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PUBLIC POLICY AND TERMINABILITY OF MINERAL RIGHTS IN LOUISIANA*

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Louisiana’s mineral property system is distinctive principally by reason of its prohibition of alienations of basic mineral rights in perpetuity. The mineral servitude, ownership of which grants the rights to explore and develop property and to retain all or a stated share of production, terminates ten years from the date of its creation by the running of liberative prescription of nonuse unless prescription is interrupted by use or acknowledgment or is suspended in some manner, such as the presence of an obstacle to use of the premises. The mineral royalty, a passive right to share in production, also terminates ten years from the date of its creation unless prescription is interrupted by production or

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*This manuscript is the substance of an address delivered by the author to the 1966 Annual Meeting of the Louisiana State Law Institute, Lafayette, Louisiana.
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1. E.g., Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922).
2. E.g., White v. Frank B. Treat & Son, Inc., 230 La. 1017, 89 So. 2d 883 (1956); Mays v. Hansbro, 222 La. 557, 64 So. 2d 232 (1953).
4. LA. CIVIL CODE art. 792 (1870). Although the facts of McMurrey v. Grey, 216 La. 904, 45 So. 2d 73 (1950) are clearly illustrative of an obstacle imposed by the landowner preventing the use of a mineral servitude, the specific question of law regarding whether the landowner's conduct constituted an obstacle was not raised. In that instance, the landowner had locked a gate, preventing the servitude owner's lessee from obtaining access to the servitude premises. In Boddie v. Drewett, 229 La. 1017, 87 So. 2d 516 (1956), it was held that a unitization order establishing a unit including the entirety of a servitude tract within the non-drilling area of the unit constituted an obstacle to the use of the servitude. However, the Louisiana Supreme Court has recently issued an opinion in Mire v. Hawkins (No. 47,843, decided March 28, 1966), in which it overrules the obstacle doctrine established by Boddie v. Drewett. The status of this ruling is still in question at the date of writing this piece. Undoubtedly, the matter will be considered on rehearing as it is of major importance to the future of the Louisiana property system.
6. Humble Oil & Refining Co. v. Guillory, 212 La. 846, 33 So. 2d 182 (1947). Compare Union Sulphur Co. v. Andrau, 217 La. 667, 670-71, 47 So. 2d 38, 40-41 (1950), in which there was some production in conjunction with testing of the
other means or is suspended. It is true that the Louisiana mineral lease is not presently held to be subject to the ordinary rules of prescription applicable to mineral servitudes. Nevertheless, it is by nature a terminable interest. It must have a primary term and generally it terminates unless the lessee within the stated primary term, which customarily does not run beyond ten years, makes some use of the property by conducting drilling operations or achieving production in accordance with the agreement between the parties. Further, it has not been established that, though free from the normal rules of prescription, the minor

well prior to the prescriptive date of the royalty interest. The court, in considering the effect of such production as a part of testing, made the following statement: "Therefore, since the sale or reservation of a royalty by a landowner is the mere sale or reservation of a right to share in the production of minerals if and when produced, and under the jurisprudence of this state if the event does not happen within ten years the right to share in such production is lost, and drilling for such production does not interrupt the prescription then accruing, of necessity the incidents to the drilling operations that show indications of the presence of oil, gas, or other minerals cannot have the effect of interrupting the running of such prescription. . . ."

7. The minority suspension of prescription which formerly existed in favor of minor owners of royalty interests is no longer applicable. LA. R.S. 9:5805 (1950). The suspension of prescription in favor of major co-owners of a mineral servitude owning in indivision with a minor was never applicable to mineral royalty rights. St. Martin Land Co. v. Pinckney, 212 La. 605, 33 So. 2d 169 (1947). As the royalty interest is not a servitude, the obstacle concept articulated in article 792 of the Civil Code is apparently not applicable. However, this does not mean that the concept of suspension is necessarily inapplicable to the royalty right. For example, it has been held that if a royalty tract is included in a unit on which there is located a well capable of producing in paying quantities, prescription will not run against the royalty interest. Delatte v. Woods, 252 La. 341, 94 So. 2d 281 (1957); LeBlanc v. Haynesville Mercantile Co., 230 La. 299, 88 So. 2d 377 (1956); Lee v. Goodwin, 174 So. 2d 651 (La. App. 2d Cir. 1965), writs denied, 238 La. 149, 177 So. 2d 118. There is no clear holding as to the nature of this effect on prescription, although the court in Delatte v. Woods does describe it as an interruption. However, it appears to the author to be more in the nature of a suspension of prescription rather than an interruption.


10. In north Louisiana, the primary term of mineral leases is commonly ten years. In south Louisiana, where the industry has been more active and dynamic in recent years, terms are customarily shorter, running most often for three or five years. Obviously, variations of these customary norms are found, but the maximum is almost universally ten years. If there are leases being executed for periods in excess of ten years, there has certainly been no litigation regarding them in recent years.

11. Obviously, under the normal mineral lease, the lessee can allow it to expire at the end of the primary term without any operations whatsoever. However, as a basic rule, there must be operations or production to preserve the lease beyond the primary term. In addition, the standard lease provides for maintenance of the lease after discovery and shutting-in of a well capable of producing gas in paying quantities by the making of some form of shut-in payments. These are frequently regarded as constructive production by the parties. However, some of the more recent forms extant in south Louisiana equate the shut-in payments with rentals and permit extensions of the primary term for stated periods of time.
eral lease is entirely free of limitations on the duration of the primary term which might be imposed solely for reasons of public policy.\textsuperscript{12}

The Louisiana State Law Institute is presently in the course of conducting a study looking toward the reduction of Louisiana mineral law to some legislative form. The author serves as Reporter for the project. One of the determinations made early in the course of this study was that the three basic mineral interests which characterize the present system — the mineral servitude, the mineral royalty, and the mineral lease — should be retained. Retention of these basic interests, of course, means that the mineral property system will continue to be characterized by a basic group of terminable interests in minerals. Obviously, this determination is strongly motivated by pragmatic considerations arising from contemplation of both the havoc which would be wrought by attempting radical changes in the property system or its descriptive terminology and the extreme risk to the hope of success of any such undertaking posed by the opposition which would undoubtedly arise from all quarters if radical change in the system were undertaken.

