Private Law: Mineral Rights

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MINERAL RIGHTS

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IMPRESCRIPTIBLE MINERAL INTERESTS

The controversy between Leiter Minerals, Inc., and the California Company has a long and varied history and has by this time become almost a career for the attorneys involved. To date it has labored its way through at least seven hearings in six different courts over a period of ten years.1 It is now apparently pending on appeal on its second trip to the top of the federal court system.2 No pointed observations as to the law's delays or the problems of state-federal relations are pertinent here, but the history of the case itself gives some mute but brutal testimony on these points.

The problem which has spawned all of these multitudinous hearings, resultant opinions, and difficulties for the parties involved centers on a reservation of minerals by Thomas Leiter in a conveyance of land to the United States in 1938. Briefly, the reservation was for an initial period of ten years with a limitation of seven years on the right to enter the lands for the purpose of mining and removing minerals. Extension of the rights reserved beyond the basic ten-year period was dependent upon a condition that operations be carried on for an average of at least fifty days for each of the preceding three years. If such a condition were fulfilled, the rights were to be continued in existence for a further period of five years with the limitation that the extended right should be limited to an area of twenty-five acres around each producing well. Further five-year extensions were possible upon fulfillment of the condition requiring an annual average of fifty operating days for each five-year period.

In 1940, the Louisiana legislature passed Act 315, now R.S. 9:5806A, providing that upon acquisition of land by the United

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2. The case is now pending before the United States Court of Appeals for the Fifth Circuit.
States by conventional deed or contract, condemnation or expropriation, mineral rights reserved in any such transaction or in any prior transaction shall be imprescriptible.

Neither Thomas Leiter nor his successors in title exercised the mineral rights reserved in 1938. In 1949, the United States leased the property acquired from Leiter, and highly successful drilling operations followed.

The predictable result of this success was litigation, but it is doubtful that anyone involved foresaw the opening of Pandora's box when Leiter Minerals first filed a petitory action in the District Court for Plaquemines Parish in 1953 seeking to be declared owner of the mineral rights in the lands conveyed in 1938. This action named the federal lessees as defendants but did not name the United States as a party. Soon thereafter, the United States instituted an action in the United States District Court for the Eastern District of Louisiana asserting its title to the mineral rights. Also sought and obtained by the federal government was an injunction against the state court action. The exclusive jurisdiction of the United States District Court was upheld in the Fifth Circuit Court of Appeals3 and ultimately by the United States Supreme Court.4

It was the position of the United States that R.S. 9:5806 could not be held to apply to a conveyance in which the parties themselves contracted for a reservation of specific duration and that if the statute were construed to apply to the reservation there would be an impairment of the obligations of the contract. The United States Supreme Court noted that the Louisiana Supreme Court had not dealt with the precise issue presented and expressed questions concerning the applicability of the statute and the problems it was designed to meet, and whether it was merely declaratory of prior jurisprudence or new legislation. Desiring answers to these questions before proceeding to a decision of the case, the United States Supreme Court stated, "we think it advisable to have an interpretation, if possible, of the statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court,"5 and went on to suggest the apparent availability of the Louisiana Declaratory Judgments Act.

5. Id. at 229.
Following the suggestion of the United States Supreme Court, a declaratory judgment action was instituted in state court. Ironically enough, the United States was not a party to this action, nor did it intervene, or even appear as suggested by Justice Frankfurter.6

The state district court concluded that the statute was applicable, that the mineral rights were accordingly imprescriptible, and that the statute was not unconstitutional.7 The Fourth Circuit Court of Appeal reversed, declaring that the statute was inapplicable, concluding that the parties had fixed a contractual prescriptive period less than the prevailing statutory period of ten years.8 Writs were granted by the Louisiana Supreme Court.

There are at least three aspects of this controversy and of the Louisiana Supreme Court's opinion which compel one's notice and attention. Certainly, as previously indicated, the knotty problems of state-federal relations so vividly apparent in this case are of the first magnitude. However, any discussion of these would necessarily have to be extended, and they are beyond the scope of the mineral rights portion of this Symposium.

Second, there is a jurisdictional problem involved. This is raised by the court's statement that "to us it is evident that in this action, instituted pursuant to the directive of the United States Supreme Court under the Louisiana Declaratory Judgments Act, we are called upon to render only an advisory opinion." (Emphasis added.)9 This problem, too, is beyond the basic scope of these comments. However, because it relates to the value of the statutory interpretation by the court, it is not inappropriate in passing to pose three interesting questions arising from the rendering of this "advisory opinion." Does the Louisiana Supreme Court have authority of any kind to render an advisory opinion to anyone? Its own opinions reflect that it has previously considered that it did not.10 Certainly, the court was

6. "The Louisiana declaratory judgment procedure appears available to secure such an interpretation, . . . and the United States of course may appear to urge its interpretation of the statute." Ibid.
10. "In some states the Court of last resort renders advisory opinions at the request of other departments of the Government, but not in this state." State ex rel. Day v. Rapides Parish School Board, 158 La. 251, 259, 103 So. 757, 760
in a dilemma as to whether it should (a) decide the case presented, to which the United States was not a party; (b) render an “advisory opinion” without specific authorization; or (c) refuse to render an “advisory opinion” and thus stalemate the progress of the litigation, leaving the United States Supreme Court as unenlightened as it had been before. There was disagreement among the court as to the proper course of action. Chief Justice Fournet and Justice Hamlin dissented from the court’s refusal to render a decision on all issues of the case, both feeling that the district judge had correctly decided the case.1

On application for rehearing, Justice Summers joined the ranks of the minority, taking the position that a rehearing should be granted and a decision rendered on all issues.2

As to the propriety of issuing an advisory opinion generally, there is some precedent in the conduct of the highest courts of other states for the proposition that such a tribunal may render advisory opinions in proper circumstances without specific authorization.3 Other courts, however, have refused to render such decisions in the absence of specific constitutional authority, and this position appears to be in the majority.4


13. North Carolina has no constitutional provisions granting authority for the issuance of advisory opinions. However, such opinions have been rendered on a number of occasions. See Edsall, The Advisory Opinion in North Carolina, 27 N.C.L. Rev. 297 (1949). At one time advisory opinions were rendered in several other states without specific authority; however, the practice seems to have been abandoned. See Ellingwood, Departmental Cooperation in State Government 64-67, 71-76, 78 (1918).

14. For an authoritative commentary on the present status of the advisory opinion the reader is referred to Stevens, Advisory Opinions—Present Status and Evaluation, 34 Wash. L. Rev. 1 (1959). See also Ellingwood, supra note 13; Note, 69 Harv. L. Rev. 1302 (1956); Edsall, supra note 13; Field, The Advisory Opinion—An Analysis, 24 Ind. L.J. 203 (1949). According to the article by Dean Stevens cited above eleven states presently utilize the advisory opinion. In seven of these authorization is specifically granted by the state constitution; in two states it is granted by general statutes; in one state limited authority is granted by statute; and in one state (North Carolina) advisory opinions are rendered by judicial custom. This article also indicates that such opinions are normally rendered upon the request of a coordinate branch of the government. For the early rejection of advisory opinions by the federal government see the letters from Secretary of State Jefferson to Chief Justice Jay and the Associate Justices and from Chief Justice Jay and the Associate Justices to President Washington printed in Correspondence of the Justices (1793), in Hart & Wechsler, The Federal Courts and the Federal System 75 (1953). Hart & Wechsler note occasional extra-judicial expressions of views, op. cit. supra at 79-80. The question of more immediate significance in this case is the problem of authorization to render an advisory opinion not to a coordinate branch of the
The rendering of an "advisory opinion" and the division of the court lead to the second question. Of what value is the opinion of the Supreme Court of Louisiana to the courts of the United States in resolving the controversy? As a practical matter, it seems that the federal tribunals will accept the statutory interpretation, but there are some technical questions which arise. These, too, are beyond the scope of this piece.

