Private Law: Mineral Rights

George W. Hardy III
On the basic policy issue concerning the period for bringing the redhibitory action, the protection of the purchaser against latent defects is counterbalanced not only by the protection of the vendor against uncertainty in his affairs but also by the interest of society in the stabilization of transactions. Under both the French and Spanish laws, there is the basic idea that this period should be short, and in the present case the difference between 13 months after the sale and 11 months after the delivery hardly seems to support an interpretation contra legem.

Another aspect of the prescription against the redhibitory action is brought out in Mid-City Finance Co. v. Coleman which held that the period starts to run from the moment the vendor abandons his attempts to repair the defects. This matter was well discussed in the earlier case of Brown v. Dauzat and in previous symposium comments to the effect that the attempt to make repairs is an acknowledgment of responsibility and therefore constitutes an interruption of the prescription.

MINERAL RIGHTS

George W. Hardy, III*

THE LANDOWNER'S RIGHTS IN MINERALS

Unauthorized Removal of Minerals

White v. Phillips Petroleum Co. is to be noted by a student in a later issue. However, this writer desires to express the view that the decision should be read with extreme care and limited to its specific facts. The case raises the question of the right of a landowner to recover for unauthorized removal of minerals. Without delving into details, it is safe to say that the law recognizes at least two remedies for such conduct: one in delict under which damages are measured by the value of the thing taken and the other in quasi-contract for the amount by which the defendant has been enriched as a result of the taking. Early cases also applied the old “theory of the case” doctrine.

1. 232 So.2d 918 (La. App. 4th Cir. 1970).
2. 157 So.2d 570 (La. App. 3d Cir. 1963).

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with the result that one framing his petition on a theory of tort and asking for the appropriate remedy was deemed to have elected that remedy to the exclusion of all others. Perhaps the most critical significance of application of the concept of election of remedies lay in the area of prescription. Thus, the party suing on a delictual theory more than one year from the date of the damage or its discovery would be defeated by a timely plea of prescription. Implicit in the jurisprudence is the idea that if suit had been brought on a theory of quasi-contract, the prescription of ten years would have been applicable.

Insofar as the White case is concerned, it is important to emphasize that articles 862 and 2164 of the Code of Civil Procedure abolished the "theory of the case" concept. Today, if a plaintiff alleges the appropriate facts to support recovery under either of two available remedies, he should not be deemed to have elected one remedy over the other even though he has prayed for only one. Additionally, his petition should withstand a plea of prescription if there are sufficient facts to support relief on a cause for which prescription has not yet accrued. The court in White held that under the uncontested construction of the petition in question the cause of action there alleged for unauthorized removal of minerals was in tort and that insofar as the plaintiff was seeking recovery for minerals removed more than one year after discovery of the removal, the plea of prescription of one year should be sustained. Judge (now Justice) Tate concurred in the majority opinion "because it is narrowly restricted to the conclusion that, under the unopposed construction of the present plaintiffs' petition as seeking delictual relief, we are not presented with the issues raised by this concurring opinion"—i.e., given a proper factual situation, whether a petition should be sustained against a plea of prescription if sufficient facts are alleged to support relief either in delict or quasi-contract.

In the writer's opinion, the White decision should definitely be construed in the manner in which Judge Tate's concurring opinion suggests. Otherwise, there would be a reversion to an outmoded and expressly discarded procedural concept.

3. See note 2 supra.
4. Id.
5. Id.
MINERAL SERVITUDES

By Whom a Use May Be Made

One of the hazy questions arising from adoption of the servitude analogy in Frost-Johnson Lumber Co. v. Salling's Heirs⁷ has been a determination of what persons may commit acts which will result in an interruption of prescription by use. In Nelson v. Young⁸ the court touched upon this question, partially avoided it, and in the process added confusion to the law. This case, too, is being noted in a later issue. However, once again because of the importance of the issue this writer feels it is desirable to express his own opinion.

Briefly, prescription on the mineral servitude in question had recommenced after a use by drilling operations in 1952. In 1957, the landowner granted leases on the property even though he did not then own the mineral rights in question, and in 1959, a producing well was completed by the landowner's lessee. This well produced slightly in excess of one thousand barrels and was plugged and abandoned in 1964, approximately two years and five months beyond the prescriptive date of plaintiffs' mineral servitude. Though it does not appear from the record, the writer takes scholarly notice of the fact that there has recently been a substantial revival of interest in development in the parish in which the subject property is located. In 1967, three years after the well drilled by the landowner's lessee was abandoned, and five years after the prescriptive date of plaintiffs' servitude, the plaintiffs' action was filed, seeking to be declared owners of the mineral rights in question.

