus, while section 128 may impose privity between a lessor and a remote assignee or sublessee,” the court stated that “we are not prepared to say—as a federal

223 Cited at footnote 203, supra.
224 987 F.2d 1138 (5th Cir. 1993).
court sitting in diversity – that it creates statutory privity between all successors in interest to an oil and gas lease.223

D. Article 129

An assignor or sublessor is not relieved of his obligations or liabilities under a mineral lease unless the lessor has discharged him expressly and in writing.

The rationale which underpins article 129 is both obvious and logical – it would be a neat trick indeed if a party could “wash his hands” of his assumed obligations by the mere expediency of transferring the mineral lease. If only it were so easy!

In a case involving the transfer of a gas purchase contract,226 it was held that the purchaser “is not relieved from its obligations under the gas purchase contract with [the sellers] just because it made an assignment to [a third party].” With regard to mineral leases, this is so even if the lessor’s consent to an assignment is required and obtained.227

The mere assignment of a mineral lease, without more, would not constitute a novation which would release the assigning party, even where the lessor consents to the assignment. This is so because novation “may not be presumed” and “must be clear and unequivocal.”228

The United States Court of Appeal, Fifth Circuit, considered this issue recently in the context of an operating agreement (and, admittedly, not in the context of a lessor-lessee relationship). In Chieftain Intern. (U.S.), Inc. v. Southeast Offshore, Inc.,229 Southeast, a working interest owner under Federal offshore leases, assigned its interest to another party, South Pass. When South Pass failed to pay its share of certain abandonment costs, the operator, Hunt, sued Southeast who resisted on the basis that it was released from further liability to the operator upon its assignment to South Pass. On authority of La. Civ. Code Ann. art. 1821, it was held that “Southeast’s assignment to South Pass Properties, by itself, did not release Southeast from its obligations to Hunt. Hunt must

225 Id. at 1158.
226 Bradford v. Onshore Pipeline Construction Co., Inc., 37,421 (La.App. 2nd Cir. 8/22/03); 853 So.2d 756.
227 Davis Oil Company v. TS, Inc., 962 F.Supp. 872 (E.D. La. 1997), reversed on other grounds 145 F.3d 305 (5th Cir. 1998) (“The lessor’s consent to the assumption agreement does not effect a release of the assignor. . . . Thus, although the State Mineral Board did consent by resolution to the assignments to HPC and to Davis Fuel, this alone did not operate to discharge any obligor.”).
228 LA. CIV. CODE ANN. art. 1880.
229 553 F.3d 817 (5th Cir. 2008). In the interest of full disclosure, your author represented the defendant in this suit.
have affirmatively released Southeast. The record is devoid of any affirmative release from Hunt.\textsuperscript{230}

In cases involving commercial leases, it has been held that the “consent to the assignment [of a lease] and [the assignee’s] assumption of the payments is merely the acceptance of a new debtor and in and of itself does not expressly declare an intent to discharge the debtor.”\textsuperscript{231}

In \textit{Mire v. Sunray DX Oil Company},\textsuperscript{232} plaintiff brought a suit to cancel a mineral lease, naming the original lessee (a lease broker in whose name the lease was taken) and the ultimate owners. Defendants removed the suit to Federal court on the basis of diversity jurisdiction. The original named lessee was dismissed because “they claim no further interest in the lease.” The plaintiff moved for reconsideration. The court stated the issue, as follows:

The issue quickly resolves itself to the single question of whether or not the original lessee of a Louisiana mineral lease remains bound to the lessor for the fulfillment thereof after having executed a complete assignment of the lease. We hold that he does.

\* \* \*

The lease contains no provision which can be construed as consent of the lessors to the release of the original lessee from his obligations to them in the event of its assignment and a substitution of the assignee in his stead, nor does the record reflect any evidence that subsequent thereto the plaintiffs expressed their intention to do so in an unequivocal manner by implication or otherwise. There was no novation in this case.

Since the original lessee (not having been discharged or released) remained liable to the lessor, the court reversed its original decision and reinstated the original lessee in the suit. By reason of his joinder, diversity jurisdiction was defeated and the case was remanded to state court.

In \textit{Kleas v. Mayfield},\textsuperscript{233} a lessor sued his lessee and its sublessee for a declaration that a mineral lease had expired and for damages and attorney’s fees for the failure of the defendants to release the expired lease pursuant to the written demand of lessor, in accordance with article 207 of the Louisiana Mineral Code.\textsuperscript{234} The court declared the lease to

\footnotesize{
\textsuperscript{230} \textit{Id.} at 819.

\textsuperscript{231} \textit{Cane River Shopping Center v. Monsour}, 443 So.2d 602 (La.App. 3rd Cir.), \textit{writ denied} 444 So.2d 1213 (La. 1983).


\textsuperscript{233} 404 So.2d 500 (La.App. 3rd Cir. 1981).

\textsuperscript{234} “If the former owner of the extinguished or expired mineral right fails to furnish the required act within thirty days of receipt of the demand or if the

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have expired, denied the claim for damages and awarded attorney’s fees against both defendants. The court also denied the demand by Gulf, the original lessee, for indemnity from Mayfield, Gulf’s sublessee.

On appeal, the court affirmed the judgment against both Gulf and Mayfield for attorney’s fees, but awarded indemnity to Gulf, pursuant to a contractual provision whereby Mayfield obligated itself to indemnify its sublessee, Gulf.

Gulf argued that it was not liable to the plaintiff-lessee “for attorney’s fees because Mayfield assumed all expenses and implied lease obligations and became directly responsible to the lessor for performance of these obligations under La.R.S. 31:128.”

The court stated that this “position vis-a-vis the landowners is untenable.” Noting that the lessor “did not discharge Gulf, a sublessor, from its obligations or liabilities under the lease,” Gulf “is clearly liable to the plaintiffs under 31:129 for failure to provide a recordable release.” While Gulf and Mayfield were held to be solidarily liable to the landowners, Mayfield was held liable to Gulf pursuant to the indemnity agreement.

In Wegman v. Central Transmission, Inc.,235 an assignor was held liable to its lessor because it “had not been discharged and was found to be liable based upon its obligations as a lessee and as a party to a contract.”

The court got it wrong in Quality Environmental Processes, Inc. v. Energy Development Corporation.236 In 2000, the lessor sued several successive assignees of a mineral lease for royalties. Defendants asserted the liberative prescription of three (3) years for unpaid royalties.237 Mobil had assigned the mineral lease to Phillips in 1995. Mobil contended that, in any event, because it had transferred the mineral lease in 1995, “it no longer had any obligation to pay royalties to anyone.” “Therefore, Mobil posited, all of its royalty payment obligations were prescribed at the time the plaintiffs filed suit.”

former lessee of a mineral lease fails to record the required act within ninety days of its extinguishment prior to the expiration of its primary term, he is liable to the person in whose favor the right or the lease has been extinguished or expired for all damages resulting therefrom and for a reasonable attorney’s fee incurred in bringing suit.”

235 499 So.2d 436 (La.App. 2nd Cir. 1986), writ denied 503 So.2d 478 (La. 1987).

236 2001-2255 (La.App. 1st Cir. 10/2/02); 835 So.2d 642, writ denied 2002-2697 (La. 1/10/03); 834 So.2d 439.