However compelling these practical considerations may be, they do not form an adequate policy base for a mineral property system. It is, therefore, the intent of this manuscript to expose some possible elements of public policy relevant to the feature of terminability which should be considered in shaping legislation for the clarification of Louisiana mineral law and, perhaps, in the judicial administration of such legislation. The considerations discussed do not necessarily constitute an exclusive list, and there will undoubtedly be some disagreement with the propositions put forward. However, it is hoped that this piece can serve to reveal some of the author's motivations in approaching his task as Reporter for the Law Institute project and that it will stimulate beneficial thought and discussion of questions of essential importance to the life of this state.

\textsuperscript{12} The requirement of a primary term imposed in Bristo v. Christine Oil & Gas Co., 139 La. 312, 71 So. 521 (1916) was frankly imposed for reasons of public policy. It does not appear impossible that further limitation on the primary term of the lease might be imposed for reasons of policy. It should be noted that in Succession of Simms, 175 So. 2d 113 (La. App. 4th Cir. 1965), overriding royalty interests carved out of a mineral lease were held to be incorporeal immoveables for purposes of descent and distribution. This case is still pending before the Supreme Court. It is conceivable that when finally decided, the case may have basic impact on the conceptual nature of the mineral lease.
I. POLICY FACTORS IN THE PROPERTY SYSTEM

A. Physical Characteristics of Oil and Gas

At least one of the originally articulated reasons for the servitude analogy which gave birth to the system of terminable interests was that oil and gas migrate from place to place beneath the surface.\(^1\) Thus, it was reasoned, they are insusceptible of ownership in place.\(^14\) As these substances were deemed insusceptible of ownership in place, it was further deduced that the only right regarding minerals inherent in title to land was that of exploring for oil and gas and reducing them to possession and ownership.\(^15\) The ultimate conclusion was that as this was the only right of the landowner, it was the only attribute of ownership which he might convey to another. This right, when alienated by the landowner, was likened to a servitude\(^16\) and was held subject to liberative prescription.\(^17\)

There are several reasons why this course of reasoning is inadequate as a basis for the mineral property system. First, the concept that oil and gas are migratory is sound only to a very limited degree. It is true that over the course of geologic ages there was primary migration of oil in minute particles from source beds into permeable, porous reservoir rocks.\(^18\) It is also true that there was secondary migration within the reservoir bed to a point of entrapment.\(^19\) However, as a general rule oil and gas, having reached a trap, are relatively static until the reservoir is tapped.\(^20\) Thus, contrary to early judicial thought, oil is not tapped from a moving or percolating subsurface stream. For this reason, the concept of free migration or self-transmission can be considered erroneous insofar as it forms the basic premise for the nonownership theory and the servitude analogy.

\(^{13}\) Frost-Johnson Lumber Co. v. Salling's Heirs. 150 La. 756, 767-69, 858-63, 91 So. 287, 211-12, 243-45 (1922).
\(^{14}\) Ibid.
\(^{15}\) Id. at 780-81, 863, 91 So. at 216, 245.
\(^{16}\) Id. at 780, 863, 91 So. at 216, 245.
\(^{17}\) Ibid.
\(^{18}\) TIRATSOO, PETROLEUM GEOLOGY 45 (1952); RUSSELL, PRINCIPLES OF PETROLEUM GEOLOGY, 192 (1960).
\(^{19}\) TIRATSOO, PETROLEUM GEOLOGY 45 (1952); RUSSELL, PRINCIPLES OF PETROLEUM GEOLOGY, 194 (1960).
\(^{20}\) TIRATSOO, PETROLEUM GEOLOGY Ch. 4 (1952).
\(^{21}\) E.g., Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 287 (1922); Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919).
It is acknowledged that subsurface movement of oil and gas is induced by drilling into and producing from a reservoir. Perhaps this characteristic does afford some support for asserting that oil and gas in place are not susceptible of ownership. Yet, it may be observed that the Louisiana Civil Code clearly contemplates that certain inherently migratory things may be owned by accession but that title to such things may be lost if they migrate from the owner's property. Further, it may be observed that other jurisdictions which have adopted an ownership theory accommodate the characteristic of movement caused by tapping of a reservoir by means of the rule of capture, which permits a landowner to assert title to all of the oil and gas which may be produced through a well located and bottomed on his own property even though some of it may be captured by drainage from beneath a neighboring tract of land. The ownership-rule of capture combination is functionally analogous to the

22. In one degree or another, the driving forces which cause subsurface movement are said to include the following: (1) the expansion, as a result of pressure reduction, either of gas which has come out of solution from the reservoir oil or of free gas initially present in the reservoir; (2) edge or bottom water encroachment, also a result of pressure; (3) gravitational force; and (4) expansion of the reservoir oil itself as pressure is released. *Oil and Gas Production* 36 (compiled by the Engineering Committee, Interstate Oil Compact Commission, 1951).