Though the jurisprudence is by no means clear, the nearest similar case stands for the proposition that the owner of mineral rights cannot adopt drilling operations by another after the prescriptive date on which his rights were extinguished for nonuse.⁹ Additionally, Civil Code article 618, dealing with the personal servitude of usufruct and also applicable to other forms of personal servitude, states that usufruct is extinguished unless used "by the usufructuary or by any person in his name." Further, article 804, applicable to predial servitudes, requires that to overcome a plea of prescription of nonuse, the owner of the

7. 150 La. 756, 91 So. 207 (1920).
dominant estate must prove that "he, or some person in his name, has made use of this servitude as appertaining to his estate during the time necessary to prevent the establishment of the prescription."

Despite these decisions and code provisions, the court worked out a tenuous theory of quasi-contract, reasoning that as a result of what the court construed as the approving silence of the mineral servitude owners when the lease was executed by the landowner and production was established under it, a quasi-contractual relationship was established, and the act of producing by the landowner through his lessee became the act of the servitude owner, thus interrupting prescription. In spinning out this theory, the court had to deal with the established jurisprudence that the execution of a lease by a landowner does not per se interrupt prescription, though his intentional execution of a joint lease with the servitude owner may effect an "extension" of prescription under certain circumstances. The court also acknowledged the basic rule that no act of the landowner should have the effect of interrupting prescription unless he intends that it do so. By an undefined process, the court, however, reached the conclusion that whereas execution of a lease by the landowner would have no effect, production under that lease would cause an interruption of prescription.

The only offered policy basis for the decision was an expressed fear of rewarding lawless and clandestine acts by the landowner. This fear is unfounded. The liabilities involved in intentional execution of leases and production by a landowner at a time when he does not own the minerals are simply too great to make it believable that there would be any great stampede to engage in unlawful development had the court ruled otherwise. It is here that the court erred. In these situations there are two sets of legal relationships. One is between the landowner and the servitude owner insofar as the question of use is concerned, and the other is between the servitude owner and the rest of the world, including the landowner, regarding his ownership of a real right.

10. See, e.g., Union Oil Co. v. Touchet, 229 La. 316, 86 So.2d 50 (1956); LeBleu v. LeBleu, 206 So.2d 551 (La. App. 3d Cir. 1967).
The first relationship, that between landowner and servitude owner, requires that a use take place for the servitude owner or in his name, if resort is had to article 618, or by the servitude owner or someone in his name "as appertaining to his estate," if article 804 is used as the analog. But the greater question is whether permitting adoption of operations by another, either the landowner or a total stranger, after the prescriptive date, is beneficial to the system of titles. The writer believes that it is not. To permit the servitude owner to adopt operations by another as his own years after the prescriptive date adds complexity and uncertainty to the title system. Admittedly, this is not going to be a widespread problem as cases of this kind are rare, but if another such situation is faced, it would certainly be difficult for the landowner or his lawyer to determine a course of action. If anything is said to the servitude owner or if a lease is granted after the prescriptive date but less than ten years from the "clandestine" activity, "sleeping dogs" may well be aroused. Additionally, the legal advisor to the potential lessee of the landowner is certainly in a difficult position as the threat of the servitude owner coming in and "adopting" the prior operations is always present.

Insofar as the court's reliance on the servitude owner's benign silence as indicating ratification of the lease contract is concerned, this is questionable at best. There are many explanations and constructions which can be placed on silence in these situations, and, absent proof that the servitude owner was aware of the leasing and subsequent operations, the inference drawn by the court is not warranted. Even a showing of awareness might not justify the inference.

The second set of legal relationships, that between the servitude owner as owner of a real right and the rest of the world, furnishes the sanctions for the lawless and clandestine actions about which the court expressed concern. If the landowner or any person other than the owner of the mineral rights appropriates all or any part of those rights, there are ample remedies available. The servitude owner can exercise the real actions,\textsuperscript{13} use injunctive processes,\textsuperscript{14} and sue for damages in any of several possible situations and under any of several available theories.\textsuperscript{15} These protective devices would apply to physical and legal dis-

\begin{footnotesize}
15. \textit{See} the authorities cited in note 2 \textit{supra}.
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turbances of possession, to appropriation of exploration rights by geophysical exploration, to the granting of leases, to unlawful operations, and to unlawful production. These rights furnish adequate protection to the mineral servitude owner against any unlawful acts, whether by the landowner or a total stranger. And the servitude owner should be permitted to exercise these rights at any time within the appropriate prescriptive period. However, if he has done nothing to adopt another's actions or to claim his share of production within the prescriptive period, any assertion of rights to damages after the prescriptive date should not result in an interruption of prescription as he has done nothing to use his rights within the time required. Reasonable vigilance in the assertion and protection of a mineral servitude owner's rights is not too much to expect.