237 LA. CIV. CODE ANN. art. 3494(5), quoted in footnote 193, supra.
Plaintiffs countered by asserting that "Mobil must prove that [the lessors] discharged it expressly and in writing, and as it has never been discharged, [Mobil] remained a 'lessee' under the 1954 mineral lease." This would seem to be a valid position under article 129, quoted above.

The court disagreed with the plaintiffs' argument, saying:

The trial court concluded that because the only basis for the recovery of royalties by plaintiffs from Mobil was the lease which had been transferred or assigned by Mobil to Phillips on December 1, 1995, any claim for royalties against Mobil prescribed, at the very latest, three years later on December 1, 1998. We agree with the trial court's conclusion that this lawsuit, filed on June 29, 2000, was untimely, and therefore find no error in the judgment sustaining the exception of prescription.

While the ruling that a claim for unpaid royalties is subject to the liberative prescription of three (3) years is undoubtedly correct, the result of such a determination merely fixes the period of time for which the lessor has a claim for such unpaid royalties – not earlier than three years before the date of filing suit. However, the court erred by failing to recognize that all undischarged lessees are responsible to the lessor for such unpaid royalties (limited to royalties on production obtained during the three year period preceding the filing of suit), regardless of when any particular lessee owned an interest in the lease. The lessees presumably have claims among themselves for contribution or indemnity, but the lessor should be able to pursue any undischarged lessee for the monies owed to it.

The release by the lessor need not be concurrent with or subsequent to the transfer. Thus, in Hayes v. Pride Oil & Gas Properties, Inc., the mineral lease contained a provision which recognized the right of assignment, and provided further that an assignment by the lessee "shall, to the extent of such assignment, relieve and discharge Lessee of any obligations hereunder to Lessor." When the lessors sued the original lessee (Pride), a Louisiana citizen, and Pride's two assignees, which were not Louisiana citizens, the defendants removed the suit to Federal court. The plaintiff-lessees moved to remand the suit due to the absence of diversity jurisdiction. The defendants resisted remand, contending that

238 See LA. CIV. CODE ANN. art. 3462. ("Prescription is interrupted . . . when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period.").

the joinder of Pride was improper and that its citizenship should be disregarded.\textsuperscript{241} The court agreed with the defendants, finding that, by reason of the clause in the lease, Pride was "anticipatorily discharged" and, thus, was relieved of any liability under the lease. The motion to remand was denied.

E. Article 130

A partial assignment or partial sublease does not divide a mineral lease.

The situations under which courts have found that a partial assignment might "divide" the mineral lease were reviewed in Part III.B.1 hereof. As there noted, the courts have construed mineral leases containing a "division of rental clause" as having the effect of "creating two leases where but one existed before" in the case of a partial assignment.

No case decided since the enactment of the Louisiana Mineral code, effective January 1, 1975, has considered the issue of whether this article announces a principle which so embodies public policy that it cannot be altered by convention of the parties.\textsuperscript{242} Thus, one might ask whether the rule of divisibility considered in \textit{Swope v. Holmes} and its succeeding cases remains good law.

The Comments to Article 130 indicate that there was no legislative intention to displace the role of "freedom on contract." Rather, it is stated that "the intent of Article 130 [is] to preserve what is understood to be established law."

F. Article 131

A mineral lessor must accept performance by an assignee or sublessee whether or not the assignment or sublease is filed for registry.

Article 131 legislatively overrules the case of \textit{Baird v. Atlas Oil Co.}\textsuperscript{243} – a case widely viewed as legally unsound.\textsuperscript{244}

In \textit{Baird}, a delay rental payment under a mineral lease was made by a party who did not own an interest in the lease. The court, holding the payment was ineffective, said:

\begin{quote}
\textsuperscript{241} \textit{Melder v. Allstate Corp.}, 404 F.3d 328 (5th Cir. 2005).
\textsuperscript{242} "Unless expressly or impliedly prohibited from doing so, individuals may renounce or modify what is established in their favor by the provisions of this Code if the renunciation or modification does not affect the rights of others and is not contrary to the public good." \textit{La. Rev. Stat. Ann.} § 31:3.
\textsuperscript{243} 146 La. 1091, 84 So. 366 (1920).
\textsuperscript{244} \textit{Tucker, Sub-Lease and Assignment: Some of the Problems Resulting from the Distinction}, 3 Ann. Inst. on Min. Law 176 (1955).
\end{quote}

- 350 -
Therefore, when plaintiff's vendor, . . ., came to purchase the second mineral lease on the property in question, he was only required to ascertain if the Consolidated Progressive Oil Corporation, the owner, according to the records, of the first lease, had made the payments necessary to keep it alive. Why? Because that right was a mere incident accompanying the contract in which it had been stipulated, and no one else, as to third persons, dealing on the faith of the public records, enjoyed the privileges flowing therefrom.

Thus, Baird would seem to suggest that, while a mineral lease—like any other instrument affecting immovable property—must be recorded in order to bind third parties relying on the public records, the payment of delay rentals necessary to keep a lease in force without drilling should also be recorded. To the extent that the court relied upon the “public records doctrine,” it misunderstood the negative feature of that doctrine.

This holding was nonsensical, and failed to recognize certain principles of general law. La. Civ. Code Ann. art. 1855 informs that “[p]erformance may be rendered by a third person, even against the will of the obligee, unless the obligor or the obligee has an interest in performance only by the obligor.”

It should be of no moment to the lessor as to the identity of the person who renders the performance to which it is entitled. Rather, the issue should be whether the performance is in fact rendered, not by whom it is rendered. If a lessor has a particular interest in having performance rendered by a particular party, it could avail itself of its right to restrict the free alienation of the mineral lease.

While article 131 clearly repudiates the rule of Baird as it relates to performance rendered by a grantee under an unrecorded assignment or sublease, this formulation is of dubious comfort to one who is not an assignee or a sublessee, such as a farmee who has not yet earned an assignment (sublease) pursuant to the farm-out agreement. Being neither an assignee nor a sublessee, a farmee who is contractually obligated under the (unrecorded) farm-out agreement to pay delay rentals might be concerned as to whether or not the illogical decision in Baird.
has been fully suppressed. One respected Commentator has suggested that article 131 be amended “to provide for the effectiveness of performances rendered by persons holding under or acting pursuant to any kind of unrecorded valid contractual arrangement.”

G. Article 132

An assignee or sublessee is bound by any notice or demand by the lessor on the lessee unless the lessor has been given written notice of the assignment or sublease and the assignment or sublease has been filed for registry. If filing and notice have taken place, any subsequent notice or demand by the lessor must be made on the assignee or sublessee.

As discussed above, the Massey case addresses the need for notice to a sublessor in the event the lessor wishes to seek lease cancellation.

In Lamson v. Austral Oil Company, Inc., the issue presented was whether notice of non-payment of royalties had been properly given to an assignee of a mineral lease. Although it was established that “the [lessors] had written notice of the assignment to Triton [the assignee], and its proper recordation,” it was also stated that “there is no evidence as to how the [lessors] acquired this notice.”