23. *La. Civil Code* art. 519 (1870): “Pigeons, bees or fish, which go from one pigeon house, hive or fishpond, into another pigeon house, hive or fishpond, belong to the owner of those things: Provided such pigeons, bees or fish have not been attracted thither by fraud or artifice.” The principle of accession embodied in this article was argued by Justice Provosty in *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 803, 91 So. 207, 224 (1922). Of course, a logical objection can be raised to any analogy to this article as a basis for establishing the rule of capture in conjunction with a theory of ownership by accession. The article states that the ownership of the creatures named is in the owner of the pigeon house, hive or fishpond (i.e., the owner of the land) so long as the creatures have not been enticed thither by artifice. The drilling of a well and use of a pumping device might be described as artifice. This was pointed out by Justice O'Neill in his dissent on first rehearing in *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 846, 91 So. 207, 239 (1922). However, no analogy which the court could have made would have been perfect, and it seems that the basic principle enunciated in the article is that due to the peculiar nature of certain things deemed to be owned by accession by the owner of land, title to them can be lost by movement. As adapted to the peculiarities of the petroleum industry, this principle could have been stated to the effect that oil and gas are subject to ownership by accession, but title to them may be lost upon movement from beneath the property of one landowner to that of another, whether by any natural movement or by artificially induced movement, so long as such artificially induced movement results from a lawful exercise of the right to extract minerals from the earth.


26. In addition to the authorities cited in note 25 see, *e.g.*, *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923).
Louisiana Civil Code concept of ownership by accession and loss of ownership by migration.

Perhaps the most telling blow which may be struck at reliance on physical characteristics of oil and gas as a basis for a system of terminable mineral property interests is that if the "migratory" character of such substances were the only basis for such a system, there would appear to be no reason why solid minerals, being static in their natural state, should not be susceptible of both ownership and conveyance in place. Yet it appears with reasonable clarity that the contrary conclusion has been reached by Louisiana courts and that the servitude analogy is applicable to attempted conveyances of solid minerals in place. 27

Two early decisions expressly avoid the question of ownership versus nonownership of solid minerals and the applicability of the servitude analogy by construing particular conveyances as having been intended by the parties to create no more than a servitude in the first instance. 28 However, in Lee v. Giauque 29 and Wemple v. Nabors Oil & Gas Co., 30 the Louisiana Supreme Court considered conveyances susceptible to construction as grants of solid minerals in place in addition to oil and gas. Justice Overton dissented from both of these opinions insofar as they applied to solid minerals. 31 A conveyance purporting to divide the subsurface by horizontal planes and to sell certain portions of the subsurface by description according to such planes was subsequently considered in Iberville Land Co. v. Texas Co. 32 In reliance on Wemple v. Nabors Oil Co., 33 the court of appeal rejected the contention that the deed created ownership within the specified planes separate from ownership of the surface.

Considering the servitude analogy as originally applied to oil and gas it is possible to reason that prescriptibility of min-

29. 154 La. 491, 97 So. 669 (1923).
30. 154 La. 483, 97 So. 666 (1923).
32. 14 La. App. 221, 128 So. 304 (1st Cir. 1930).
33. 154 La. 483, 97 So. 666 (1923).
eral rights was a byproduct. One might infer that the *raison d'être* for the servitude analogy was the misconception regarding migration of oil and gas which resulted in the conclusion that they were insusceptible of ownership. But the application of the servitude analogy to solid minerals strongly suggests that there are other reasons for it, that prescriptibility is an end in itself rather than a byproduct of the nonownership theory. In turn this suggests that the question of ownership versus nonownership is really irrelevant to the functioning of Louisiana's mineral property system.

**B. Historic Policy of the Civil Law**

A second asserted foundation for the servitude analogy which spawned the Louisiana system of terminable mineral interests is that the historic policy of the civil law recognizes only two estates in land—ownership and servitude. For example, the following is found in the opinion rendered in *Wemple v. Nabors Oil & Gas Co.*:

> "On the contrary, our civil law, coming to us through Roman, Spanish and French sources, recognizes but two kinds of estates in lands, the one corporeal and termed ownership, being the dominion over the soil and all that lies directly above and below it . . .; and the other incorporeal and termed servitude (including usufruct) being a charge imposed upon land for the utility of other lands or persons . . . .

> "And accordingly this court has always resisted every attempt to introduce into this state any system of land tenures and estates in land inconsistent with these simple but fundamental principles."

It is worth observation at this point that the *Wemple* decision is one of those in which the Supreme Court applied the servitude analogy to a conveyance affecting hard minerals as well as oil and gas. This strongly suggests that the court itself recognized the weakness of relying solely on the physical nature of certain minerals as the basis for the servitude analogy and that it was groping for some broader policy base permitting application of the analogy to all types of minerals. The policy base advanced was the historic civilian system of land tenures. One may question this view of history.

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35. *Id.* at 486-87, 97 So. at 667.
Research into the briefs filed in *Frost-Johnson Lumber Co. v. Salling's Heirs* reveals that those allied in interest with the Sallings responded to the argument regarding historic policy by citing copious authorities among the civilian commentators to demonstrate that the subsurface of land could indeed be severed and owned separately from the surface. It appears that the point was well taken, but the court was not persuaded.