In terms of equitable considerations, the other side of the "lawless exploration and production" argument is that the decision as rendered permits the mineral servitude owner to sit back for a period of years after the prescriptive date and walk in and effectively "take back" what has been lost when a new development play makes the mineral rights worth fighting about. The writer is in general accord with the views expressed by Justice Barham in a cogent and incisive dissent.

**Imprescriptible Mineral Servitudes**

*Franks Petroleum v. Martin* is an attempt to relitigate the same basic issues already determined in *Franks Petroleum v. Hobbs* three years ago. The writer's comments on these issues

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16. LA. CODE Civ. P. art. 3659 (disturbance in fact and in law defined).
18. LA. CODE Civ. P. art. 3659.
21. The possessory action must be brought within a year of the last disturbance. LA. CODE Civ. P. art. 3653(4). The petitory action can be brought at any time unless the land has been acquired by another by acquisitive prescription. If a servitude owner elects to proceed in tort, he must bring his action within a year from the date of the offense. LA. CODE art. 3536.
22. 234 So.2d 268 (La. App. 2d Cir. 1970).
23. 200 So.2d 708 (La. App. 2d Cir. 1967), cert. denied, 251 La. 219, 203 So.2d 555 (1967).
can be found in the 1966-1967 symposium. Briefly, however, the more recent case involved a tract of land part of which was expropriated by the United States in 1950. At the time of the expropriation, the entire tract was subject to an outstanding mineral servitude. Prior to the expropriation, the servitude owner had created a royalty interest. In the conveyance to the government, the landowner purportedly reserved all of the minerals. Construing the statute in the same manner as it had in Franks Petroleum v. Hobbs, the Second Circuit Court of Appeal held that: (1) as to the portion of the tract expropriated, prescription on the servitude did not continue to accrue in favor of the owner of the land at the time of the expropriation; (2) consequently, that portion of the servitude and the royalty dependent on it remained alive; (3) prescription continued to accrue against the servitude insofar as it affected the portion of the tract not expropriated; and (4) as there had been no use or other interruption of prescription, the servitude and the royalty dependent on it had been extinguished as to that portion of the tract.

**MINERAL LEASES**

**Default Clauses**

Bouterie v. Kleinpeter is one of those cases in which, contrary to the old saw about hard facts making bad law, good equities may have made some bad law. Fortunately, however, it is a case which can be limited to a specific contractual provision. Shortly after the date on which the primary terms of leases granted by the plaintiffs would otherwise have expired, they made demand for payment of royalties, stating that "if the demand . . . made for payment of Lessor's royalty is not complied with we shall institute the necessary legal action to cancel the said leases." Thirteen days later, royalty payments were commenced and continued for approximately ten months, at which time plaintiffs refused further payments and three months thereafter made demand under La. R.S. 30:102 for an instru-

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25. 200 So.2d 708 (La. App. 2d Cir. 1967).
27. "If the lessee refuses or fails to comply with the lessor's demand for such an instrument within ten days, the lessee shall be liable to the lessor for a reasonable attorney's fee in bringing suit to obtain a decree of cancellation and for all damages suffered by the lessor stemming from his inability to find another lessee because of the noncancellation of the lease."
ment authorizing cancellation of the leases from the public records.

Defendant's primary reliance was upon an exception of prematurity based upon the contention that plaintiffs had not complied with the default, or notice, clause in the leases, which provided:

"11. In the event that Lessor at any time considers that operations are not being conducted in compliance with this lease, Lessor shall notify Lessee in writing of the facts relied upon as constituting a breach hereof, and Lessee, if legally required to conduct operations in order to maintain the lease in force, shall have sixty (60) days after receipt of such notice in which to commence the necessary operations to comply with the requirements hereof."

Defendants also relied on the prior decision of the First Circuit Court of Appeal in *Bollinger v. Republic Petroleum Corp.* which had held that compliance with the default clause there involved was a condition precedent to institution of suit to cancel the lease in question for nonpayment of royalties. Plaintiffs sought to distinguish the *Bollinger* case on the ground that the default clause there involved was applicable if lessee had failed to "comply with any of its obligations... either expressed or implied..." The court, however, resorting to such authorities as *Black's Law Dictionary, Words and Phrases,* and *Webster's Seventh New Collegiate Dictionary,* chose to construe "operations" in the lease form before it as being synonymous with "obligations" in the *Bollinger* case.