The trial court concluded “that the notice [of the assignment] to the plaintiffs did not satisfy the requirements of La.R.S. 31:132 in that there was no evidence that Triton supplied the notice directly.” On this basis, the trial court concluded that notice to Triton’s assignor constituted adequate notice to Triton.

The appellate court reversed the trial court’s seeming determination that it mattered as to who actually gave the notice, stating, as follows:

Nowhere in La. R.S. 31:132 does it require that the assignee give the required notice. It only requires that the lessor be given written notice and that the assignment instrument be properly filed.

With regard to the sending of notices or demands by the lessor to the lessee, a statute which is relevant, but probably not well known, is La. Rev. Stat. Ann. § 30:112. It provides, as follows:

A. A mineral lease shall include the lessee’s complete address. The lessee shall be responsible for informing the lessor of any subsequent change in address.

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249 Cited at footnote 209, supra.
250 97-1596 (La.App. 3rd Cir. 6/10/98); 712 So.2d 1081.
B. If a certified letter addressed to the lessee by the lessor is returned as undeliverable and no forwarding address is known, the secretary of state shall be notified by the lessor that the secretary of state will subsequently serve as the lessee’s agent and receive all notices concerning the lease until such time as the lessee supplies the lessor with a current address.

While the articles of the Mineral Code do not specify that notices or demands must be sent by any particular form of postal dispatch, it is both prudent and customary that the lessor should send notices or demands to the lessee by certified or registered mail, if for no other reason than that it provides evidence of both dispatch and receipt. However, the ability to treat the Secretary of State “as the lessee’s agent [to] receive all notices concerning the lease” seemingly only becomes operative if the notice or demand is sent by certified mail.

V. Clauses Customarily Contained in Assignments and Subleases

A. Preface

While “freedom of contract” prevails in the area of transfers of mineral leases, custom or practice in the industry has developed a series of clauses or provisions which one typically encounters in such transactions. Some are appropriate for all assignments (including subleases), while others are only relevant to an overriding royalty interest which might be reserved in a sublease. A review of certain of the customary clauses follows.

B. Clauses Applicable to Both Assignments and Subleases

1. Right of Reassignment.

A “right of reassignment clause” is a provision which contractually obligates the assignee to reassign to its assignor any mineral lease which the assignee elects to not continue to maintain in force and effect. Typically, it specifies a period of time preceding a date of expiration on or before which the reassignment must occur.

In Avatar Exploration, Inc. v. Chevron U.S.A. Inc., an assignee was held to have not breached the “right of reassignment” clause where it did not reassign leases prior to expiration of primary term. The court construed the language of the clause to only obligate the assignee to reassign the leases if it elected to not pay delay rentals thereunder. Since the assignee paid all delay rentals during term of lease, there was no violation of the clause where lease was not reassigned prior to expiration of term.

251 See LA. REV. STAT. ANN. §§ 31:136, 137 and 206.
252 933 F.2d 314 (5th Cir. 1991).
In *Atlantic Refining Co. v. Moxley*, a “right of reassignment clause” was interpreted to obligate the sublessee to give notice of an intention to abandon the lease only while the lease was still producing oil and gas. Said the court:

Sublessees were granted the right to hold the lease throughout its full life if they desired to do so. The notice clause was applicable only in the event they elected not to.

Thus, since the lease lapsed for insufficient production, “plaintiffs cannot complain that the defendant continued to hold on to the lease throughout its producing life instead of turning it back to plaintiffs before it had lapsed by its own terms.”

In another case, an assignee was held liable to its assignor for the costs of reacquiring mineral leases which the assignee had failed to reassign, pursuant to a “right of reassignment clause.” The damages awarded were based upon the bonus consideration for the new leases, recordation fees, brokerage expenses and bank charges. The assignor’s claim for lost profits was denied as being too speculative.

In *Amoco Production Company v. Texaco, Inc.*, Amoco sued the owners of certain mineral leases which it had subleased to the predecessor-in-title of defendants. The sublease contained a “right of reassignment clause,” but the sublessees failed to honor it and released portions of certain leases without notifying Amoco. The defendants contended that Amoco’s claim had prescribed because it had notice, or should have known, of the breach, arguing that, “[o]n the basis of its own records alone, Amoco must be charged with knowledge of its cause of action more than ten years prior to the filing of suit.” The court rejected this argument, stating:

Amoco notes that it is impossible to determine precisely when assigned leases may be lost. Unlike obligations that arise on a certain date, no exact date can be set when a lease may expire. Also, leases may be continued in a number of ways, including redrilling operations, productions from different units in the same field or the granting of extensions. The record establishes reliance on the lease reassignment provisions is the primary vehicle by which an assignor learns that his lease is in danger of being lost. All the experts admitted it is customary for oil and gas companies to honor reassignment clauses. However, in this case neither IMC nor Texaco provided Amoco with notice as required by the reassignment clause.

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253 211 F.2d 916, 920 (5th Cir. 1954).
255 2002-240 (La.App. 3rd Cir. 1/29/03); 838 So.2d 821, writ denied 2003-1102, 2003-1104 (La. 6/6/03); 845 So.2d 1096.
The appellate court affirmed a jury verdict of $30 million for lost profits resulting from the breach.

In *Frankel v. Exxon Mobil Corporation*, a sublessor sued its sublessee for breach of a "right of reassignment clause." The sublessee had permitted the lease to lapse and did not offer to reassign the expiring lease to its sublessor.

The court found that certain activities in which the sublessee engaged did not constitute reworking operations. As such, the lease terminated.

Concerning the "right of reassignment clause," the court noted that "such a clause is the only realistic protection for the non-working-interest owners, who otherwise are totally at the mercy of the working-interest owners to conduct operations in the field for their mutual benefit."

The court found that "the reassignment clause in this case was triggered by the choices made not to continue the Pool Lease by any of the permitted methods," and that the "sublessees breached that clause by failing to reassign the lease to the Frankels before it expired."

The court awarded the sublessor damages for lost overriding royalties.

2. Listing of Agreements to Which Assignment or Sublease is Subject.

It is not uncommon for a transferor to list or itemize in the assignment those unrecorded agreements to which the assigned mineral leases are subject. Discussed elsewhere is the proposition that a mere reference in a recorded instrument to unrecorded documents is insufficient to bind third persons to such referenced documents.

Agreements which are typically listed include farm-out agreements, participation agreements, operating agreements and the like.

Merely listing or itemizing an unrecorded agreement does not, of itself, bind the assignee personally to the obligations contained therein. A particular successor of a real right is ordinarily not bound by the personal contracts of his transferor. Thus, the assignor might wish to require the assignee to "assume" the obligations of the unrecorded agreement in

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256 Cited at footnote 201, *supra*.

257 See Part III.K hereof, *supra*.

258 "A real obligation is transferred to the universal or particular successor who acquires the movable or immovable thing to which the obligation is attached, without a special provision to that effect. But a particular successor is not personally bound, unless he assumes the personal obligations of his transferor with respect to the thing, and he may liberate himself of the real obligation by abandoning the thing." *See La. Civ. Code Ann.* art. 1764.
order to protect itself from a claim from the assignor’s obligee that the agreement was not honored.