The third question is similar to the second. If there is no authority to render an "advisory opinion," of what value is the Supreme Court of Louisiana's interpretation of R.S. 9:5806A to future Louisiana litigants? Again, the answer seems to be furnished in practical fashion by the fact that all seven members of the court were in agreement as to the interpretation of the statute itself. Thus, certainly as long as the composition of the court remains the same, or nearly so, it seems unlikely that there will be any deviation from the interpretation exposed by the "advisory opinion." Still, there are questions in the writer's mind as to the value of this opinion as precedent in a technical legal sense. If this opinion is one rendered without authorization, are lower courts in the state system bound by it, and would the Supreme Court itself be in any way bound by it if presented with the same question in the future? Perhaps this puzzle is academic, but it is nevertheless curious.


15. "There is authority in each of the eleven states using the advisory opinion procedure to the effect that such opinions are advisory only, result in no judgment or decree, and bind no one. If this be taken literally one wonders why an advisory opinion is either sought or given. "Legally, the statement is, as indicated, amply supported by authority. However, as a practical matter, not only the courts, but also the writers, recognize that advisory opinions carry real weight. They are almost invariably accepted by those who requested the opinion and are cited quite frequently in later cases both at home and in other jurisdictions as authority." Stevens, supra note 14, at 6-7, and authorities cited therein.
Having gone into such detail delimiting the scope of this commentary and raising questions which are beyond it, analysis of the interpretation furnished by the court seems almost anti-climactic. Nevertheless, this piece would be pointless without it.

The Louisiana Supreme Court took the position that it could not render a decision under the Declaratory Judgments Act, leading to its decision to render the "advisory opinion." The court accordingly eschewed any interpretation of the mineral reservation in question. Therefore, the opinion was limited to an interpretation of the statute under each of the two interpretations of the reservation urged by counsel for the respective parties.

The interpretation urged by Leiter was, of course, that the reservation in the deed of 1938 was not one for a fixed, maximum term such as fifteen or twenty-five years, but merely one subject to a prescriptive or minimum term selected by the parties in preference to that fixed by law. On the basis of this argument, for example, if the parties stated that a reserved mineral servitude was to prescribe for non-user in five years, the only difference between this and a reservation without such limitation would be that prescription would run in half the normal time. Thus, the five-year term should be construed as only a substitution for the ten-year legal term, and the running of liberative prescription thereon could be affected by any mode of interruption, extension, or suspension applicable to a servitude established without reference to an agreed period of limitation.

This argument contrasts with that advanced by the lessees, who contended that the reservation was one for a fixed, maximum term, such as that found in Hodges v. Norton. In such an instance, it is accepted that where the parties fix a maximum term for, say, twenty-five years, the laws of prescription are applicable and the rights granted will expire in ten years absent an effective interruption, extension, or suspension of prescription. But in such a case, it is held that even though there be a use of the servitude the interest will terminate upon the running of the twenty-five year maximum term. Despite its formal disavowal of intent to interpret the reservation in question, the court stated, in setting forth the lessees' argument to the

16. 200 La. 614, 8 So. 2d 618 (1942).
18. See note 17 supra.
effect that the reservation was for a fixed term as in *Hodges v. Norton*,\(^{19}\) that "for what it is worth, our opinion is that it is not."\(^{20}\)

Assuming first the correctness of the defendants' interpretation of the reservation, the court stated that "since, in such a case there is no question of prescription, Act 315 of 1940 is without application."\(^{21}\) This statement alone is incomplete, and what the court apparently meant, as exposed by its words in the preceding paragraph, was that in this particular instance there would be no question of prescription. In the preceding paragraph, the opinion points out that where there is a fixed-term reservation for a period in excess of ten years, Act 315 of 1940 would be applicable to maintain the reservation in force for the fixed period, even though there should be no user of the rights reserved. However, at the termination of the fixed period, the rights would cease to exist. Applying this statement to the one quoted above, and thus, to the reservation in question, the court apparently meant to say that in the instance involved, the period fixed by the contract would have expired and, in the event of a conclusion that there was a maximum term reservation, Act 315 of 1940 would be inapplicable. The court went on to state in that same paragraph that if the statute were applied in such an instance, there would be an unconstitutional impairment of contract under the provisions of Article IV, Section 15, of the Louisiana Constitution of 1921.

Alternatively, the court stated that if the United States Supreme Court should conclude that the reservation was one of uncertain and indefinite duration, and that it was the intention of the parties to fix by contract the period of liberative prescription as opposed to a maximum term, Act 315 of 1940 would be applicable and constitutional under the Louisiana Constitution.

In rendering its opinion the Louisiana Supreme Court took note of the background of Act 315 of 1940, pointing out that as there had been some question as to the applicability of prescriptive laws to sales of land to the federal government some landowners were accordingly reluctant to sell to the United States, and that the legislature had clearly in mind the purpose of protecting these landowners, placing them on the same footing as

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\(^{19}\) 200 La. 614, 8 So. 2d 618 (1942).


\(^{21}\) Id. at 937, 132 So. 2d at 853.
landowners in other states, in which it is possible to make a mineral reservation in perpetuity. Two additional purposes for the passage of the act were recognized: that severance taxes are a major source of state revenue which would be lost on large amounts of land if reservations in perpetuity were not legal; and the state's interest in conservation and proper utilization of its natural resources, as contemplated in the Louisiana Constitution.

The court pointed out that the policies stated would not be fully served if distinctions were drawn between contractually fixed periods of prescription and the legal period. Reasoning negatively from absence of any such distinction in the statute, and relying also on the stated policies, it was concluded that there is no such distinction in effect.

On the other hand, in considering the applicability of the statute to fixed-term reservations, the court did not fully illuminate its reasons for concluding that the statute is inapplicable, but merely stated that in such a case the servitude would expire at the end of the time fixed for its duration. From a strictly logical standpoint, it seems that if one may reason negatively that, as the statute does not draw distinctions between reservations for contractually fixed prescriptive periods less than ten years and those for the legal prescriptive term, neither does it draw any distinctions between those for a fixed term greater than ten years and either of the other two types. Therefore, if this failure of distinctions is to be accepted as a determinative criterion, there seems to be something lacking.

Another consideration, possibly of greater moment, suggests itself. In an instance in which the parties fix a maximum term for the existence of a mineral reservation it may be inferred that this result was negotiated, agreed upon, and reflected in the consideration paid. By contrast, according to the history narrated by the Louisiana Supreme Court, many persons who were alienating their lands to the government were conveying for a price clearly reflecting that the minerals were not included, and some were apparently being told that the laws of prescription did not apply to such sales or conveyances to the government. The inference, then, would be that one who sells for a fixed term contemplates that he will lose his minerals in any case upon passage of the specified period of time. On the other hand, he who sells and reserves without specification of maximum
term does so in the hope that he can maintain his rights in existence, and perhaps in some instances in the past reservations were made under the assurance by representatives of the vendee that they were in perpetuity. Legislative relief for the latter class seems justifiable, and it is not unreasonable to exclude from the coverage of the statute those who contemplated at the moment of their transfer that they would lose their rights upon passage of a specified maximum term except to the extent that their reservations will be preserved by the statute until the full term has elapsed.