The dissenting opinion of Judge Blanche clearly had the better of the technical argument as to the proper construction of the two clauses. Taking the clause in the instant case as a whole, it unquestionably refers to "operations" as that term is traditionally accepted and meant in lease forms. It refers to "failure to conduct operations," then states that if lessee is legally required "to conduct operations in order to maintain the lease in force," lessee shall have sixty days in which to "commence operations." These are all rather clearly understood terms of art in the drafting and construction of mineral leases, and it is difficult to discern how the court reached the result achieved.

It would have been easy for the court to have viewed the

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28. 194 So.2d 139 (La. App. 1st Cir. 1966).
notice clause of the lease as being inapplicable to the facts at hand and still have reached the same end result. Even if the notice clause were inapplicable, the general law of default would have required that plaintiffs make a demand for payment unless there had been failure to pay for an appreciable length of time without justification. Plaintiffs in fact made such a demand, which was met by commencement of payments within a few days thereafter and regular continuance until plaintiffs refused further payments ten months later.

However, it seems that this approach would have required that the exception of prematurity be overruled. Despite this fact, some other exception or procedural device should have been successful in disposing of the case without trial on the merits. It seems unlikely that plaintiffs' petition could have withstood an exception of no cause of action unless there were facts alleged which do not emerge from the court's opinion. And a motion for summary judgment seems certain to have succeeded if the exception could not.

Viewing the practical results of the decision, it appears likely that the court was impressed with the evidence that plaintiffs had accepted royalties for ten months and then started rejecting them. Evidence of this was admitted on trial of the exception of prematurity. Given the proof submitted, it seems unlikely that plaintiffs could ever have succeeded, and the court may have felt disposed to render the coup de grace at an early stage of the proceeding. Nevertheless, the law regarding putting in default, particularly in cases of nonpayment of royalties, is in sufficiently critical condition already, and this decision adds unnecessary confusion to an already muddled area.

Hebert v. Sun Oil Co. seems to have brought the nonpayment of royalty cases full circle, and it is now virtually impossible to predict when a court will award cancellation and when it will not. The cycle started in Bollinger v. Texas Co. and Melancon v. Texas Co. in which the court found coercive conduct

31. 223 So.2d 897 (La. App. 3d Cir. 1969).
32. 232 La. 637, 95 So.2d 132 (1957).
33. 230 La. 593, 89 So.2d 135 (1956).
on the part of the lessee, which was withholding royalties to pressure the lessor into giving consent to the formation of certain voluntary production units. This was construed as an active breach of contract and default was not required. From that point, the concept was extended to include situations in which there was no such coercive conduct, such as withholding of royalties because a lessee had not settled a dispute over well costs with the unit operator or failure to pay royalties because of internal reorganization. The formula evolved was that if there was a failure to pay for an appreciable length of time without justification, the breach was active in character and no default was required. Conceptually, it has always been difficult to perceive how what is unquestionably a passive breach of contract becomes active merely by the passage of time. But the development gave courts the power to assure timely commencement and payment of royalties in situations in which the remedy provided by the Civil Code, damages in the form of interest, would not be a sufficient spur to assure diligence on the part of lessees.

A softening of the courts' attitude emerged as justifications began to be found for failures to pay. These were generally in the form of title difficulties or administrative delays which were beyond the control of the lessee and were basically reasonable. Further amelioration of the rule occurred when courts began awarding partial cancellation of leases even though a failure to pay on certain units or portions of the lease had occurred.

Cancellation was refused in the Hebert case on two basic grounds. First, the failure to pay resulted from clerical error in revising tract numbers and distributions following a unit revision. This, the court felt, was justifiable reason for the delay, noting that immediately upon discovery of the error, payment was made. Second, the amount of the royalties in arrears was only $13.54 over a five month period, which the court did not consider a "serious basis for cancelling the lease." This was particularly true in view of the fact that there had been an over-

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payment on other royalties exceeding the amount in arrears by seven cents.

Insofar as the court accepted the clerical error as an excuse, the decision seems to be in conflict with *Pierce v. Atlantic Refining Co.* in which the court rejected internal organizational problems as justifying a delay of approximately six months. But the result can be fully justified on the ground that the amount involved, coupled with the offsetting overpayment, was not a serious basis for cancellation. Any other result under the circumstances would have been unjust.