Enter La. Civ. Code Ann. art. 1821, which reads, in pertinent part, as follows:

An obligor and a third person may agree to an assumption by the latter of an obligation of the former. To be enforceable by this obligee against the third person, the agreement must be made in writing.

It is clear under Louisiana law that the “public records doctrine” does not allow a vendee of immovable property to avoid complying with the obligations of an unrecorded instrument affecting that immovable property if the vendee agreed to assume the unrecorded contract.

Illustrative of this proposition is *Gulf Oil Corporation v. Adams* in which the court confronted a recorded assignment of mineral leases which stated that the conveyance was subject to an unrecorded letter agreement. The assignee tried to avoid the effects of the unrecorded document to which it was not a party by relying on the “public records doctrine” first espoused in *McDuffie v. Walker*. The court rejected the assignee’s argument:

> We do not consider the holding of the McDuffie case to be applicable to the instant case. Here we have a suit between the parties to a contract as to the proper interpretation thereof. True, the subject matter of the contract dealt with certain real rights, but we know of no law that forbids parties to contract about real rights and include specific obligations against the contracting parties by reference to a prior written instrument.

A similar result was reached in *Stanley v. Orkin Exterminating Co., Inc.* In that case, the parties executed a purchase agreement for immovable property which included the statement “Note Lease Agreement to Orkin,” referring to an unrecorded lease affecting the leased property. The act of sale, which was subsequently passed, did not refer to the unrecorded lease and the vendee later attempted to avoid the obligations of the unrecorded lease by relying on the “public records doctrine.” The court rejected that attempt, saying:

> However, we find that the [public records] doctrine is not applicable under the instant factual situation, inasmuch as the basis for holding that plaintiffs are bound by the lease is plaintiffs’ contractual assumption of the obligations of the lease rather than the lease’s

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259 209 So.2d 770 (La.App. 2nd Cir.), *writ denied* 252 La. 473, 211 So.2d 333 (1968).

260 Cited at footnote 59, *supra*.

261 360 So.2d 225 (La.App. 1st Cir. 1978).

The vendee also argued that the failure to include a reference to the unrecorded lease in the actual act of sale was evidence that the sale was not intended to be subject to the lease. The court also rejected this contention, stating that the "mere silence of an act of sale does not preclude proof of an obligation arising from a valid prior or contemporaneous agreement between the parties, e.g. the purchase agreement."263

Thus, the court found that the vendee had assumed certain obligations affecting real rights even though the contract creating the assumption was not recorded in the public records. The court also noted certain evidentiary facts evidencing the assumption such as the vendee's acknowledgment of the receipt of a copy of the unrecorded lease prior to the sale, his admission that he knew the sale was supposed to be subject to the lease, and the vendee's acceptance of rental payments after the act of sale. Thus, the court stated that the intention to assume was "... expressly stated in the purchase agreement and impliedly agreed to in the subsequent transactions between the parties."264

3. Derrick Floor Privileges.

A party who assigns a mineral lease might wish to provide that the assignee must allow the assigning party to visit the derrick floor to observe operations, particularly "log runs," and to receive certain well data. These are called "derrick floor privileges." If the assignor has totally divested itself of any interest in the leases, this clause would probably not be included. But if the assignment is a partial assignment (such that the assignor retains some interest), or is a sublease, such a clause might be included.

In some instances, the clause might be redundant as the right probably already exists in the operating agreement.265

C. Clauses Applicable Only to Subleases

1. Proportionate Reduction.

It is the custom in the industry to state the amount of an overriding royalty interest which is reserved in a sublease as a gross amount or in

262 Id. at 227.
263 Id. at 228.
264 Id. at 228. See also Motwani v. Fun Centers, Inc., 388 So.2d 1173, 1175 (La.App. 4th Cir. 1980) ("Because plaintiffs contractually assumed the obligation of the lease, the lease became their obligation and the Public Records Doctrine was rendered inapplicable.").
265 See, e.g., Article VI.D (lines 21-29 of Page 8) of the AAPL 1982 Model Form Operating Agreement.
terms of the full leasehold interest (what is in jargon of the industry called “to the 8/8ths”). If the assignor (sublessor) owns the entire interest in the mineral lease and undertakes to assign that entire interest, and if the mineral lease covers and affects 100% of the minerals under the leased premises (called a “100% lease”), then the stated amount of overriding royalty interest is the full interest actually and effectively reserved.

However, it is typical to include in the assignment a “proportionate reduction clause” in order to address the not uncommon situation where either the assignor does not own the entire interest, or is conveying a partial interest only, or the lease is not a “100% lease.” In any of those instances, the stated overriding royalty interest is “proportionately reduced” in respect of the actual net working interest owned by the assignor who creates the overriding royalty interest.266

Also called a “cut down clause,” an example of a “proportionate reduction clause” is, as follows:

Should the Said Leases not validly cover and affect all of the oil, gas and other minerals and mineral rights in and under the lands described therein, or in the event of failure of title to the Lessor, or in the event that the interest of Assignor in and to Said Leases, or any of them, is less than the entire interest therein, the overriding royalty interest reserved herein shall be proportionately reduced as to the interest or acreage so affected.

Under such a clause, if, in a sublease whereby the assignor reserves an overriding royalty interest of four (4%) per cent (of 8/8), the assignor (sublessor) will actually receive that full amount, unless any of the following scenarios is present, to-wit:

(a) The subleased lease only covers, say, a three-fourth (3/4) interest in the minerals, either because the lessor only owns that interest originally or, purporting to cover a full mineral interest, title to a one-fourth (1/4) interest fails. If the sublessor owns (and thereby subleases) the entire interest in such a lease, its effective overriding royalty interest is three-fourths (3/4) of four (4%) per cent, or a net three (3%) per cent (of 8/8) overriding royalty interest.

(b) The assignor does not own the entire lease. If, for example, it owns (and thereby subleases) an undivided one-half (1/2) interest in the lease, its effective overriding royalty interest is one-half (1/2) of four (4%) per cent, or a net two (2%) per cent (of 8/8) overriding royalty interest.

266 A “proportionate reduction clause” is also typically included in an assignment of overriding royalty interest.
(c) The two scenarios above could actually be combined, or both can be operative – The subleased lease might only cover and affect a three-fourth (3/4) interest in the minerals AND the assignor might not own the entire lease. Under those circumstances, the effective overriding royalty interest actually reserved to the sublessor is three-fourths (3/4) of one-half (1/2) of four (4%) per cent, or a net one and one-half (1.5%) per cent (of 8/8) overriding royalty interest.

Hence, if an overriding royalty interest is reserved in an assignment (which thereby makes it, in legal contemplation, a “sublease”), and if the sublessor does not own the entirety of a “100% lease,” it is important to ascertain if the sublease contains a “proportionate reduction clause,” and, if it does, to determine the scope and effect of such clause. The stated amount of the reserved overriding royalty interest will be the correct amount (regardless of the circumstances) unless it is to be reduced proportionately pursuant to the terms of such a clause, if it exists.


A sublessee would find it appropriate to include a provision which negates any duty on its part to maintain the mineral leases in force and effect. Even in the absence of a clause which expressly requires that the sublessee maintain the mineral leases in force and effect either by the payment of delay rentals or the conduct of operations, the sublessee would nevertheless want to negate any implication that such a duty exists. A clause of this type might be as simple as the following, to-wit:

Assignee [Sublessee] shall have no obligation for the conduct of operations under Said Leases or for the maintenance of Said Leases in force and effect.