There is, therefore, a rather sound basis for the differentiation made by the court between reservations for a fixed term greater than ten years and an agreement by the parties upon a period of limitation or prescription of less than the ten-year legal prescriptive period.

As to the problem of constitutionality raised by the retrospective application of Act 315 of 1940, it is basic that periods of prescription may be altered without such enactments being declared unconstitutional for impairing contractual obligations. The Louisiana Supreme Court has previously upheld Act 315 of 1940 against such an attack.

The court stated that there would be impairment, however, if a particular reservation were determined to be for a fixed term and the provisions of R.S. 9:5806A applied so as to extend the rights beyond that term. Although the writer finds no quarrel with the opinion of the court in this regard on the basis of accepted principles of constitutional law, viewed abstractly the problem seems to be more one of differentiating degree of impairment rather than kind. There must necessarily be a real if not a legal effect on the obligations of a contract when a prescriptive period is altered retroactively, just as there would be a real effect if Act 315 were applied to a fixed-term reservation. Conceptual reasoning on the basis of the nature of the "reversionary right" which exists upon creation of a mineral servitude is not, therefore, fully satisfactory. Yet it seems to furnish the only legal basis for distinction. Accordingly, the


court reasoned that the reversionary right held by the government upon reservation of minerals by one of its vendors prior to passage of the remedial statute of 1940 is no more than an expectancy or hope and not a vested right. On the other hand, in a fixed-term reservation the landowner has a vested right in the reversion of the minerals, and to divest this right would, in the court's eye, impair the obligations of the contract in question. This reasoning has one dangerous drawback. In pursuing its policy of keeping minerals in commerce the Louisiana Supreme Court has held that the "reversionary right" of the landowner holding property subject to an outstanding mineral servitude is no more than a hope or expectancy, and this right is not an object of commerce. If, however, the contractual right to the reversion of a fixed-term mineral interest is a "vested right," one may ask whether it is a right subject to commerce? If so, then there is a possibility of circumvention of the established policy of the court. Because, however, the court regards the desirable end of keeping minerals in commerce as a matter of public policy, it seems likely that an attempt at circumvention by use of fixed-term reservations or grants would stand little chance of success. Also, the undesirable features of the fixed-term servitude, from the viewpoint of the servitude owner, make any attempt of this kind unlikely.

JOINT LEASE-EXTENSION OF SERVITUDE

The opinion in Adam v. Johnson is a clear and concise exposition and application of the rules which have finally evolved concerning the effect of execution of a joint lease by a landowner and a mineral owner upon running of liberative prescrip-

24. Hicks v. Clark, 225 La. 133, 72 So. 2d 322 (1954); Liberty Farms, Inc. v. Miller, 216 La. 1023, 45 So. 2d 610 (1950). See also United States v. Nebo Oil Co., 190 F. 2d 1003 (5th Cir. 1951). "The reversionary interest cases have gone through a transition from dicta admitting the legal possibility of the creation of a reversionary interest by a properly phrased contract, to an express statement that it is settled that sales of reversionary interests cannot be made." Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute, 25 Tul. L. Rev. 155, 183 (1951). It is noteworthy that these remarks by Professor Nabors were made prior to the decision rendered in Hicks v. Clark, supra.

25. "If the act should be held to be applicable in such a case so as to extend the right or servitude beyond the time fixed by the contract for its duration, the act would operate to impair the obligation of the contract between the parties, and to divest vested rights, and hence would be unconstitutional." Leiter Minerals, Inc. v. California Co., 241 La. 915, 937, 132 So. 2d 845, 853 (1961).


27. 133 So. 2d 175 (La. App. 4th Cir. 1961).
tion. This development began with the decision rendered in *Mulhern v. Hayne*, which in no uncertain terms stated that execution of a joint lease by the landowner and servitude owner constituted an acknowledgment interrupting prescription. The cases subsequent to *Mulhern* disclose a difficult retreat from this initial decision. The withdrawal took a decisive turn in the direction of the present judicial interpretation in *Achee v. Caillouet*, in which the Supreme Court found it necessary to state that in rendering the *Mulhern* decision it had not used the term "interruption" as a legal term of art but merely in its dictionary sense. This opened the way for subsequent decisions which now rather clearly hold that execution of a joint lease by a landowner and mineral servitude owner does not interrupt liberative prescription but extends the life of the servitude, "at least for the primary term of the lease."

The second aspect of this evolutionary development, also noted in the Fourth Circuit opinion, centers upon the determination of whether the parties intended to sign a joint lease. Cases subsequent to *Mulhern v. Hayne* develop the principle that the mere fact that a document appears on its face to be a joint lease in form is not conclusive proof that the parties so intended it. Thus, extrinsic evidence is admissible to show the intent of the parties. Evidentiary factors which have been considered in reaching a conclusion on this issue of intent include different times and places of signing, educational background, lack of knowledge that the lease was to be signed by others in counterpart, and insertion of the names of parties as joint lessors sub-

29. See Bremer v. North Central Texas Oil Co., 185 La. 917, 171 So. 75 (1936); Kennedy v. Pelican Well Tool & Supply Co., 188 La. 811, 178 So. 359 (1938); English v. Blackman, 189 La. 255, 179 So. 306 (1938); Hightower v. Maritzky, 194 La. 998, 195 So. 518 (1940); Achee v. Caillouet, 197 La. 313, 1 So. 2d 530 (1941); Baker v. Wilder, 204 La. 739, 16 So. 2d 346 (1943); Barnsdall Oil Co. v. Miller, 224 La. 216, 69 So. 2d 21 (1953); Elkins v. Roseberry, 233 La. 59, 96 So. 2d 41 (1957).
30. 197 La. 313, 1 So. 2d 530 (1941).
sequent to execution by the party claiming that he had no inten-
tion to sign a joint lease.\textsuperscript{88}

In the decision under discussion two factors were apparently of some concern to the court in resolving the issue of intent. First, the instrument itself disclosed that the parties had not signed at the same time or place. Second, the lease had been executed in counterpart. Analyzing the instrument the court was disposed to disregard these two "suspicious circumstances" because the lease specifically recited that the parties intended to sign a joint lease and expressly authorized execution in counterparts. Thus, in the absence of further evidence submitted by the landowner, the court correctly held that the instrument was a joint lease, the parties had so intended it, and the servitude was consequently extended.

This decision raises a problem about which the jurisprudence has thus far been decidedly unclear — that of allocating the burden of persuading the trier of fact on the issue of intent. As the servitude owner is the party taking the position that execution of this instrument extended the life of his interest beyond the normal prescriptive date, the burden of persuasion in this regard should logically fall upon him. But what is necessary to establish a prima facie case and require the landowner to come forward with evidence?

Obviously, the \textit{Johnson} decision holds that when the servitude owner introduces a lease reciting that the parties intended to sign a joint lease and authorizing execution in counterpart a prima facie case has been established even though the instrument discloses different times and places of signing and execution in counterparts. Further evidence by the landowner to rebut the effect of the instrument would have been necessary to overcome the effect of the instrument itself.