It may be further observed that our own Civil Code appears to contemplate the possibility of separate ownership of the subsurface. In article 506 it is provided that "all the constructions, plantations and works, made on or within the soil, are supposed to be done by the owner, and at his expense, and to belong to

36. 150 La. 756, 91 So. 207 (1922).
37. Supplemental brief for defendants-appellees (by Foster, Looney, and Wilkinson) 9, 20-21; original brief of defendants-appellees on second rehearing (by Foster, Looney and Wilkinson) 19-24; brief of Hudson, Potts, Bernstein & Sholars, *amicus curiae*, 33-39. Among the authorities cited in these briefs are found references to Demolombe, Baudry-Lacantinerie et Chaveau, Laurent, and Aubry et Rau.
38. For example, one may consider the following passages from 9 DEMOLOMBE, *TREITÉ DE LA DISTINCTION DES BIENS* (1874-82): "162. Without doubt the owner of the soil may alienate part of the soil, a part of the subsurface or part of the superficies; he can alienate, for example, the mine itself, or the quarry, or the fountain, or the cave, or the house, or even only one floor of his house or even only trees.

   "And in these different cases, there is no doubt that we must consider as immovable the right of the acquirer, who has, in effect, himself become the owner of a part of the immovable, considered in its state as an immovable, and is to be possessed and exploited as an immovable.

   "483 Quater. The surface right is, therefore, a true right of ownership, that is a corporeal and physical thing, immovable by nature, according to article 518, and not merely an incorporeal thing, a thing immovable according to the object to which it applies, under article 528; a thing very certainly susceptible of being alienated, mortgaged, burdened with a usufruct or servitude, seized as an immovable, of giving rise to possessory actions and of being acquired by prescription; a thing subject also to taxes on the transfer of immovable property.

   "484. It is necessary to apply to subterraneous property that which we have just said concerning superficies.

   "654. And today it is certain, as we have remarked before (supra n° 644), that the ownership of the soil, properly speaking, may be detached either from the ownership of the superficies, from the *dessus* (surface), or from the ownership of the *dessous* (the subsurface).

   "655. Article 553 [which corresponds to La. Civil Code art. 506] expressly declares that a party may acquire, by prescription, the ownership, not only of a superficial structure, but also of a subterraneous piece of ground under a building or under the soil of another.

   "It is necessary to say, however, that prescription in the latter case would, in general, be very difficult and unusual, for it is necessary that the possession, to have the effect of prescription, must be public, and this condition, so essential, would be met in fact with great difficulty, in possession of a subterraneous part of the soil.

   "But, nevertheless, this could very well be, in this case, a public possession, as, for instance, it would be shown by an opening in the surface of the soil itself, which the proprietor could not very well ignore."
him, unless the contrary may be proved *without prejudice to the rights of third persons, who have acquired or may acquire by prescription the property of a subterraneous piece of ground under the building of another or of any part of the building.*" If, as indicated by the article, a "subterraneous piece of ground" is subject to acquisition by prescription, there appears no sound reason why it should not be subject to alienation in an ordinary conveyance and thus to ownership separate from the surface. Again, however, argument based on this article was unpersuasive in the *Frost-Johnson* case.  

The point to be made here is that there really does not appear to be any historic policy of the civil law prohibiting severance of the subsurface from the surface. True enough, the traditional civilian system of land tenures recognizes ownership and servitude only. But in considering those things which may be the subject of private ownership, it is apparently recognized elsewhere that the subsurface of land is a thing which may be bought and sold separately from the surface. Thus, the structure of the system of land tenures is not affected. It is merely recognized that the subsurface is a thing subject to ownership by itself.

It is suggested, therefore, that the argument regarding the historic policy of the civil law is not well founded. The argument has undeniably served as a convenient rationale for the servitude analogy, particularly for its application to solid minerals, but it has little foundation in fact. Even if the argument were historically correct, there is question whether it should serve as a rationale for new legislation. For history to command obedience to customs of antiquity, there should be continuing validity to the basis for the custom. Thus, one must look elsewhere to discover why the feature of terminability is worthy of retention.

C. Retention of Control of Interests in the Land in the Hands of the Surface Owner

There are some scholars and practitioners who feel that it is wise policy to maintain control of all interests in land as closely in the hands of the surface owner as possible. This objective is

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automatically achieved by adoption of a system which characterizes mineral rights as prescriptible interests in land. The only present inconsistency lies in those decisions which place the mineral lease outside the prescriptive system. However, despite these decisions, a rather high degree of control remains with the landowner who executes a mineral lease because of built-in competitive factors in the mining industries presently located in Louisiana. As a normal rule, the mineral lessee in Louisiana today does not wish to become bound for an extended period of time, nor does the lessor wish to encumber his property with a lease for long periods absent exploration or production. Thus, custom presently achieves the objective of control in the case of mineral leases.

Even though this customary deterrent to alienations of economic interests and development rights for excessive periods of time exists and operates effectively at present, it may, nevertheless, be desirable to consider the idea of imposing some legal limit which would effectively achieve the objective of limiting the power of alienation without importing into the law governing mineral leases all of the complex, and in some instances undesirable (if applied to leases), rules of prescription applicable to mineral servitudes and mineral royalties. For example, one possible means for so doing would be to impose a legal limit on the length of the primary term of mineral leases. This would prohibit the execution of mineral leases with extended terms without burdening the mineral lease with the intricate rules of prescription applicable to other interests.

All things considered, the concept of retention of control of interests in land in the surface owner does not, of itself, seem to be a valid policy factor. It is a result of the present system, but, like the system itself, it seems to have no inherent validity. Why should dismemberment of title be limited? This is the real question. The ensuing discussion considers several possible answers.