While a sublessee would want to protect its discretion to participate, or not participate, in operations proposed by another party (in the case of jointly owned or operated mineral leases), it might also want to ensure that it would not be obligated to pay proceeds to its sublessor in respect of the reserved overriding royalty interest in the situation where the sublessee elects to “go non-consent” in accordance with a joint operating agreement and, therefore, is not itself receiving any proceeds of production pursuing “payout” of the costs of such non-consent operations. A clause of this type would be appropriate in such an instance and might read, as follows:

If, at any time and from time to time, the interest of Assignee in and to the Said Leases (or any of them) and the right of Assignee to receive production or proceeds thereunder or allocable thereto shall, pursuant to the terms of any Joint Operating Agreement, contract or other agreement, be suspended or deferred until the achievement or occurrence of payout or any other event or condition (including, by way of illustration, the satisfaction or discharge of any non-consent penalty), then, in that event, the overriding royalty interest reserved
herein by Assignor shall also be suspended or deferred and the owner thereof shall not be entitled to receive production or proceeds allocable thereto for the same period of time and under the same circumstances as the interest of Assignee is subject to such suspending circumstance. Assignee shall have no duty or obligation to pay any production or proceeds allocable to such overriding royalty interest during any period of time that Assignee is not receiving or entitled to receive production or proceeds under such circumstance. The overriding royalty interest reserved herein by Assignor shall be free and clear of all costs of exploration, development and operations, but shall be subject to bearing its proportionate part of any severance, production and any other taxes now or hereafter applicable thereto or affecting the same.

3. Extension and Renewal.

An overriding royalty interest is an appendage to the mineral lease to which it relates. Consequently, when the mineral lease terminates, the overriding royalty interest also expires.

Whether or not the termination of the mineral lease is in violation of a “right of reassignment clause,” the owner of the overriding royalty interest would want to be protected in its interest (or an equivalent interest) in the event that the working interest owner acquires a new lease on the same leased premises (or any portion thereof).

In Wier v. Glassell, the plaintiff sought to have himself recognized judicially as the owner of a one-sixteenth (1/16) overriding royalty interest in and to certain mineral leases taken by defendant, plaintiff’s sublessee under prior leases, after the expiration of the mineral leases originally subleased to defendant and in which plaintiff, in the earlier sublease, reserved such overriding royalty interest. The court rejected the plaintiff’s demands and said, as follows:

Aside from the language of the assignment and the custom and practice alleged by plaintiff, it would seem that royalty, by its very nature, when created by a lessee, is dependent for its existence upon the lease under which it is created.

The overriding royalty reserved by the plaintiff in the present case was a right created by the lease in which he was the lessee and which he assigned to the defendant. It depended on the continued existence of that lease to which it was an appendage. It could have no greater life than the lease itself and consequently upon the termination of the lease it became

267 “An interest created out of the mineral lessee’s interest is dependent on the continued existence of the lease and is not subject to the prescription of nonuse.” LA. REV. STAT. ANN. § 31:126.

268 216 La. 828, 44 So.2d 882 (1950).
extinguished and the defendant was at liberty to deal with the owners of the property and obtain new leases either in his own name or through an agent.

The court cited Continental Oil Co. v. Landry269—a case dealing with a mineral royalty interest, rather than an overriding royalty interest. In the Continental case, the court said, as follows:

[A mineral royalty right] depends upon the continued existence of the right to which it is an appendage. It cannot have a life of its own, any more than could interest exist apart from the note or debt to which it is attached.

In Fontenot v. Sun Oil Company,270 it was held that, because of the appendage nature of an overriding royalty interest, the owners of an overriding royalty interest who did not appeal an adverse judgment cancelling the burdened mineral lease, got the benefit of a partial amendment of the judgment of cancellation.

In order to avoid the consequences illustrated by the Wier case, parties often include in the instrument creating the overriding royalty interest (whether by way of assignment or reservation), a provision commonly referred to as an “extension and renewal clause.”271 In essence, an “extension and renewal clause” provides that, upon the expiration of the original lease(s), the owner of the overriding royalty interest is entitled to a like or equivalent interest in and to any “extensions” or “renewals” of such expiring leases. Of course, the clause is purely a matter of contract and may vary in many respects.

These clauses are often the subject of litigation involving interpretation and application to pertinent factual circumstances. The question is often whether or not a newly acquired lease is in fact an “extension” or “renewal” of the expiring lease.272

In Sunac Petroleum Corporation v. Parkes,273 the Texas Supreme Court was presented with the issue of whether a newly acquired lease

269 215 La. 518, 41 So.2d 73 (1949).
270 257 La. 642, 243 So.2d 783 (1971).
271 This clause has also been referred to as an “anti-washout clause.” See Otter Oil Company v. Exxon Company, U.S.A., 834 F.2d 531, 533 (5th Cir. 1987) (“This course of action is commonly known in the oil and gas industry as a ‘washout’ of the intermediary. Had a washout not been contractually precluded, Otter could not safely have undertaken to assign the option to Exxon.”).
272 An early non-mineral case involving a determination of whether a commercial lease was a “renewal” of an earlier lease for purposes of the entitlement of a real estate broker to a commission on a “renewal” of the commercial lease which he secured, was Zuzak v. Querbes, 193 So. 258 (La.App. 2nd Cir. 1939).
273 416 S.W. 2d 798 (Tex. 1967).
was an "extension" or "renewal" of the earlier lease in which Parkes had reserved an overriding royalty interest in an instrument containing an "extension and renewal clause." The court held that the new lease was neither an "extension" nor a "renewal" of the expiring lease. The court stated that an "extension, as used in this context, generally means the prolongation or continuation of the term of the existing lease." The court further held that the newly acquired lease was not a "renewal" where the "new lease had other terms substantially different from the old." "Since the new lease was executed under different circumstances, for a new consideration, upon different terms, and over a year after the expiration of the old lease," the court held "that the new lease was not a renewal of the old lease."

In Berman v. Brown,274 it was held that there was no privity of contract between a sublessor and a sublessee once removed. Accordingly, in Berman, the court held that the sublessee once removed was not obligated to pay overriding royalty payments to the lessee-sublessor, notwithstanding the fact that the lessee-sublessor had an "extension and renewal clause" in his sublease and such (first) sublease was recorded.275

4. Pooling and Unitization.

Because the owner of an overriding royalty interest has no operational rights, one might presume that its interest is totally at the mercy of the working interest owner who, after all, is spending its dollars for the benefit of all parties.

An analogy might be drawn from cases involving a mineral royalty, wherein the courts have rejected the royalty owner's suggestion that "landowners, had no power to authorize pooling in so far as [the royalty owner]'s rights were concerned." In LeBlanc v. Haynesville Mercantile Company, Inc., Trustee,276 the Supreme Court held that "the landowners [had] full power to enter into any lease contract they saw fit affecting the property — and that would include the power to grant a lessee the authority to pool and combine the leased acreage or any portion thereof with any lands or leases and mineral interests in the immediate vicinity — subject only to the right of the royalty owner to receive its [fractional share] of the oil, gas or other minerals allocated to the acreage included in the unit."