But where is the line to be drawn when factors present in the \textit{Johnson} case are pared away? If the servitude owner adduces a lease which recites that it is a joint lease, should he be deemed to have borne the burden of proving a prima facie case? What if the instrument has no such designation but is merely a standard lease form with the names of the landowner and servitude owner typed in as lessors? What should be the effect in

\textsuperscript{38} Achee v. Caillouet, 197 La. 313, 1 So. 2d 530 (1941) (on original hearing).
either of these two cases if there has been execution at different times and places, execution in counterparts, or both?

Certainly it is impossible to trace out all of the permutations and combinations of disclosures which might be made by the lease instrument and indicate a result for each. However, some basic principles can be suggested. In doing so, some weight should be given to the following considerations: (1) the well-established principle that an individual must be responsible for the contents of a document he signs; (2) the common practice in the industry of having parties execute lease agreements at different times and places; (3) the facility with which a landowner may testify that he did not intend to sign or know that he was signing a joint lease, subjectively, and the difficulty of disproving this assertion.

In the light of these considerations, then, it seems fair to regard the servitude owner as having proved a prima facie case by introduction of the lease in at least two situations. This should clearly be so in the circumstances presented by the Johnson case in which the lease expresses an intent to sign a joint lease and authorizes execution in counterparts. Second, if the lease is designated as a joint lease by title or in any other manner, its introduction should constitute a prima facie case without regard to time and place of execution or execution in counterparts, even though there is no clause authorizing execution in counterparts.\(^3\)\(^9\) In a situation of this kind, of course, if the lease itself shows some evidence of tampering, such as the possibility that names of parties might have been inserted at different times, a court might legitimately require some explanation of these circumstances. But in the ordinary case in which there is no such evidence of alteration, the common practices of different time and place of execution and execution in counterpart

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39. It must be acknowledged that the Louisiana Supreme Court in Barnsdall Oil Co. v. Miller, 224 La. 216, 226, 69 So. 2d 21, 24 (1953) indicated that the fact of different times and places of execution is in itself "sufficient to cast disbelief that the parties contemplated the creation of a joint obligation and warranted the introduction of parol evidence for the purpose of ascertaining their true intent." However, considered as a whole the sentence seems rather clearly to indicate that the phrase "cast disbelief" does not mean that the introduction of a document designated as a joint lease would constitute a failure of proof but rather, as stated, that a basis would be established for the introduction of parol evidence. It seems reasonable to say that in accordance with the Barnsdall decision, the introduction of a lease designated as a joint lease would constitute a prima facie case, even though doubt was created by the different times and places of execution, thus laying a foundation for the defendant to adduce evidence to show lack of intent to execute a joint obligation.
should not destroy the fact that the lessor-landowner has affixed his name to what has every appearance of being a regularly executed joint lease.

A more difficult situation arises when the lease is executed on a standard form. There are strong considerations of fairness weighing in favor of the conclusion that the introduction of even a standard form with all names of parties typed or written in without any apparent irregularity should constitute a prima facie case regardless of the mode of execution. In such a situation it is simple for a landowner to allow introduction of the instrument, knowing full well that it was a joint lease and was so intended, yet still win on the ground of failure of proof. However, Barnsdall Oil Co. v. Miller and other decisions indicate that the intention to sign a joint lease “must appear either from the contract itself . . . or, in cases where the language of the lease does not plainly express such an intention, from extraneous evidence submitted by the parties for the purpose of showing their intent.” The lease involved in the Barnsdall case was executed on a standard printed form. Therefore, one must conclude that if the instrument is a standard lease form it is at least advisable to adduce extrinsic evidence showing an intent to sign a joint lease to assure the establishment of a prima facie case.

The Johnson opinion naturally gives weight to the presence of a clause in the lease authorizing execution in counterparts. But a word of caution is appropriate concerning the weight to be given this fact. Even in the absence of a lease provision such as that in the Johnson case, the indication of intent to execute a joint lease is of prime weight and mode of execution should not destroy the evidentiary effect of the lease. Fairness requires the party denying intent to sign a joint lease to come forward with supporting evidence outside the lease instrument which will convert these “suspicious circumstances” into a proper evidentiary basis for a legal conclusion of lack of intent.

MINERAL SERVITUDE — RESERVATION OF POWER TO LEASE

Dart v. Breitung, decided by the Court of Appeal for the First Circuit, adds one more small piece to the puzzle of the

40. 224 La. 216, 69 So. 2d 21 (1953).
42. Barnsdall Oil Co. v. Miller, 224 La. 216, 226, 69 So. 2d 21, 24 (1953).
rights and obligations of servitude owner and landowner with regard to the leasing of their interests. Plaintiff sold property to defendant in 1950, reserving a one-fourth mineral interest together with the exclusive power to lease both his interest and that of the landowner for such periods and on such terms as should be satisfactory to plaintiff. The parties were to share equally in any bonuses and delay rentals.

Near the end of the ten-year prescriptive period, plaintiff had an opportunity to lease. However, the prospective lessee would not take the lease without the signature of defendant or, alternatively, his ratification of the lease or of plaintiff’s power of attorney. As a result of defendant’s refusal to do any of these things, plaintiff was unable to let the property for mineral development.

Plaintiff sought judgment decreeing that defendant’s refusal to sign or ratify the lease or ratify the power of attorney “interrupted” the running of liberative prescription on plaintiff’s mineral interest. Alternatively, plaintiff prayed for judgment declaring him to be empowered to grant an oil, gas, and mineral lease for a period of ten years or less and retain one-half of the bonus and rental payments, or as a last alternative for the sum of $847.39, presumably the amount of the bonus money which would have been retained by plaintiff had there been a lease.

The court of appeal rejected plaintiff’s demands. In considering whether plaintiff was entitled to any damages, the court gave determinative effect to the fact that defendant was in no way obligated to sign or ratify any lease or ratify a power of attorney.

Of principal significance in this case, however, is the rejection of plaintiff’s argument that defendant’s refusal to sign or ratify the lease or a power of attorney wrought a suspension of liberative prescription under Article 792 of the Louisiana Civil Code.44 The court is not precise in distinguishing the problem of interruption of prescription from suspension of prescrip-

44. Examination of the plaintiff’s pleadings indicates that it was initially contended defendants’ inaction interrupted prescription. However, this position was altered and plaintiff urged instead that there had been a suspension of prescription under LA. CIVIL CODE art. 792 (1870).

45. LA. CIVIL CODE art. 792 (1870): “If the owner of the estate to whom the servitude is due is permitted from using it by an obstacle which he can neither prevent nor remove, the prescription of non usage does not run against him as this obstacle remains.”
tion and this results in some confusion. As one reason for rejecting plaintiff's argument, it was stated that the mineral reservation in question provided that only the beginning of drilling operations prior to the prescriptive date could interrupt the running of liberative prescription. This does not have anything to do with the possibility of a suspension of prescription, however, which might result from issuance of a conservation order or the creation of some obstacle by act of the landowner.

It is suggested that there may be more merit in the position of plaintiff in this case than met the eye of the court. Problems of this kind seem to be arising with greater frequency, and there is considerable discussion of the possibility that some fiduciary principle may be applicable to the relationship between landowner and mineral owner. It is a statement of the obvious to point out that a servitude is granted for a period of ten years, in the absence of agreement to the contrary, and not for eight, nine, or nine and one-half years. Therefore, it seems that although the landowner should certainly not be required to do anything prejudicial to his interest in seeing the minerals revert to him, he should not at the same time be allowed to deal unfairly with property over which he has the executive power.