D. Encouragement of Commercial Transactions in Mineral Rights

One possible reason for seeking to limit the power of the landowner to alienate economic interests and development rights

in any available combination is the possibility that such a policy may encourage dealing in mineral interests, thus stimulating commerce with some resultant benefits to the general economy. If at a given time in history a landowner alienates mineral rights or executes a lease in the heat of local play, income is normally generated. If his alienation were permanent, a rebirth of interest in the locality would not bring fresh income to the landowner. Certainly this is true when one considers mineral interests other than leases. Insofar as lease activity is concerned, the competitive nature of the oil and gas industry will in itself have this regenerative effect on income production and local stimulations of commerce. Of course, the same may not be true of other mining industries in which interest in development of particular areas is not characterized by the ebb and flow so typical of the petroleum industry. Thus, some legal limitation of the duration of mineral leases may be desirable to place leases on basically the same footing as other interests.

As a practical matter it seems that any stimulus to commercial transactions in minerals now lies chiefly in that afforded by prohibiting perpetual alienations of mineral servitude and royalty interests as distinguished from leases. Local interest probably stimulates some market in mineral interests other than leases, but it is hard to ascertain the magnitude of the stimulus. Actually it seems that the tide of development of any mining industry brings income with it in the form of mineral transactions. Perhaps the noteworthy characteristic of Louisiana's property system is that it determines who will receive this income differently from those systems permitting perpetual alienations. This consequence of the system is discussed more fully below.

It is therefore difficult to discern whether the notion of encouraging commerce in mineral rights has played a major role in the evolution of the present system. It does not appear to be more than a byproduct of the basic choice to subject mineral rights to prescription. In any case, its effect on commerce in mineral rights is somewhat questionable.

E. Encouragement of Development

Another possible factor weighing in favor of limiting the right of the landowner to make a perpetual alienation, or even a long term alienation, of his economic interest in mineral trans-
actions or production and his development rights is the concept that limiting the capacity to alienate will encourage development by forcing those who may purchase such rights to use them or suffer the penalty of losing them. This consideration was, undoubtedly, one which affected the collective mind of the judiciary in the early development of Louisiana’s mineral property system. Based upon complete search of the records of several of the early cases, it is suggested that whether the servitude analogy actually had the effect of encouraging development, the Louisiana Supreme Court at least thought that its choice would have such an encouraging effect.

Whether the Louisiana property system has played any significant part in actually encouraging development is questionable. Obviously, development has occurred. But the fact of major development in other oil producing states permitting perpetual or long term alienations suggests that the presence

41. This development psychology is somewhat difficult to document. However, there are fragmentary bits of evidence which support this assertion. For example, in the original brief filed on behalf of McCoy and Moss, _amicus curiae_, in Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co., and Frost-Johnson Lumber Co. v. Salling’s Heirs, one finds the following observation on pages 24 and 25: “We note the expression by a member of the court, during the course of the argument, that to hold it possible to create a separate estate by dividing real estate with horizontal lines, would have the effect of taking it out of commerce, which is contrary to public policy.”

The following passage is found in the brief of Spencer, Gidiere, Phelps & Dunbar, _amicus curiae_, in Frost-Johnson Lumber Co. v. Salling’s Heirs, at page 11: “The recognition of such a doctrine [separate mineral estates] would clearly obstruct the development of our oil fields. It would put a large portion of the property in these oil fields out of commerce. It would breed litigation and reward the indolent and unprogressive.” At page 14 is found the following: “This doctrine of servitude quiets titles, discourages litigation, encourages development of the natural resources and rewards industry.”

In his dissenting opinion on first rehearing in _Frost-Johnson Lumber Co. v. Sallings’ Heirs_, Justice O’Neill stated: “I cannot see how it imposes any hardship upon the owner of a right to extract the mineral oil or gas from the land of another to require that he shall exercise his right within ten years _or allow it to go back into commerce_. That has been the law of this state from the beginning of her history.” 150 La. at 848, 91 So. at 239 (1922).

In _Bristo v. Christine Oil & Gas Co._, Justice O’Neill declared a mineral lease without a term to be a nullity. In his opinion is found the following remark: “To recognize that the defendant has the right, without any obligation, to hold the plaintiff’s land under a perpetual lease or option, would take the property out of commerce, and would be violative of the doctrine of ownership, defined in the second title of the second book of the Civil Code.” 139 La. at 315, 71 So. at 522.

42. See the authorities cited in note 41 _supra_.

43. For examples, see the authorities cited in note 25 _supra_.

44. Some states characterize the right to oil and gas as an incorporeal hereditament, such as a _profit à prendre_, which is conceptually akin to the Louisiana mineral servitude. _E.g._, Phillips v. Springfield Crude Oil Co., 76 Kan. 783, 92 Pac. 1119 (1907); Kolachny v. Galbreath, 26 Okla. 772, 110 Pac. 902, 38 L.R.A.
of mineral resources rather than a mineral property system limiting the right of alienation is the strongest factor in securing development. It may be further observed that the owner of a mineral servitude or royalty interest is, as a practical matter, in the poorest of positions actively to procure development today. In the vast majority of cases the owners of such interests are not operators and must wait for the tide of development to come to them. As observed in connection with the concept of encouraging mineral transactions, the major consequence of the Louisiana system seems not to be that it encourages development but that it determines, to a large degree, who shares in development income when resources are exploited.

Since development has occurred and since it does not seem likely to discontinue except because of exhaustion of resources, one wonders whether this element of policy should not be discarded. In addition to its questionable effectiveness, it is subject to criticism as being antithetical to the ends envisioned in the conservation laws. Conservation entails careful, restricted development rather than free, unimpeded, and reckless exploitation. Therefore, because any benefit which might have been derived from the notion that limitation of the right of alienation would encourage development has served its usefulness and also because this possible element of policy conflicts to some degree with the idea of conservation, it seems that the elements of policy underlying Louisiana's mineral property system need no longer include this concept as a major factor.