The whole patchwork quilt of jurisprudence concerning non-payment of royalties needs examination and revision. It seems highly unlikely that the courts can cut through the smoke and confusion which has resulted from a well-motivated desire to put lessors in a better position by giving them some means of assuring timely commencement and continuance of royalty payments. However, looking at the state of the jurisprudence, the game seems hardly to have been worth the candle. A device intended to prevent coercive conduct, indolence, neglect, or simple selfishness quickly opened the way for greed to have its day. When a lessor sues for cancellation over $13.54, one cannot be surprised that courts would be reluctant to use the protective device which they have fashioned. The *Hebert* decision is unquestionably just, but it underscores even more strongly the need for a change in the law which must apparently come about through legislation. This writer has previously suggested the device of subjecting lessees to liability for double or treble the amount of royalties due. Attorney's fees might also be levied to permit those with small claims to sue. The lessee, however, should receive the security of investment which he deserves in these cases by removing nonpayment of production royalties as a cause for cancellation of mineral leases.

**Surface Damages**

Two cases decided during the 1969-1970 term dealt with the problem of surface damages caused by a lessee's operations. In *Andrepont v. Acadia Drilling Co.* plaintiff held an unrecorded agricultural lease, and defendant held a subsequently granted and recorded mineral lease. Defendant's operations caused dam-
age to plaintiff's crops for which plaintiff sued. Defendant's principal defense was that it could not be bound by the unrecorded agricultural lease. The mineral lease held by defendant contained an alteration in the standard surface damage clause, which normally provides that lessee "shall be responsible for all damages to timber and growing crops of lessor caused by lessee's operations." The alteration resulted in a clause which provided that lessee would be responsible "for all damages caused by lessee's operations." Plaintiff argued that if defendant was not liable in tort for the crop damage, it was liable under the contract as a stipulation pour autrui. Further considering the argument, the court reasoned that since the landowner owed his agricultural lessee the obligation to maintain him in peaceful possession, there was a possibility of future liability for violation of that obligation. Thus, the alteration in the damage clause of the mineral lease protected the landowner from liability. This was found sufficient to support the holding that the alteration was intended to confer a benefit on the agricultural lessee.

The decision does justice in the immediate case, but the particular facts should be carefully viewed. It appears that the mineral lessee had taken a release from the landowner for "her" damage upon payment of $125.00. Plaintiff had made repeated efforts to communicate with persons in authority at the well site in order that he might obtain reparations for his loss, all to no avail. The damages to plaintiff's crop amounted to almost $1300.00, and from the facts recited in the opinion, it appears that there might have been an attempt to take a quick release from the landowner under circumstances in which the reasonable person would be aware that damages to someone's crop exceeded $125.00. Thus, it was a supportable result for the court to find that the release to the landowner was for her damages alone, and the altered surface damage clause benefited plaintiff by allowing him to recover the remainder of the damages of which the defendant should reasonably have been aware.

Those on the court who dissented, however, may have been correct in maintaining that the lessee should not be bound by the unrecorded agricultural lease in most situations. Given the basic situation of an altered damage clause, as in this case, and a prior unrecorded agricultural lease, the mineral lessee should normally be entitled to take a release from the landowner for "all" damages caused by his operations. If the landowner made
the alteration for the benefit of the holder of an unrecorded interest who has been damaged, it seems that the landowner should protect himself by assuring that these damages have been paid to him in negotiating the release. The landowner could then discharge his obligation to the agricultural lessee by turning the money over to him. In this case, however, the court may have felt that the knowledge which the lessee's employees had of a complaint of damage to the surface merited the result achieved.

Collins v. Morrow\(^{41}\) also involved a conflict between an agricultural lessee and a mineral lessee. There was no special damage clause such as the alteration of the form in the Bouterie case; therefore, the plaintiff could not recover without proof that the defendant had used an unreasonable amount of the surface or had been negligent in using the surface\(^{42}\) Clouding the evidence was a release taken for damage up to August, 1966. Except for a claim for the value of one steer, the court felt there was insufficient evidence to prove that damage had occurred since the date of the compromise and also that the proof of the amount of damage suffered was vague. The case appears to be correctly decided and does nothing to alter the existing law as to the relationship between owners of coexisting rights to use the surface of the same land.