47. Although not discussed in terms of suspension by obstacle, the factual situation presented in McMurrey v. Grey, 216 La. 908, 45 So. 2d 73 (1950) is clearly one in which the conduct of the landowner in padlocking the entrance to servitude property prevented the entry of the servitude owner's lessee for the purpose of continuing drilling operations. This would seem to fall squarely within the obstacle theory. In addition, several other cases suggest that the landowner's physical resistance to exercise of a mineral servitude suspends liberative prescription: Patton's Heirs v. Moesley, 186 La. 1088, 173 So. 772 (1937); Gayoso Co. v. Arkansas Natural Gas Corp., 176 La. 333, 145 So. 677 (1933); Clark v. Tensas Delta Land Co., 172 La. 913, 136 So. 1 (1931); Myers v. Cooke, 175 La. 30, 142 So. 790 (1932). See also Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: Report to the Mineral Law Committee of the Louisiana State Law Institute, 25 Tul. L. Rev. 485, 489 (1951) [hereinafter cited as Nabors].
48. Nabors, at 485; Note, 22 La. L. Rev. 867 (1962); Williams, The Fiduciary Principle in the Law of Oil and Gas, 13TH ANNUAL INSTITUTE ON OIL & GAS LAW & TAXATION 201, 239-52 (1962); 2 WILLIAMS & MILEY, OIL & GAS LAW §§ 339.2-339.3 (1959); Everett, The Executive Right to Lease, 3RD ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE 509 (1957); Mertz & Harris, Implied Rights of Royalty Owners, 3RD ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE 195 (1957); Jones, Problems Presented by the Separation of the Exclusive Leasing Power from Ownership of Land, Minerals or Royalty, 2ND ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 271 (1951); Jones, Non-Participating Royalty, 26 Tex. L. Rev. 569 (1948).
49. Although not based directly on the existence of any fiduciary relationship between a landowner with the executive right and a servitude owner, the decision rendered in Namie v. Namie, 134 So. 2d 572 (La. App. 2d Cir. 1961) takes a big step toward holding that during the latter days of existence of a servitude a landowner with the exclusive power to lease may not deal with the property in bad faith.
prejudice of a servitude owner, or to hinder the reasonable exercise of the rights of the servitude owner.

In these cases, leasing practices place the vendor of land wishing to reserve a portion of the minerals in a difficult position. If he gives the vendee the executive power, he runs the risk of being dealt with unfairly in the latter days of existence of his interest; if he retains the executive power, a prospective lessee may understandably be unwilling, as here, to invest in a lease without some assurance that the landowner’s interest will be under lease and will remain so if prescription should run on the servitude prior to operations which could be construed as a user; if the vendor takes a third possible course and retains only the power to deal with his own interest, he may find that in the twilight of his servitude the landowner will refuse to lease his interest in the property and a prospective lease will again be lost. As a matter of conveyancing technique, of course, the preferable approach for either landowner or mineral owner taking a power to lease is specifically to obligate the other party to ratify any leases which may be executed under the power, but this is not always done and may not always be possible. These are, therefore, problems which deserve some serious consideration by the courts.

Regarding the strict legalities involved in the Dart case it should be noted that Article 792, which is the basic provision on suspension by obstacle, is buttressed in this situation by Article 777, which provides in part that “the owner of the estate which owes the servitude can do nothing tending to diminish its use, or to make it more inconvenient.” True enough, this article seems to refer to active hindrance by the owner of the servient estate rather than mere passive refusal to act as in the Dart case. However, it is like the proverbial ostrich to deny that in such a situation the landowner is effectively foreclosing the servitude owner from the exercise, or at least the opportunity for the exercise, of his rights.

This discussion is not intended as any violent criticism of the Dart opinion, for it does appear from the facts there present that as intransigent as the landowner may have been, the servi-

51. This was actually done in the conveyance involved in Nolen v. Bennett, 119 So. 2d 636, 637 (La. App. 2d Cir. 1960): “The said W. H. Bennett binds and obligates himself, if requested, to ratify such oil, gas and mineral leases as may be executed by said J. S. Nolen, his heirs, successors, or assigns.”
tude owner may have been trying to steer him into a joint lease “trap.” This the mineral owner certainly had no right to expect, but nevertheless the plight of the servitude owner who makes a reasonable request for execution of a document not prejudicial to the landowner's interest but sufficient to protect the lessee and allow the servitude owner his chance to develop deserves very careful and perhaps favorable consideration by the courts.

MINERAL LEASES — SHUT-IN ROYALTIES — DELAY RENTALS

The opinion of the Louisiana Supreme Court in *Davis v. Laster* casts light on the nature of the shut-in royalty clause. This decision will be treated in a Note in a future issue of this Review. However, certain of the problems bear illumination in this commentary.

The case centered upon three determinations: whether a lessee, upon completion and shutting in of a gas well for lack of a market during the primary term, is bound to pay shut-in royalties or may at his option maintain the lease in force by payment of delay rentals; if payment of shut-in royalties is obligatory, whether acceptance by the lessor of delay rentals for nine years prior to tender of shut-in royalties at the end of the primary term should excuse the lessee's failure to pay shut-in royalties; and whether the well in question was one "producing gas only" as contemplated by the shut-in royalty clause.

Plaintiff, purchaser of the property from the vendee of the original lessor's heir, accepted but one of the nine delay rental payments personally. Prior to lapse of the primary term lessee made a tender of shut-in royalties. Nine months later, plaintiff returned the shut-in royalty check with a written demand for cancellation.

The Court of Appeal for the Second Circuit held that upon completion of a well capable of production the right to pay delay rentals ceases and the lease must be maintained by payment of production royalties or, if the well is shut in, by further drilling operations or the substitute for production contemplated by the lease in question — shut-in royalties. Cancellation of the lease was granted on the ground that as shut-in royalties are conceptually the same as production royalties under the type lease in-

52. 242 La. 735, 138 So. 2d 558 (1962).
volved, there could be no distinction in the legal consequences of unjustified failure to pay. Under the doctrine evolving from *Melancon v. Texas Co.* and *Bollinger v. Texas Co.* nine years was deemed an unjustified length of time. No question of de-

fault was raised as defendants denied the existence of any obligation to pay shut-in royalties.

The Supreme Court affirmed the decision as to the obliga-
tory nature of the shut-in royalty clause but refused cancella-
tion on grounds discussed below. Emphasis was placed on the fact of definition of shut-in royalties in the same paragraph of the lease setting forth the obligation to pay production royalties. By contrast, the right to pay delay rentals, set forth in a separate paragraph, was granted to secure the privilege of deferring drilling operations during the primary term. In response to an argument that the lease granted the privilege of resuming rentals after the drilling of a dry hole or cessation of production once established, the court replied that a shut-in well is clearly not a dry hole and within the intendment of the lease production did not cease upon shut-in of the well. Further supporting the basic construction of the shut-in royalty provision, the court stated that as the shut-in payments were intended by the parties as royalties, holders of non-participating royalty interests would be entitled to share in such payments. To allow the lessee to elect to pay rentals instead would, therefore, permit him to foreclose these royalty owners from revenues to which they were entitled under the contract.

In denying cancellation, reliance was placed on Article 1956 of the Louisiana Civil Code, providing that when the intent of the parties to a contract is doubtful, the construction put upon it by the parties in execution by both or by one with the express or implied consent of the other furnishes a proper basis for interpretation. Citing the varying views of courts and scholars as to whether payment of shut-in royalties is obligatory or optional, the court concluded that doubt existed as to the

54. 230 La. 593, 89 So. 2d 135 (1956).
55. 232 La. 637, 95 So. 2d 132 (1957).
56. LA. CIVIL CODE art. 1956 (1870): "When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation."
intent of the parties. Acceptance of rental payments by the original lessor and her successors, including plaintiff, was viewed as tacit consent to this mode of execution and the interpretation by the parties was allowed to govern.