F. Simplicity of Titles

Examination of the briefs submitted in Frost-Johnson Lumber Co. v. Salling's Heirs reveals that counsel for Frost-Johnson and the amici curiae favoring plaintiff's position strongly relied on the complexity of titles which would flow from a de-

(N.S.) 451 (1910). Such interests are not technically a perpetual estate in lands as is the case in those jurisdictions permitting the creation of a separate mineral estate. The profit à prendre is subject to loss by abandonment. In effect, however, proof of loss of an easement or profit created by deed of grant or other writing, as is customary for mineral rights, as a result of abandonment seems very difficult.

45. LA. CONST. art. VI, § 1: "The natural resources of the State shall be protected, conserved and replenished." LA. R.S. 30:1-32 (1950). R.S. 30:2 provides: "Waste of oil and gas as defined in this chapter is prohibited." The statutory framework elaborates a system for controlling development and operation of oil and gas wells to minimize waste.

46. 150 La. 756, 91 So. 207 (1922).
cision permitting the creation of perpetual mineral interests. It was observed that such a choice would create a separate chain of titles, would make it impossible to possess mineral interests by possession of the surface, and would, therefore, effectually remove mineral interests from the operation of prescription (particularly acquisitive prescription),\textsuperscript{47} the work horse of the property system insofar as clearing titles is concerned.

Although the Supreme Court did not clearly articulate this consideration in its decision, it can be reasonably assumed that the argument was firmly impressed upon the Justices and that it could not have gone unnoticed or remained insignificant in the decision-making process. There is, therefore, some reason to believe that the preference for a system of titles free of the complexities which would have been engendered by permitting separate mineral estates played some motivating role in the Frost-Johnson decision.

\textsuperscript{47} In the original brief for plaintiff-appellant (by Thigpen & Herold and Elmo P. Lee), the following remarks are found at pages 41-42: "When we come to consider the consequences that would flow from the recognition of the right of the landowner to create such a separate ownership as counsel contends for, we can easily see why such a result is prohibited, not only by the code, but why it is opposed to the public policy of the state."

"It is a matter of general knowledge that as to hundreds of thousands of acres of land in Louisiana there have been attempts to create or to reserve such an estate as defendant here contends for. The authorities cited in the obiter in the DeMoss case demonstrate that it follows as a necessary and inevitable result of the recognition of such estate, that possession of the land does not constitute an adverse possession of the minerals. If such estate be permissible and is an immovable property, it is not lost by non-user. If such estate is permitted and created, it could not be adversely acquired by possession of the land continued for the statutory term of ten years, or for that matter for a generation, or for a century, or for a thousand years. That is, that such an estate created, the owner of the land may sell it to a third person, who goes into actual possession and cultivates it as a farm; it may be sold by that person without mention of the reservation of or the severance of the minerals and passed by repeated sales, absolute on their face, and followed by actual corporeal possession for a century or more; and yet the owner of a mineral estate could at the lapse of that time claim his property as entirely unaffected by abandonment or the bona fide possession of purchasers in good faith under titles translative of property."

"If this result is attained, we then have a class of property liberated from the general laws and practically imprescriptible. How does this concur with the announced rules of public policy?"

In the brief of Spencer, Gidiere, Phelps & Dunbar, \textit{amicus curiae}, the following is found at page 11 after a hypothetical case setting forth the possibility of an ancient purchase of the mineral estate: "The baneful effects of such a doctrine are patent. Its recognition would inextricably complicate and tend to destroy titles to land. What lawyer has ever thought that, once he had satisfied himself that the government had parted with title, it was necessary to go back more than one hundred years in his examination of the title, when the land was shown to have been cultivated by the supposed owner and his author in title during that period? Under this doctrine no lawyer can be safe in approving any title unless he is furnished with a complete abstract, showing the full provisions of every deed from the time when Louisiana was first settled."
Whether the court was so motivated or not, it seems that this is one of the principal benefits presently derived from the system of terminable interests. Allowance of separate mineral estates would have meant the creation of a separate chain of title, and fractionation of mineral ownership would have meant multiple chains of title aside from the basic title to the land. A separate mineral estate would have required separate possession of minerals to commence acquisitive prescription. Title examination is difficult enough without having to face the problems which would have arisen from such a situation.

Simplicity of titles and simplicity in administering the title system in the courts should, therefore, be recognized as valid factors of public interest. Terminability aids simplicity of administration by preventing the creation of multiple chains of title. Additionally, as the basic characteristic of terminability simplifies the system of titles, the rules by which the principle of terminability is applied should promote ease of administration and stability in the title system.

G. Distribution of Wealth

Search of the record and briefs in the Frost-Johnson case has also revealed that the suggestion was made to the court that allowing perpetual interests in minerals would create the danger of centralization of the wealth to be derived from oil and gas. Without in any way implying criticism, there is some empirical evidence that centralization might have occurred absent a system of prescriptible rights. For example, at the birth of the petroleum industry in Louisiana major timber interests owned large amounts of acreage primarily for timber operations.

48. The following is found at pages 11-12 of the brief of Spencer, Gidiere, Phelps & Dunbar, amicus curiae: "The recognition of such a doctrine would clearly obstruct the development of our oil fields. It would put a large portion of the property in these oil fields out of commerce. It would breed litigation and reward the indolent and unprogressive. Unless a man could be absolutely certain that there had never been a reservation of oil and gas or a sale thereof by any previous owner, his enterprise in risking his money in attempting to strike oil would always be subject to the risk that the fruits of his success would go entirely to those who had sat by for a century without making any attempt at development. To them would accrue all the profits, and they would bear no part of the risk of loss. Moreover, such a doctrine would encourage the making of such reservations without the slightest intention of exploring for oil, but merely on the bare chance that scores, nay hundreds of years thereafter, oil might be discovered in that vicinity." (Emphasis added.)