The following clause might be used if the sublessor desires to deny the sublessee the right to declare a unit. Alternatively, it could be altered

274 224 La. 619, 70 So.2d 433 (1953).

275 In Robinson v. North American Royalties, Inc., 463 So.2d 1384 (La.App. 3rd Cir. 1985), the court held that the rule of Berman v. Brown had been legislatively overruled by LA. REV. STAT. ANN. § 31:128.

276 230 La. 299, 88 So.2d 377 (1956).
by changing “may not,” to “shall have the right to,” and deleting the word “written,” if the parties desire to affirm the right of the sublessee to declare a unit without the consent or approval of the sublessor, to-wit:

Sublessee may not pool or voluntarily unitize the Said Leases (or the lands covered and affected thereby) without the written consent or approval of Sublessor. However, should the Louisiana Commissioner of Conservation or other Regulatory authority create a compulsory unit affecting Said Leases, said overriding royalty interest shall be computed only on the proportionate share of production from such pooled unit or units that is allocated to the lands subject to said overriding royalty interest; and unless otherwise allocated by a pooling agreement or order of the Commissioner of Conservation or other Regulatory authority, the amount of production to be so allocated from each pooled unit shall be the proportion of such total production that the surface area of the land affected thereby and included in the unit bears to the total surface area of all lands within such pooled unit.

5. Marketing of Production.

The sublessor is interested, not only in being paid the proceeds to which it is entitled, but also in the marketing arrangements into which the sublessee might choose to enter. At the same time, the sublessor—who is spending its dollars and who also shares the common desire to maximize the price at which production is sold—would want to remain in charge of marketing decisions. A typical clause relative to this issue might read, as follows:

Sublessee, its successors and assigns, shall have exclusive charge and control of the marketing of all production and shall market the production attributable to the reserved overriding royalty interest proportionately with and on the same terms as Subject Hydrocarbons and shall collect and receive the proceeds of the sale of all such production. Notwithstanding the foregoing sentence, Sublessor has the right to take the production attributable to the reserved overriding royalty interest in kind and, upon written notice from Sublessor, Sublessee shall deliver the production attributable to the reserved overriding royalty interest to Sublessor at the tanks or pipeline inlet, as the case may be, where Sublessee delivers the Subject Hydrocarbons to the purchaser thereof.

VI. Calculation of Working Interest and Net Revenue Interest

A. Preface

Very little, if any, of the published literature concerning assignments of mineral leases is devoted to a promotion of an understanding of the methodologies and principles involved in the calculation of working interest and net revenue interest arising out of
such transfers. In this context, an understanding of arithmetic is probably as important as the law pertaining to the transactions.

A couple of principles of general application are important to an understanding of the manner in which such calculations are to be made.

An overriding royalty interest – often called an “ORRI” – can only burden the interest of the party or parties who created it (and, of course, the successors or assigns of such person). While this statement is an obvious proposition, it is but a particularized application of the codal principle that the “sale of a thing belonging to another does not convey ownership.” In other words, an assignment of an overriding royalty interest cannot burden or affect the interest of a party owning a distinct working interest who has not joined in the assignment.

However, if an overriding royalty interest is created by a working interest owner, the subsequent assignee of that working interest owner acquires its interest burdened by the proportionate part of that overriding royalty interest. This is so because an assignee takes the interest subject to the burdens on the assigned leasehold interest which are reflected in the public records.

B. “Two Columns”

When one speaks of “working interest” [WI] and “net revenue interest” [NRI], one is speaking, respectively, of the obligations and entitlements of the lessee in the lessor-lessee relationship evidenced by a mineral lease.

When a lessor grants a mineral lease, reserving a lessor’s royalty, the lessee’s obligations for costs and rights to revenue are represented or embodied in “two columns,” the WI – which is the responsibility for costs – and the NRI – which, as the name suggests, represents “revenue interest,” but “net” of the lessor’s royalty. For our purposes, it is instructive to consider these as columns of assigned numbers – one for WI and the second for NRI.

Thus, if the lessor reserves a one-sixth (1/6) royalty, the lessee has 100% WI and 5/6, or .8333333, NRI.

277 LA. CIV. CODE ANN. art. 2452.
278 LA. CIV. CODE ANN. art. 3338.
279 This is sometimes called the “operating interest.”
280 A lessor’s interest is free of costs of drilling, equipping, completing and operating a well; thus, the lessee gets the privilege of paying all costs of exploration and operation during the existence of the lease. See Shanks v. Exxon Corporation, 95-2164 (La.App. 1st Cir. 5/10/96); 674 So.2d 473, writ denied 96-1475 (La. 9/20/96); 679 So.2d 436.
If the lessee(s) own 100% of the minerals (meaning, there are no unleased interests in the tract of land subjected to the lease),\footnote{As noted in Part V.C.1 hereof, such a lease is called a "100% lease."} the WI column always adds up to 1.0, or 100%, and the NRI column always adds up to 1.0 minus lessor’s royalty, in this case, 5/6, or .833333.

If the lessee thereafter assigns an undivided one-half (1/2), or .5, interest in the lease to B, each of the (now) two WI owners (lessee and B) has a .5 WI – the column always adds up to 1.0 – and has a .5 of .833333 NRI. Again, the second column always adds up to 1.0 minus lessor’s royalty, in this case, 5/6, or .833333.

If B then assigns a 4% ORRI to G, its company geologist, the first column does not change since an ORRI is a non-cost bearing interest and no WI has been assigned.

But B’s NRI is reduced by a certain number. However, before calculating it, one needs to determine if, in the assignment of ORRI to G, there is a “proportionate reduction clause.”\footnote{See Part V.C.1 hereof, supra, for a discussion and example of such a clause.}

It is customary in the industry to state the assigned ORRI in terms of the full interest (“what is, in jargon of the industry, called “to the 8/8ths”), but if the assignment has a “proportionate reduction clause,” and if, as here, the assignor (B) owns “less than the entire interest therein,” the 4% ORRI is reduced in respect of the interest of the assigning party (B) which is one-half (1/2), or .5, so that B’s NRI is reduced by one-half (1/2), or by .5 of 4%, or 2% (which is the net amount of the ORRI which G receives), with the result that B’s NRI, after giving effect to the assignment to G, would be calculated, as follows:

\[
\text{(.5 of .833333) minus (.5 of .04), or .4166666 minus .02, or .3966666.}
\]

Again, adding up the second column, it should equal 1.0 minus the lessor’s royalty:

\[
\text{A's NRI + B's NRI + G's ORRI, or .4166667 + .3966666 + .02 = .8333333}
\]

So, WI is the cost bearing responsibility, spread among the WI owners; NRI is the net revenue to which each party is entitled – the owner of an ORRI has zero or “None” in the first column.

C. Two or More Leases With Different Burdens

If a tract of land is covered and affected by two different mineral leases – each executed by the owner of an undivided one-half (1/2), or .5, interest in the minerals in the leased premises – and if each lease provides for a different lessor’s royalty and/or burdens, the WI column still adds up to 100%, or 1.0 (.5 under Lease No. 1 and .5 under Lease

\footnote{As noted in Part V.C.1 hereof, such a lease is called a “100% lease.”}
No. 2). The NRI column will add up to the sum of the NRI under each separate lease.