Although there is controversy on this point, the decision of the court on the obligatory character of the shut-in royalty clause is sound and well-supported by its interpretation of the lease. However, there is something rather curious in a decision which in a crisp, straightforward manner interprets a contract as outlined above and then, as a vehicle for reaching an equitable result, states that the meaning of the provision in question is doubtful, permitting utilization of the parties' manner of execution as a basis for interpretation. It is incongruous to interpret the clause as obligatory and then call it "doubtful."

At one point the opinion states that "there is ample authority in our law to support the proposition that the parties to this lease by their conduct in its execution varied its terms." Article 1956, however, does not concern variance of the terms of a contract by execution, but interpretation of otherwise doubtful language. Further, Articles 1817 and 1818 relating to silence as a mode of creating obligations, also cited in the opinion, do not appear to have been designed for application in this instance. Reliance on the provisions cited, therefore, does not offer firm support for the decision.

Two lines of authorities suggest themselves as valid support for the equitable result reached by the court. Both are embodied in the opinion, but neither is fully elucidated. One is suggested by the above quotation regarding variance of the contract by conduct of the parties. This principle has been applied in a number of cases involving payment of rent in a manner or at a

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58. See authorities cited in note 57 supra.
60. LA.CIVIL CODE art. 1817 (1870): "Silence and inaction are also, under some circumstances, the means of showing an assent that creates an obligation; if, after the termination of a lease, the lessee continue in possession, and the lessor be inactive and silent, a complete mutual obligation for continuing the lease, is created by the act of occupancy of the tenant on the one side, and the inaction and silence of the lessor on the other."
61. Id. art. 1818: "Where the law does not create a legal presumption of consent from certain facts, then, as in the case of other simple presumptions, it must be left to the discretion of the judge, whether assent is to be implied from them or not."
time or place other than that specified by ordinary lease contracts or implied by law.\(^{62}\) In such instances, the courts have refused cancellation because the parties have by mutual acquiescence varied the terms of the contract, and this variance cannot be altered without mutual consent. This group of cases springs from older decisions concerning execution of insurance contracts.\(^{63}\) The insurance cases reflect reliance on decisions of the United States Supreme Court and courts of other states.\(^{64}\) Apparently, no code authority has ever been cited for this line of jurisprudence; rather it derives from the equitable principle of estoppel by conduct.\(^{65}\)

Application of the above principle to *Davis v. Laster*\(^{66}\) is difficult as the case involves substitution of one obligation for another rather than simply variance in the mode of execution of an obligation. Still, if acquiescence in a course of conduct can result in variance of the terms of a contract as to mode of performance, it is but one step beyond to hold that conduct can estop a party from insisting on cancellation for failure to perform one obligation of a contract when for nine years there has been acceptance of another act as accomplishing the same function, \textit{i.e.}, maintaining the lease in force. This is particularly true here as the lessee was paying $180.00 annually in delay rentals as opposed to $50.00 shut-in royalties, and the lessor was receiving $67.50 as opposed to $18.75 annually as owner of a three-eighths interest.

The Second Circuit was unwilling to find estoppel, as plaintiff had accepted only one rental check and the court felt that proof was lacking that he knew of the shut-in well. However, if


\(^{64}\) Phoenix Insurance Co. v. Doster, 106 U.S. 30 (1882); Insurance Co. v. Eggleston, 96 U.S. 572 (1877); Home Life Insurance Co. v. Pierce, 75 Ill. 426 (1874); Thompson v. St. Louis Mutual Life Insurance Co., 52 Mo. 469 (1873).

\(^{65}\) "Plaintiff relies on the strictly technical ground that failure to pay rent on the day it is due puts an end to the lease, and such is ordinarily the rule; but such rule cannot have application in a lease like this where the lessor has by his conduct led the tenant to believe that a delay of a few days would make no difference." Standard Brewing Co. v. Anderson, 121 La. 935, 939, 46 So. 926, 928 (1908). In Gunther v. New Orleans Cotton Exchange Mutual Aid Ass'n, 40 La. Ann. 776, 5 So. 65 (1888), cited by the court in the *Standard Brewing Co.* decision, the Supreme Court cites Bigelow, *Estoppel* (1882), as authority for its holding.

\(^{66}\) 242 La. 735, 138 So. 2d 558 (1962).
the principle of variance by acquiescence in a course of conduct is to be applied, the variance was established long before plaintiff became lessor, and he would not be entitled to alter the established course of conduct unilaterally.

Both the dissenting judge in the court of appeal and the Supreme Court point to another line of authorities in support of the position that cancellation of the lease should not be granted. These cases enunciate the principle that "in Louisiana, the right to dissolve a lease is subject to judicial control according to circumstances. . . . This Court has not, and will not, penalize a litigant lessee by dissolving a lease held technically in default when there is a bona fide defense." The idea is not completely unlike the estoppel principle discussed above and entails some of the same factors as prerequisites to its application.

The line traces back through Brewer v. Forest Gravel Co., in which the court refused cancellation of a sand and gravel lease because, though mistaken in deducting severance taxes from rent or royalty payments, the lessee had acted in good faith and with reasonable legal basis. This decision in turn relies on a case involving change in destination of leased premises by a tenant. In the latter opinion, reference is made to the writings of Troplong and Duvergier. In his treatment of leasing and hiring of things Troplong states that the right to cancellation of a lease for abuse or change in destination of the thing should be subject to the power of the judge to weigh the circumstances and give the lessor satisfaction "through gentler means" when it appears that cancellation of the lease contract would be too harsh a penalty.

68. Rudnick v. Union Producing Co., 209 La. 943, 25 So. 2d 906 (1946); Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 372 (1931). The court also cites Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So. 2d 34 (1948). Although this decision applies a principle akin to that involved in the other cases cited above, it relies for authority on decisions of other jurisdictions. Therefore, it is not technically in the line of authorities under discussion. Also cited were Atlantic Refining Co. v. Shell Oil Co., 217 La. 576, 46 So. 2d 907 (1950) and Sohio Petroleum Co. v. V.S. & T.R.R., 222 La. 383, 62 So. 2d 615 (1953). Both of these decisions seem inappropriate in the present situation.
70. 172 La. 828, 135 So. 372 (1931).
72. Id. at 730, 45 So. at 564.
73. TROPLONG, LE DROIT CIVIL, DE L'ECHANGE ET DU LOUAGE, 316 (1859): "The reader is now sufficiently enlightened on the complaints which can be made by the lessor on account of the abusive use or change in destination of the thing leased."
This idea, besides having the advantage of some basis in the civil law, is appealing in cases such as Davis v. Laster,\textsuperscript{74} for it honestly admits the existence of a breach of contract, but acknowledges that in some circumstances cancellation is unnecessarily onerous. Despite the soundness of this principle, attention should be given to its self-contained problem: what are proper circumstances? Certain broad generalizations can be made from the cases, and they are here suggested with the acknowledged danger of oversimplification.

Conduct of the lessee may be judged by two general criteria. First, there is a rigid requirement of good faith.\textsuperscript{75} Second, his conduct should be reasonable under the circumstances.\textsuperscript{76} Reasonableness may be judged by such standards as the degree of departure from the contract and the soundness of any legal position which he may have taken with regard to the meaning of the contract or legal effect of his action. When a legal dispute is involved, lack of binding precedent and action on advice of counsel might be of weight in determining reasonableness.