49. E.g., Lenard v. Shell Oil Co., 211 La. 266, 29 So. 2d 844 (1949) involves servitudes covering a total of 80,000 acres. In Patton v. Frost Lumber Industries,
When these lands were stripped of timber, small tracts were then sold to individual farmers. Such sales were usually accompanied by reservations of minerals or mineral rights. A mineral property system permitting perpetual alienation of rights would clearly have resulted in retention of mineral wealth on the entirety of these large areas in the hands of established commercial interests. Although nothing in the existing system prevents reservation of a mineral servitude on large areas of land, the difficulties of maintaining the integrity of a single servitude covering fifty or sixty thousand acres are well known.

Conversations with several members of the judiciary concerning the mineral property system have convinced the writer that one of the major policy elements influencing the administration of the property system today is the desire to promote distribution of mineral wealth and to prohibit its centralization.

Although there is substance to the argument that the existing system has had the beneficial result of distributing wealth and although there is merit in recognizing and intentionally retaining this policy element, one may nevertheless question whether it has been too strongly applied. Notably, there is some indication that the distribution of wealth concept motivates the tendency of the court to find a "division" or "reduction" of a servitude or royalty interest in cases involving partial unitization. There is at least some question whether certain of these decisions are completely fair to the mineral servitude and mineral royalty owner whose use rights are substantially inhibited by conservation laws and practices. Further, there is question

176 La. 916, 147 So. 33 (1933) there were some 30,000 acres. Numerous similar examples are found throughout the jurisprudence.

50. In Lenard v. Shell Oil Co., 211 La. 266, 29 So. 2d 844 (1949) a small tract had been sold to plaintiff. The record in Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922) reveals that the Frost-Johnson interests repurchased several small tracts previously sold by them. See also Hodges v. Long-Bell Petroleum Co., 240 La. 198, 121 So. 2d 831 (1960); Long-Bell Lumber Co. v. Granger, 222 La. 670, 63 So. 2d 420 (1953); Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 43 So. 2d 782 (1949).


52. For example, see Hodges v. Long-Bell Petroleum Co., 240 La. 198, 121 So. 2d 831 (1960); Long-Bell Lumber Co. v. Granger, 222 La. 670, 63 So. 2d 420 (1953); Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 43 So. 2d 782 (1949).


54. See the discussion in Hardy, Ruminations on the Effect of Conservation
whether overemphasis of the desire to promote distribution of wealth by application of the concept of "division" causes serious problems for the title system. If compulsory unitization of part of a tract with other acreage "divides" a servitude, there are two property interests with different use requirements and, if a use occurs on the unit but off the servitude, different prescriptive dates. Further, if the unit is reformed to exclude acreage previously included in the unit, a third interest emerges where only one existed originally. The resultant complexity of titles is obvious. The writer has suggested elsewhere that questions regarding the effect of unitization should be solved in terms of rules of use and that in the interest of simplicity of titles a use of any portion of a servitude should constitute a use of the whole. This suggestion throws the balance more in favor of simplicity and stability of titles than distribution of wealth, but perhaps that is where the balance belongs.

In any case, it seems that the preference for distribution of wealth can be isolated as a major motive in the administration of the present system. There is certainly merit in retaining the concept as an element of policy underlying the system. Nevertheless, it is suggested that careful consideration should be given to determining whether the principle has been applied with some inequity to the owners of mineral servitudes and royalties and whether damage to our system of titles has resulted.

II. THE IMPACT OF CONSERVATION

The foregoing discussion has centered on policy aspects in the property system which have sprung up in the jurisprudence. This discussion would not be complete without considering another major policy source, the conservation laws. The existence of the Louisiana Conservation Act is in itself sufficient evidence that conservation of mineral resources is a major element of public policy in Louisiana mineral law. It does not seem worthwhile to devote any space in this discussion to justifying or supporting conservation as an existing or desirable factor in the mineral law. However, because this policy source is a product

55. See the authorities cited in note 53 supra.
of legislation rather than the judicially molded property system, some benefit may be derived from brief discussion of certain specific aspects of the conservation laws which create serious conflicts with the present property system or with the manner in which it is presently being administered.

First, as already suggested, there is conflict between the development psychology which seems to have been a motivating policy consideration in shaping the property system originally and the basic idea of conservation. In view of the fact that the legislature has imposed the system of conservation subsequent to evolution of the property system, there is some basis for advocating the position that the legislative policy is in this instance the stronger of the two and that in cases of direct conflict between the two the concept of conservation should prevail. It has been suggested that the idea of encouraging development of unexploited resources is no longer a factor of major interest in the mineral property system. It is now known that Louisiana possesses great mineral resources. Their development, and the pace of that development will be governed much more by economic factors than by any possible artificial encouragement in the property system.

Another very deep theoretical conflict between the property system and the conservation regime is evidenced by the provisions of the Conservation Act protecting the correlative rights of surface owners in a common reservoir.\(^57\) It is contemplated that all persons entitled to participate in production from a unit will receive their just and equitable share.\(^58\) The just and equitable share is, theoretically, to be based upon a volumetric computation of recoverable hydrocarbons in place beneath each tract entitled to participate in production.\(^59\) There is clear conflict between this concept and the non-ownership theory now applicable to oil and gas. The philosophy of the Conservation Act is completely inconsistent with the notion that oil and gas are insusceptible of ownership in place because of their peculiar physical characteristics. Thus, as has also been suggested above, insusceptibility of these substances to ownership, or even susceptibility of other substances \textit{to} ownership because they occur in a solid state, does not form a sound base for the present prop-

\(^{57}\) See \textit{La. R.S.} 30:9 (1950).
property system. For this reason, the other elements of public policy which have been suggested and discussed must be seriously considered in an effort to determine why the present system is desirable and what functions and purposes of public policy it can serve.