To illustrate, Lease No. 1 provides for a one-fifth (1/5) lessor’s royalty and Lease No. 2 provides for a one-fourth (1/4) lessor’s royalty. Assuming no additional burdens on the lease in the form of overriding royalty interest(s), the second column would be calculated, as follows:

NRI under Lease No. 1 + NRI under Lease No. 2, or (.5 of .8) + (.5 of .75) = .4 + .375, or .775

The easiest way to make the calculations (in the case of multiple leases affecting the same tract, with different royalties being reserved in multiple leases covering undivided mineral interests, but totaling 100%, or 1.0, in the aggregate), is to make the calculations one lease at a time, as though each lease covered 100% of the minerals, and to then multiply the resultant numbers by the mineral interest covered by the lease. This approach would work even as to the overriding royalty interest but only if the instrument creating the ORRI contains a “proportionate reduction clause” which is operative in the case that “the Said Lease does not validly cover and affect all of the oil, gas and other minerals and mineral rights in and under the lands described therein.”

If the lessee under either (or both) of the leases should assign an overriding royalty interest, it would reduce the assignor’s NRI relevant to the burdened lease, subject to the operation of the “proportionate reduction clause,” if any. The working of that clause is discussed above.

The methodology described above applies to the calculation of WI and NRI on an individual tract basis. In the event that the tract is unitized, the unitized WI and NRI numbers pertinent to the unitized tract are determined by multiplying such tract interests by the unit equity or participation factor applicable to such tract.

D. A Practice Not Recommended

To be avoided is an assignment (or sublease) which conveys a stated portion “of Assignor’s interest” in the affected leases. While not problematic in all cases, your author has experienced a series of assignments so constructed, and it is clear that the intention of the parties was not effectuated.

To illustrate, assume that the initial lessee under a mineral lease desires to sell its lease to two parties, in equal proportions to each. It presents each with a separate, but identical, assignment, stating that “Assignor hereby conveys and assigns to Assignee one-half (1/2) of Assignor’s interest” in the described lease.

The first assignment placed of record would effectively convey to the assignee the interest intended – “one-half (1/2) of Assignor’s interest” is, in effect, an undivided one-half (1/2) interest in the assigned lease. This, of course, reduces the record interest of the assignor to the
remaining undivided one-half (1/2) interest in the lease. When the second assignment is recorded, that assignee is receiving “one-half (1/2) of Assignor’s interest,” but that interest is, in effect, a net undivided one-fourth (1/4) interest in the lease – one-half of one-half is one-fourth.

Where possible, it is preferable to state the precise interest intended to be conveyed. To do otherwise makes difficult any consideration of warranty obligations in case such become necessary.

VII. A Few “Asides”

A. Preface

Transfers of mineral leases give rise to the need to consider other issues as it relates to their susceptibility of treatment under other statutes or case law of general application to the transfer of immovables. These are somewhat in the nature of “asides,” but nevertheless merit some examination.

B. Applicability of Securities Laws to Transfers of Mineral Leases:

The sale of undivided fractional interest in oil and gas leases constitutes sale of a “security” under Securities Act of 1933.283

Under Louisiana’s Blue Sky Law, “Security” means any fractional undivided interest in oil, gas, or other mineral rights; . . .

La. Rev. Stat. Ann. § 51:702(8) (c) instructs that, “[w]ith respect to fractional undivided interests in oil, gas, or other mineral rights, the term ‘issuer’ means the owner of any such right or of any interest in such right, whether whole or fractional, who creates fractional interests therein for the purpose of public offering.”

Thus, based upon these definitions, the sale of an undivided interest in a mineral lease has been held to be the sale of a “security” under both the state and federal securities laws.

In Caldwell v. Trans-Gulf Petroleum Corporation,285 plaintiffs sued defendants “for the return of the purchase price of fractional, undivided interests in certain non-producing oil and gas leases.” Although the decision discloses very little in the way of the underlying facts, it seems logical that the defendants had assigned the fractional interests to the plaintiffs. The suit was brought under Louisiana’s Blue Sky Law.286 The court reviewed the statutory definitions of “security”287 and “issuer,”288 and concluded that the “apparent intent of this provision is to make the

285 322 So.2d 171 (La. 1975).
public sale of mineral leasehold rights, which have been fractionalized by the offeror, subject to the Act.” Further, the court stated that “the language contained in 51:701(5) defining ‘issuer’ is much too clear to leave any serious doubt that the fractionalized, undivided interests sold by these defendants in non-producing oil and gas leases were securities, subject to regulation under the Louisiana Blue Sky Law.”

In *Adena Exploration, Inc. v. Sylvan*, the Fifth Circuit held that the transfer of “an undivided 25% interest in and to” certain mineral leases “can be nothing but a ‘fractional undivided interest’ in oil and gas.” The court affirmed the trial court’s order of rescission of the transfer.

In practice, this law is probably one of the most ignored laws as there are many assignments whereby the parties are not even aware of the fact that they are engaged in a securities transaction.

As stated by one Commentator:

It frequently comes as a shock to many people in the oil and gas business to be informed that as a general rule, in both the federal and state securities laws, oil and gas property interests are included within the broad definition of the term “security,” and that a transfer of an oil and gas interest for value involves the sale of a security.

C. Inapplicability of Louisiana Real Estate License Law

The Louisiana Real Estate License Law requires a license to sell “real estate.” Since a mineral lease constitutes immovable property — that is, “real estate” — does one have to have a real estate license to sell (assign) a mineral lease?

Real estate is defined to “mean and include condominiums and leaseholds, as well as any other interest in land, with the exceptions of oil, gas and other minerals and whether the real estate is situated in this state or elsewhere.”

In *Vander Sluys v. Finfrock*, it was held that the sale of oil and gas leases was not sale of “real estate” or immovables within meaning of

289 860 F.2d 1242 (5th Cir. 1988).
290 Id. at 1249.
292 LA. REV. STAT. ANN. §§ 37:1430, et seq.
293 LA. REV. STAT. ANN. §§ 31:16 and 18.
294 LA. REV. STAT. ANN. § 37:1431(6).
295 158 La. 175, 103 So. 730 (1925).
Real Estate License Law, and a seller of such interests was not required to have license as a "real estate broker."

D. Is an Assignee Bound by an Oral Amendment of the Mineral Lease as Agreed to by its Assignor?

If your client is the assignee of a mineral lease and the lessor contends that your client's assignor – the original lessee – had orally modified the contract, can such oral modification (even assuming it existed) be enforced against the assignee who had no knowledge of it? By definition, not being in writing, the supposed oral amendment was not recorded.