Similarly, the lessor's position may be measured. Of course, it should be possible to make him whole by awarding damages,\textsuperscript{77} if any have been suffered. Also, the degree of damage or inconvenience suffered should be considered.\textsuperscript{78} In Davis v. Laster,\textsuperscript{79} for example, it was clear that plaintiff had not only suffered no

\begin{quote}
"These complaints give him the action ex locato for damages and interest, or for cancellation of the lease. But judges should have the power to weigh the circumstances, to determine whether cancellation would be too rigorous a penalty, and whether there are ways of giving satisfaction to the lessor by gentler means." (Translation by the present author.)
\end{quote}

\textsuperscript{74} 242 La. 735, 138 So. 2d 558 (1962).
\textsuperscript{76} In Rudnick v. Union Producing Co., 209 La. 943, 950, 25 So. 2d 906, 908 (1946), the court stated that it was "not unreasonable for the lessee to await judicial interpretation of plaintiff's demands." In Brewer v. Forest Gravel Co., 172 La. 828, 831, 135 So. 372, 373 (1931), the court stated that "when the tenant has reasonable grounds for thinking that he does not owe all of the rent claimed by the landlord, it would be a harsh rule to turn him out because he made some error in good faith; and, as above said, courts will exercise some discretion in such cases."
\textsuperscript{77} Rudnick v. Union Producing Co., 209 La. 943, 25 So. 2d 906 (1946); Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 372 (1931); Sieward v. Denechaud, 120 La. 720, 45 So. 561 (1908). The implication that an award of damages should be adequate to make the plaintiff whole is clear in the passage of the work of TROPLONG quoted in note 73 supra.
\textsuperscript{78} "The destination in the use of this building is not changed to a prejudicial extent, in so far as plaintiff is concerned; at any rate, not to such an extent as would justify us in annulling the lease." Sieward v. Denechaud, 120 La. 720, 750, 45 So. 561, 564 (1908).
\textsuperscript{79} 242 La. 735, 138 So. 2d 558 (1962).
damage but had indeed profited. The last criterion suggested, and one strongly similar to the estoppel authorities, is the availability of opportunities for demanding adherence to the letter of the contract. This last measure has not been linked directly to the problem of default, and perhaps it should not be.

Caution should be exercised in utilizing this control over the right to obtain cancellation. It is all too obvious that it would be dangerous to allow a party to escape the penalty of forfeiture in every instance in which he fails to pay royalties or disagrees with another as to the meaning of their agreement or claims a split of authority as to the legal effect thereof. Such a policy would be unjust and impossible of proper administration. The court has, however, stated that the circumstances warranting application of this principle must appear of record with the greatest and most convincing clarity.

The Davis decision's adherence to the principle that considerations of equity can prevent forfeiture is of more than passing significance to the evolving doctrine under Melancon v. Texas Co. and Bollinger v. Texas Co. concerning cancellation for nonpayment of royalties. Continued acceptance of delay rentals in the Davis case and absence of evidence of refusal to pay upon request were viewed as distinguishing factors. This portion of the decision seems to make some use of the criteria indicated above and may point the way for drawing some needed lines in the royalty cases. There are elements of willfulness in the conduct of the lessees in Melancon and Bollinger which should be carefully distinguished from situations in which there is reasonable, good faith error or a soundly based but ultimately incorrect legal position.

There is also a moral for the lease draftsman in the Davis decisions. An able practitioner has suggested that there might be a basis for a different interpretation if the shut-in payments were designated "shut-in rentals" and defined in the paragraph

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80. Certainly the period of nine years during which delay rentals were paid in Davis v. Laster, 242 La. 735, 138 So. 2d 558 (1962) offered ample opportunity for a demand to pay shut-in royalties rather than delay rentals. This criterion is not rigid and need not always be present. No mention of it was made and indeed it was lacking in both Rudnick v. Union Producing Co., 209 La. 943, 25 So. 2d 906 (1946) and Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 372 (1931), in both of which it was the reasonableness of lessee's legal position which resulted in refusal of cancellation.

81. 230 La. 593, 89 So. 2d 135 (1956).
82. 232 La. 637, 95 So. 2d 132 (1957).
relating to delay rentals. An agreement so drafted presents interesting stuff for conjecture as to whether the court will give some functional, conceptual definition to the shut-in payment or leave its definition and application entirely within the discretion of the contracting parties.

The third point of note in this decision is the lessor's contention that the well in question was not one "producing gas only" as contemplated by the shut-in royalty provision. On the basis of evidence that some condensate had been produced and sold, it was urged that the shut-in provision was inapplicable. Whether this claim of forfeiture was based on failure to pay royalties on the condensate or failure to have a producing well at the end of the primary term is unclear. Plaintiff's pleadings indicate he had the latter in mind, but the court seems to have acted on the former basis. In any event, the court refused to go behind the Commissioner of Conservation's designation as a gas well in the absence of evidence that the condensate was produced in paying quantities.

Of course, it is difficult to see how, in the absence of a recycling operation, condensate could have been produced in significant quantities without production of the gas as well. However, assuming, as the court did, that there was some production, the conclusion reached is sound. If production is utilized to maintain a lease, it must be in paying quantities. If production of condensate was sufficient to maintain the lease, the lessee was under obligation to pay royalties. If none were paid for a period of nine years running beyond the primary term, there would be a strong basis for cancellation. If, however, the production was not in paying quantities, payment of production royalties would not maintain the lease. If a gas well capable of production in paying quantities produced a limited but not paying amount of condensate, as most do, to say that

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84. Article 21 of plaintiff's petition states that the lease should be cancelled "because of the failure of defendants to produce oil, gas and other minerals in merchantible [sic] quantities." Record, page 9, Davis v. Laster, 130 So. 2d 479 (La. App. 2d Cir. 1961).
this is not a "gas well" would prohibit the lessee from maintaining the lease in force beyond the primary term by any means when he has a potentially paying gas well on hand and a sizable investment in the lease.\textsuperscript{88} To deny applicability of the shut-in gas royalty clause would be basically unsound policy resulting in its virtual emasculation.

MANDAMUS TO COMPEL PAYMENT OF ROYALTIES OR OTHER SUMS DUE

In \textit{State ex rel. Superior Oil Co. v. Texas Gas Transmission Corp.},\textsuperscript{89} the Louisiana Supreme Court faced the problem of construing the Louisiana statutes forbidding withholding payment of rentals, royalties, or other sums due to a party holding an interest in minerals or under a lease from which minerals are purchased above ground.\textsuperscript{90} Defendant company was the purchaser under a gas purchase contract of all of the production from a well located on a forced unit including land under lease by plaintiff. The purchase contract had been confected prior to inclusion of the plaintiff's lease acreage in the unit by the Commissioner of Conservation. Proper filing of the contract with the Federal Power Commission had been completed, and the sale had been permanently certificated. The Commissioner's order fixed the share of production to which plaintiff was entitled. Plaintiff sought by this action to compel payment by the gas purchaser of the value of its share of the unit production based upon the prices fixed by the gas purchase contract. In filing the suit and throughout its litigation, plaintiff stated that it accepted the price fixed by the contract filed with the Federal Power Commission.