Royalties—Effect of Price Rollback

Whitehall Oil Co. v. Boagni\(^{48}\) required a determination of the rights of a lessee who had sold gas which was owned by it and the lessor under a temporary rate authorization by the Federal Power Commission. When the permanent rate was fixed at a lower figure, lessee, as it was required to do, reimbursed the vendee of the gas for the amount owed because of the rollback. The reimbursement included both the lessee's and the lessor's share of the gas. Lessee then sued lessor for the amount which had been reimbursed to the vendee on the lessor's share of the gas. The court upheld the right of the lessee to recover from the lessor the amount repaid to the vendee as a result of the rollback. The court relied on the general principle of unjust enrichment and on express provisions of the lease under which:

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\(^{41}\) 234 So.2d 234 (La. App. 2d Cir. 1970).


\(^{43}\) 255 La. 67, 229 So.2d 702 (1969).
sales of lessor's gas by lessee had to be at the same price and on the same terms as those received by lessee for its own gas and (2) the lease was subjected to state and federal regulatory orders.

The only curious note in the opinion is found in the fact that the court assumes, arguendo, that Civil Code articles 2301-14 concerning payment of a thing not due are inapplicable to the instant case and yet ultimately supports its conclusion on the basis of the principle of unjust enrichment. The articles on payment of a thing not due constitute one specification of the underlying principle of unjust enrichment. Although the court did not hold but only assumed that the articles on payment of a thing not due were not applicable, the assumption could have been a holding, for at the time the lessee paid the royalties at the higher temporary rate, the amounts paid were unquestionably due. However, looking beneath these articles and applying the basic principle of unjust enrichment is laudable judicial technique.

The defenses raised were that voluntary payments of disputed sums cannot be recovered, even though later found not to have been due, and equitable estoppel. The first defense was properly rejected on the ground that the sums paid were not disputed but were clearly due at the time paid. The second was rejected on the ground that there was no proof of detrimental reliance.

The opinion conveys the feeling that the result would be achieved except in the presence of unusual circumstances. There is substantial justice in requiring the lessor to bear his proportionate share of the price rollback. However, the case suggests that as a matter of policy, when gas is sold under conditions which make the lessor liable to repayment of a portion of royalties received, the lessee should inform the lessor of this contingency. Failure to do so could impose hardship on some individual lessors, and the situation presents the possibility that given proper circumstances a lessee might be considered to have breached his obligation to act as a prudent administrator. The lease provision requiring that sales of lessor's gas be at the same price and on the same terms as sales of lessee's gas is a protective device for the lessor. It makes express what is implied by

44. La. Civ. Code art. 2710.
the lessee's duty to deal fairly with the lessor's interest. This express provision is not present in many common lease forms. Therefore, in many instances the lessee would not be able to rely on supporting lease terms. The argument that the lessor would be unjustly enriched if not compelled to bear his share of the rollback might be offset and overcome by a contention that the lessee's duty to act as a prudent administrator and to deal fairly with the interest of the lessor requires that the lessor be informed of the contingency on which the gas was sold so that he might protect himself against hardship by setting up a reserve against the potential liability. This possible argument was not mentioned in the Boagni opinion, but it might be persuasively urged in future litigation.

Mandamus to Compel Payment of Royalties

In Todd v. Tarpon Oil Co. plaintiff sought a writ of mandamus compelling defendant operator to pay him sums representing the value of production attributable to a small overriding royalty and a fraction of the working interest owned by plaintiff. Defendant filed exceptions of no cause or right of action and unauthorized use of summary process. Defendant's principal objection was that under LA. R.S. 30:105-07, which authorize the issuance of writs of mandamus to compel payment of royalties or other sums due to a party holding an interest under a mineral lease, there must be a "sum certain." It was contended that there was no sum certain because plaintiff owed defendant for his share of drilling and operating costs. The court correctly held that whether there was a sum certain was a question to be determined on the merits of whether the writ should issue and denied defendant's exceptions.

Drilling Contracts

Duncan v. Gill was a dispute between a drilling contractor and co-owners of a lease. A written contract for the drilling of one well was entered into by plaintiff contractor and defendant lessee. After drilling of the well, the contractor performed fur-
ther services by completing that well, reworking an old well as a salt water disposal well, and drilling a second well. Defendants denied any liability for services performed beyond the drilling of the initial well. Recovery was allowed on a quantum meruit basis for the services based on findings that the lessee was aware of and in effect had authorized the additional work. The facts are complicated, but insofar as the case allows recovery for the services rendered there can be no doubt as to the correctness of the result.