A third aspect of the conservation laws which conflicts with the property system is that the high degree of regulation of manner and pace of development operations substantially inhibits the exercise of rights of use created under the present system by grants or reservations of mineral interests. This, too, has already been noted. It is necessary only to observe that there is evidence that the courts have failed to take adequate note of this impairment of use rights in administering the rules of prescription. Conservation orders and practices have presented the courts with the opportunity to increase the use burden imposed upon the owner of a mineral servitude or a mineral royalty by finding a "division" of mineral interests by unitization orders. The extent to which this opportunity has been exercised has previously been questioned.

CONCLUSION

The elements of public policy discussed above do not constitute an exclusive list, but they appear to be principal among those which are often iterated or which might conceivably have motivated the evolution of the mineral property system. Some policy factors appear more prominent than others, and this suggests that these factors are the ones which should form the principal basis for resolving policy problems in any codification.

Among the suggested policy factors, several may be identified as at least currently ineffective, if ever of any substantial effect. These include: the physical characteristics of oil and gas; the historic policy of the civil law; the notion that a system of prescriptible mineral interests materially encourages mineral transactions; and the concept that a system encouraging return of mineral rights to the land encourages exploitation of undeveloped resources.

It is true that the physical characteristics which oil and gas were assumed to have in the *Frost-Johnson* case furnish the key to the servitude analogy as first evolved. However, it appears that the court later sought a wider policy base, recognizing that if the servitude analogy was to be extended to solid minerals, the argument based upon the fugacious nature of oil and gas would be inapplicable. Thus, it seems that today, looking toward legislation, we should be frank in admitting that the fugacious character of oil and gas are not the real basis upon which the property system is founded. It is because a system of terminable mineral interests brings other benefits that it is desirable to continue that system.

The second ineffective element is the argument based upon the so-called “historic policy of the civil law.” As noted, this argument is not as soundly based as one might think. It was useful in furnishing a base for application of the servitude analogy to minerals other than oil and gas, but, here again, when one is contemplating legislation, it is not necessary to give weight to an argument which appears to have been more in the nature of a convenient rationalization than sound legal policy.

Third among the elements which have been of little or no effect is the idea that a system of prescriptible rights materially encourages transactions in mineral rights, thus providing stimulus to the general economy. As noted, the advent of development in any mining industry is the principal stimulus to transactions in minerals. It does not seem that permitting or prohibiting permanent or long term alienations of mineral rights has a great deal to do with the amount of commerce in mineral rights. This is chiefly determined by local interest in development. The significant difference between the Louisiana property system, characterized by prescriptible mineral interests, and those of other states is that since mineral interests cannot be alienated in perpetuity, the return of mineral rights to the land means that the landowner will often benefit by a rekindling of local interest rather than one who has purchased mineral rights in perpetuity. There may be some minor amount of traffic in mineral servitude and mineral royalty interests which would not result absent a system of prescriptible rights, but it is suggested that in the overall picture of the general economy, this is relatively insignificant.
The fourth ineffective element is the concept that terminability will encourage exploitation of undeveloped resources. This appears to lack substance because development of mineral resources is governed more by economic factors external to the property system than by impetus furnished by the rules of property. If the property system does have any effect on development, it seems that it is to be found principally in the fact that a simple, well-administered system of titles keeps title problems from becoming so complex as to discourage development.

As noted in the foregoing discussion, the mineral property system has the result of retaining a high degree of control over mineral interests in the hands of the landowner. However, it was also observed that this result has no inherent validity as a policy factor. In answer to the question why it is valuable to retain such control in the owner of the land, it is suggested that the simplicity and stability of our title system and the deterrent to centralization of economic wealth and power furnish the answer. These appear to the writer to be the most prominent reasons why terminability is a desirable characteristic of the property system. Of these two currently active policy factors the concept of distribution of wealth appears to be occupying a current role of activity somewhat out of keeping with its importance. The major danger of centralization of mineral wealth existed in the infancy of the petroleum industry. Presumably, that threat or danger has been averted. Thus, one may question whether this policy factor should operate to divest the mineral servitude or mineral royalty owner of all or part of his interest in every available instance and to complicate the system of titles or whether it should be subdued to some degree and relegated to a more passive role. Obviously, the landowner's expectancy in the reversion of outstanding interests should not be unjustly neglected, but it need not be arbitrarily or unjustly protected. Further, the interest in distributing wealth should not be given such weight that it will do crushing damage to the system of titles.

Along with the two policy factors presently active in the property system, or perhaps counterpoised against the property system, one must take account of the policy inherent in the conservation laws. As noted, the philosophy of the act tends more in the direction of concepts of ownership than nonownership. It inherently favors conservation rather than development. Also,
it can be asserted that the conservation laws are designed, in
certain circumstances, to preserve existing mineral leases and
other mineral interests rather than to promote their extinction.
These characteristics of the act must be carefully accounted for
in considering the shape of the property system.

It is suggested that the principles embodied in the Conser-
vation Act and the maintenance of simplicity of the title system
should occupy the most prominent roles as policy factors in the
conception and drafting of a system of mineral property law.
In the event of conflicts between these two major considerations
of public policy, careful determinations will have to be made.
No rule of thumb could possibly be developed to determine which
should prevail in any given area of inconsistency.