Citing past decisions establishing the principle that to secure a writ of mandamus ordering payment of royalties or other sums due the amount must be definite and certain,\textsuperscript{91} the Louisiana Supreme Court sustained an exception of no cause of action filed by defendant and held that the amount due was not certain and therefore the remedy of mandamus under the

\textsuperscript{88} "A holding that the constructive production provision applies only to wells producing no liquid condensate would render that provision almost nugatory." \textit{Vernon v. Union Oil Co.}, 270 F.2d 441, 446 (5th Cir. 1959).
\textsuperscript{89} \textit{242 La. 315, 136 So. 2d 55 (1961)}.
\textsuperscript{90} \textit{LA. R.S. 30:105-107 (1950)}.
\textsuperscript{91} \textit{State ex rel. Brown v. United Gas Public Service Co., 197 La. 616, 2 So. 2d 41 (1941)}; \textit{State ex rel. Boykin v. Hope Producing Co., 167 So. 506 (La. App. 2d Cir. 1936)}. 
statutes was not available. Chief Justice Fournet and Associate Justice McCaleb dissented on the ground that although the exact figure of plaintiff's claim was not predetermined, it could be fixed by simple, mathematical calculation, utilizing the just and equitable share of plaintiff, the amount of total production, and the contract price.

The prior decisions relied upon are quite sound in that the writ of mandamus should not be allowed where a party cannot show a liquidated, or readily liquidated, claim. Both of these decisions involved claims for additional royalties over and above the amount stated in the lease on the ground that the market value of the gas was greater than the amount stated in the lease contract as the basis for computation of production royalties.

Two inquiries are necessary to a consideration of the court's recent decision. First, what is a fixed and certain amount? Second, does the claim here in question fit the general definition? One of the dissenting Justices equated the requirement of a fixed and certain claim with a "liquidated" claim. Presumably this is what is contemplated by the phrase "definite and certain." There is strong basis in the law of this and other jurisdictions for the position that to be liquidated a claim need not be predetermined in amount, particularly if it can be fixed by simple mathematical computation. Apparently the Supreme

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93. "The Court of Appeal in the Boykin case, supra, observed that mandamus is an extraordinary remedy, that resort to it to compel or enforce unliquidated obligations was never intended or admitted..." (Emphasis added.) State ex rel. Superior Oil Co. v. Texas Gas Transmission Corp., 242 La. 315, 324, 136 So. 2d 55, 58 (1962).
94. The jurisprudence in Louisiana concerning definition of a liquidated claim relates almost wholly to the right to compensation granted by the Louisiana Civil Code. Under Article 2209 of the Civil Code the debts in question must be equally liquidated. The leading case considering the problem of what constitutes a liquidated claim for this purpose states that the judge should, before allowing compensation, "examine whether the party offering it, can establish it immediately, or at the latest, within ten days." Caldwell v. Davis, 2 Mart.(N.S.) 135, 137-38 (La. 1824). See also Saunier v. Saunier, 217 La. 607, 47 So. 2d 19 (1950); Havard v. Stone, 5 Mart.(N.S.) 126 (La. 1826); Carter v. Morse, 8 Mart.(O.S.) 398 (La. 1820); Olinde Hardware & Supply Co. v. Ramsey, 98 So. 2d 835 (La. App. 1st Cir. 1957). In Saunier, supra, and Olinde, supra, reference is made to Carter v. Morse, supra, at 399-400, which states "a debt, says Pothier, is liquidated when it appears that something is due, and how much. . . . [A] contested debt, therefore, is not a liquidated one; and so cannot be set off, unless he who claims to set it off, has the proof in his hands, and be ready to prove it promptly and summarily." For authorities in other jurisdictions holding that a claim is liquidated when it may be calculated according to established market values, or rule or criterion established by the parties or fixed by law, or from data given
Court was unwilling to regard the present claim as capable of being fixed by mathematical calculation.

Obviously, to be subject to determination by simple calculation a sum must be based on known numerical factors. Involved here are (1) the amount of production for the unit, (2) the share of unit production to which plaintiff's lease acreage was entitled, (3) the price. The existence of the first two of these factors was apparently unquestioned; it was lack of the third which caused the court to deny plaintiff's claim.

It must be admitted that in the earlier decisions the criteria for computation of the payment due were the same, but the definite character of the third factor has been radically affected by the passage and evolution of the Natural Gas Act. One of the cases relied on was decided in 1936, prior to passage of this act, and the other in 1941, thirteen years prior to the decision of the United States Supreme Court in Phillips Petroleum Co. v. Wisconsin, requiring the Federal Power Commission to regulate well-head prices of natural gas sold in interstate commerce.

In the case in question, the regulations of the Federal Power Commission prohibited plaintiff from filing rate schedules as it was a non-signatory co-owner of the gas being taken under the contract already filed with and permanently certificated by the Commission. The federal regulatory scheme by which the rates for well-head sales of gas for use in interstate commerce are fixed can reasonably be regarded as establishing a known and definite price for the gas purchased by defendant, a price which the parties could not vary except by administrative procedures looking toward a future increase. Therefore, the third factor of price necessary to a mathematical computation of the amount of the debt to plaintiff in this instance is present, whereas the same regulatory scheme fixing rates for well-head sales was not present in the two earlier cases cited. It is suggested that if presented with the same situation in the future, the court would be well within the bounds of propriety if it adopted an opinion opposite to that rendered in this case.

Other interesting legal problems as to the relationship between plaintiff, the unit operator, and the gas purchaser were

from which damages can be calculated, see 80 C.J.S. *Set-off and Counter Claim* § 43 (1953).


97. 18 C.F.R. § 154.9(d) (1961).
raised on the merits and disposed of in the trial court. They are not discussed here as the court's decision rested on the exception and no issues on the merits were resolved.

OTHER DECISIONS

Several other noteworthy decisions were rendered by the Louisiana courts during the 1961-62 term. However, they are not discussed in this symposium because they either have been or will be the subjects of treatment in other issues of this Review. In addition to Davis v. Laster two others of the more important of these cases, Odom v. Union Producing Co. and Pierce v. Atlantic Refining Co. will be treated in future issues.

EXPROPRIATION

Alvin B. Rubin *

In 1954, pursuant to authority granted by a 1948 constitutional amendment, the legislature authorized the Department of Highways to file a “declaration of taking” and thus to take possession and title of property for highway purposes prior to a final judgment fixing value in expropriation proceedings.  

98. Obviously this commentary has dealt only with the problem whether there was a fixed and certain sum involved. If the court had decided that a liquidated claim was presented, rather complex problems as to the legal relationship arising from the appointment of a unit operator by the Commissioner of Conservation would have been presented for decision. On the merits, defendant was contending that it had paid the unit operator for all of the production from the well and was therefore freed of any obligation to plaintiff. There is some question whether defendant could pay the unit operator appointed by a conservation order and thus relieve itself of any obligation to pay plaintiff for its just and equitable share of production directly.


100. Melancon v. Cheramie, supra note 99, is considered in the student Comment, 23 LA. L. REV. 106, 111-16 (1962), and Namie v. Namie, supra note 98, is considered in the student Note, 22 LA. L. REV. 867 (1962).

101. 242 La. 735, 138 So. 2d 558 (1962).

102. 243 La. 48, 141 So. 2d 649 (1962).

103. 140 So. 2d 19 (La. App. 3d Cir. 1962).

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1. LA. R.S. 48:441-460 (Supp. 1962). This was pursuant to express constitutional authority. LA. CONST. art. VI, § 19.1, as amended in 1948.