A second issue in the case was whether co-owners of the lease were to be held liable as ordinary partners, and therefore on a virile share basis, or in proportion to their ownership of the lease. The court relied on established jurisprudence holding that a joint venture operation in the drilling of a well is to be governed by the rules applicable to ordinary partnerships and held the co-owners liable on a virile share basis. The case should be viewed as a warning to the small investor who buys a fractional working interest in a promoted well. Under this decision and those on which the court relied, such an investor might buy, say, a 1/64th interest and be held liable to third parties far in excess of his ownership of the lease. Investments of this kind are often motivated by the dual tax attraction of being able to write off intangible drilling costs and to take the depletion allowance in the event of production. Generally, the investor has no real intention of exercising management authority or participating in decision making in the way in which his status as a co-owner of the lease would technically permit him to do. He has little or no contact with the promoter and does not participate in the letting of contracts or supervision of operations. To subject him to liability beyond the proportion of his ownership in such instances seems harsh.

The leading case cited by the court, Young v. Reed, refused to limit liability to the proportionate ownership fractions of the defendants because it was clear that they had played an active role in organizing and managing the undertaking there involved. Thus, refusing to limit liability to ownership fractions in that case made parties who were active in the venture responsible as

49. Posey v. Fargo, 187 La. 122, 174 So. 175 (1937); Suckle v. Hartford Accident and Indem. Co., 163 So.2d 564 (La. App. 2d Cir. 1964); Young v. Reed, 192 So. 780 (La. App. 2d Cir. 1939).
50. LA. CIV. CODE art. 2873.
51. 192 So. 780 (La. App. 2d Cir. 1939).
they should have been to persons with whom the venturers contracted. In the Duncan case, however, the principle of the Young decision is turned around and applied so as to make essentially passive parties liable beyond the measure of their ownership interests. One wonders if some functional examination of the roles being played by the parties in these instances might not permit the court to allocate responsibility to third parties on the basis of ownership in some cases and partnership in others, depending on the real structure of the business arrangement involved. If the present rule is adhered to, however, the small investor and his attorney would be well-advised to insert protective wording in the assignments of working interest which would require the promoter to indemnify the investor for any liability to third parties beyond the fraction of his ownership. This would permit third parties to look to co-owners classified as ordinary partners on a virile share basis and simultaneously afford a measure of protection to the investor. Of course, if the promoter is not responsible or is impecunious, the measure of protection might in fact be small, but this course is certainly preferable to leaving the agreement silent and leaving the small investor entirely without recourse. Even this solution is not thoroughly satisfactory as these investments are often made and the assignments given without benefit of legal advice to the investor. It is this reality which suggests that the application of the joint venture principle embodied in Young v. Reed that might well be re-examined and applied on the basis of the real structure of individual business arrangements.

Another drilling contract case, J. C. Trahan Drilling Contractor, Inc. v. Cockrell, involved a claim by the drilling contractor for expenses incurred in fishing operations necessitated by the sticking of the drill pipe. A standard drilling contract form was used. Under the form, the owner had responsibility for the mud program and the contractor was charged with giving written recommendations for changes in the mud program designed by the owner. The contract expressly contemplated that oil might be added to the mud to increase the rate of penetration. An additive known as Protectomagic, consisting of eighty per cent diesel oil and twenty per cent blown asphalt, was added at the owner’s direction and with the knowledge of the contractor. Plaintiff contractor claimed that the additive

52. Id.
53. 225 So. 2d 599 (La. App. 1st Cir. 1969).
caused the sticking, asserting that chemical reaction of the asphalt with the mud particles caused flocculation of the mud which prevented effective sealing of the walls of the hole. This in turn, it was asserted, resulted in a pressure differential which caused the drill pipe to adhere to the wall of the hole and become stuck. Plaintiff contended that use of Protectomagic was not a use of “oil” as contemplated by the contract, thus supporting its right to recovery under the contract. The court held that the additive could fairly be regarded as “oil” under the contract and that plaintiff’s knowledge of the use of the additive amounted to a consent to its utilization.

Plaintiff alternatively claimed in tort, alleging and seeking to prove that defendant was negligent in adding the Protectomagic. The court concluded that plaintiff had not shown by a preponderance of the evidence that addition of the Protectomagic or negligence in mixing it with the mud caused the pipe to stick. To the contrary, the court found that defendant’s hypothesis that the sticking was caused by what is known as “key-seating,” the hanging of pipe collars at a point or points where the hole has deviated significantly from the vertical, was the more likely explanation for the sticking. The claim in tort was thus denied. In reaching this result, the court refused to apply the rule of res ipsa loquitur on the ground that the defendant owner did not have exclusive control of the mud program, a requirement for application of the doctrine.