In a case involving a commercial lease,296 a lessor sought to enforce an oral modification of a lease as against an assignee of the original lessee who purported to enter the oral modification with the plaintiff-lessee. It was held that an assignee of a written lease which contained a clause disallowing oral modifications, would not be bound by an alleged oral modification entered into by its assignor:

Mr. Davis cites Pelican Electrical Contractors v. Neumeyer, 419 So.2d 1 (La.App. 4th Cir.1982) for the proposition that a written contract can be modified orally even if it requires that modifications be in writing; However, in Pelican Electrical, the subsequent oral modification was enforced against the original party to the contract. That is, the same party who entered into the oral modification was bound by it. In the present case, the claimed oral modification was entered into between Mr. Davis and APAC but Mr. Davis seeks to enforce it against Avenue Plaza. We decline to extend Pelican Electrical to allow enforcement of a subsequent oral modification, despite the presence of a no oral modification clause, against an assignee who did not participate in the oral modification. Assignments of leases and other contracts, done either individually or, as in the present case, as part of a larger transaction, are common and commercially important. Were we to hold that an assignee of a written lease or other written contract, which lease or other contract contains a no oral modification clause, could be bound by an oral modification in which it did not participate, then we would make the taking of assignments of leases and contracts (which might be dearly paid for) a hazardous practice and one subject to frequent injustice. An assignee of a written lease or other written contract which contains a no oral modification clause ought to be able to rely upon that clause. Lastly, we note that, unlike an assignee, an original party to a lease or other contract, such as Mr. Davis in the present case, has the opportunity to reduce to writing

296 Davis v. Avenue Plaza, LLC, 2000-0226 (La.App. 4th Cir. 12/27/00); 778 So.2d 613.
any agreed upon (with the other original party to the contract) modifications to the lease or other contract. Such written modification to leases or contracts which have no oral modification clauses, if done prior to an assignment, protect the rights of all parties including assignees.

As noted, the lease in question contained a "no oral modification clause," a provision common in commercial leases but not in mineral leases. Thus, the extent to which a court might apply the holding in *Davis* to a mineral lease which has been assigned is uncertain, but it is submitted that the case is all the stronger in reference to a mineral lease which is a real right and an incorporeal immovable.

The "parol evidence rule" applies to mineral leases.297 "The very purpose of the writing requirement for contracts regarding immovable property is to prevent misunderstanding over verbal terms."298

E. Prescriptive Periods Applicable to Breaches of Assignments and Subleases

Brief mention might be made as to the prescriptive periods which apply to actions relative to breaches of mineral leases as well as of transfers of mineral leases.

As noted previously,299 if the claim is for unpaid royalties owed by the lessee (including overriding royalties arising under a sublease), such a claim would be subject to a liberative prescription of three (3) years under La. Civ. Code Ann. art. 3494(5).300

All other claims would be subject to the default period of ten (10) years under La. Civ. Code Ann. art. 3499.301

One exception to the latter prescriptive period is that "[a]n action for the breach or other failure to perform a contract for the sale, exchange, or

297 That the "parol evidence rule" applies to mineral leases (and interests therein) was recognized in *Ingolia v. Lobrano*, 244 La. 241, 152 So.2d 7 (1963) where the Supreme Court held that, also "applicable to the mineral leases and contracts is the same requirement of written testimonial proof that governs the transfer of immovable property." Although it principally arises in connection with alleged oral agreements pertaining to the transfer of a mineral lease, it would also apply to an alleged agreement to modify a mineral lease.


299 See Part III.G hereof, supra.

300 "An action to recover underpayments or overpayments of royalties from the production of minerals, provided that nothing herein applies to any payments, rent, or royalties derived from state-owned properties," is "subject to a liberative prescription of three years."

301 "Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years."

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other transfer of an immovable is prescribed in five years. 302 Seemingly, this provision would apply to breaches of purchase and sale agreements or other contracts, but would particularly apply to a breach of a "right of reassignment clause" in an instrument of transfer.

F. Inapplicability of Doctrine of Lesion Beyond Moiety

Under Louisiana law of sale, a vendor may rescind a sale based upon lesion beyond moiety. This right of rescission is defined in La. Civ. Code Ann. art. 2589 which reads, in part, as follows:

The sale of an immovable may be rescinded for lesion when the price is less than one-half of the fair market value of the immovable. . . . The seller may invoke lesion even if he has renounced the right to claim it.

Because of the speculative nature of mineral rights, the redactors of the Louisiana Mineral Code did not deem this principle to be appropriate to the transfer of mineral leases. Hence, Article 17 of the Louisiana Mineral Code provides that a "sale of a mineral right is not subject to rescission for lesion beyond moiety." 303

In Haas v. Cerami, 304 the Supreme Court, on rehearing, stated that it did "adhere to the ruling that there is no right of action to annul a contract for the sale of mineral rights on the ground of lesion, under article 1860 of the Civil Code [now La. Civ. Code Ann. art. 1965], or on the ground that the price stipulated is out of proportion to the value of the mineral right, under article 2464 of the Civil Code, when the mineral right is on nonproducing land, and has therefore only a speculative value."

Considering the statement of Article 17, one might wonder as to the types of transactions to which, by its terms, it applies. For example, is the grant of a mineral lease the "sale of a mineral right" as envisioned by Article 17? Seemingly, once the mineral lease is granted (and thereby


303 Part of the language omitted from LA. CIV. CODE ANN. art. 2589, as noted above, reads "[l]esion can be claimed only by the seller and only in sales of corporeal immovables." Because Article 16 of the Louisiana Mineral Code instructs that "[a] mineral right is an incorporeal immovable," one would infer from the text of LA. CIV. CODE ANN. art. 2589 that the doctrine would not ordinarily be available to a vendor in a sale of a mineral right (it being an incorporeal immovable). Nevertheless, the proposition is not left to mere inference as LA. REV. STAT. ANN. § 31:17 affirmatively establishes that the doctrine does not apply to the sale of a mineral right.

304 201 La. 612, 10 So.2d 61 (1942).
created as a mineral right), a transfer of that mineral lease is a "sale" thereof. But is the granting of the lease itself a sale of a mineral right?

In Thomas v. Pride Oil & Gas Properties, Inc., a lessor sued his lessee to rescind a mineral lease, contending, among other things, that the lease should be rescinded "because the price paid by the Defendant was grossly out of all proportion with the value of the minerals sold." Relying on Wilkins v. Nelson, the court dismissed plaintiff's "claim that the price he received for the mineral rights was out of proportion with their value."

VIII. Conclusion

In the "oil patch," the assignment or sublease of a mineral lease receives little scrutiny — all attention tends to be paid to the underlying mineral lease, and that is probably as it should be. The assignment (or sublease) is seen as a vehicle that facilitates E&P activity under the contractual rights granted by the landowner.

While the lessor is not a party to the transaction which results in a transfer (in whole or in part) of the mineral lease which the lessor has granted, the nature and content of the transfer is certainly of interest to the lessor. At a minimum, the lessor has an interest in who is occupying its property with the right to conduct the hazardous business of drilling and producing oil and gas. This interest can be protected by the landowner by regulating or restricting the ability of the lessee to transfer the lease, either by assignment or sublease.

But the interest of the lessor does not stop with the transfer. The nature of the transfer — whether an assignment or sublease — has consequences to the lessor which, in some instances, directly and materially affects its rights under the lease.

It is hoped that this analysis of assignments and subleases under Louisiana law will facilitate an understanding of this secondary market in mineral leases.

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305 "The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease." LA. REV. STAT. ANN. § 31:16.