OPERATING AGREEMENTS

The decision of the court of appeal in Crow Drilling & Producing Co. v. Hunt was discussed in the 1968-1969 symposium. The supreme court granted writs and rendered an opinion affirming the judgment of the court of appeal during the 1969-1970 term. The reasons given are very much the same as those in the decision by the court of appeal, and there is no need for detailed discussion here. Briefly, the dispute involved construction of an operating agreement and two letter agreements looking toward the drilling of two wells and execution of the operating agreement which included both wells. At the center of the controversy was the effect of failure of title. Both courts held that under the clear terms of the letter agree-

54. 211 So.2d 128 (La. App. 3d Cir. 1968).
55. 252 La. 867, 214 So.2d 544 (1968).
ments, partial failure of title was not to decrease the sharing arrangement agreed upon. As previously noted, the decision may cause some concern, but careful draftsmanship may avoid any consequences of this decision considered undesirable.

Superior Oil Co. v. Humble Oil & Refining Co.\(^57\) required interpretation of an operating agreement and a contemporaneous supplementary agreement by which the parties sought to provide for a means of adjusting costs if the Commissioner of Conservation formed units which altered the percentage of participation in the well drilled under the agreement. Exceptions of lack of jurisdiction over the subject matter, improper venue, and prematurity were filed. The court of appeal denied the exceptions of want of jurisdiction and improper venue but sustained the exception of prematurity. As the case is pending on writs at this time, discussion will be pretermitted until the case is finally decided.

**Conservation**

In *Miller v. Menefee*\(^58\) plaintiff sought to have an order of the Commissioner of Conservation struck down as illegal. The Commissioner had established a drilling unit including approximately 30 acres of plaintiff's land, which was under lease to Superior Oil Company. Plaintiff contended that the order was illegal and that the unit was established so as to include part of his land as a means of maintaining Superior's lease by the unit operations. As far as the writer can determine, a legal argument was made to the effect that as the unit was unexplored at the time it was established, Statewide Order No. 29-E, which establishes spacing regulations applicable in the absence of special orders, governed; as the purpose of conservation was being served by the statewide order, it was argued, there was no conservation purpose to be served by the unitization order. The court rejected this argument. There was apparently no serious attack on the technical basis for the order as opinions of the witnesses for the Commissioner that there was reasonable ground for the issuance of the order were uncontradicted.

The court's holding is proper. Any other result would wreak havoc with the normal operation of the regulatory scheme.

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58. 228 So.2d 689 (La. App. 1st Cir. 1969).
The Commissioner customarily operates by establishing a series of units for a pool, some of which are for wells already drilled and others of which regulate undrilled areas. To hold that the Commissioner cannot form units for undrilled areas would fly in the face of the clear provisions of the conservation act permitting him to establish “drilling units.”9 The establishment of units in advance of drilling achieves the orderly and cooperative development of pools. To prevent the Commissioner from establishing units on unexplored areas just because he promulgated a statewide spacing order applicable when no units are in existence would obstruct accomplishment of the statutory purpose.

**Correlative Rights**

Though it is outside the field of mineral rights insofar as the factual situation involved is concerned, the decision of the Supreme Court of Louisiana in *Reymond v. State, Department of Highways*60 is something on which this writer feels constrained to comment because of its potential serious and adverse impact on mineral law. Until the *Reymond* decision, it had been thought by many, including the writer, that articles 667-73 of the Civil Code contained specifications of a widely recognized general principle, the obligation of good neighborhood arising from concurrent use of an important resource, land, under circumstances which require a measure of consideration by land users each for the rights of others. The *Reymond* decision, resorting to the works of Domat, narrowly limits the applicability of article 667 to “works,” meaning structures erected on the land. This writer respectfully disagrees with the limitation imposed by the *Reymond* decision. It is, as noted by Justice Sanders’ dissenting opinion, contrary to established jurisprudence.61 Further, it fails to take note of the existence of an underlying principle in the articles of the Civil Code which can and should be extracted and applied to achieve justice in settling disputes between users of land and the resources which it contains.

This symposium will contain divergent views on the correctness of the *Reymond* decision, but this writer is of the

61. See the authorities cited by Justice Sanders. *Id.* at 466-67, 231 So.2d at 390. These authorities range from pile driving and seismic exploration to the use of insecticides.
opinion that it is an improvident one which uses the strict, exegetic style of construction now generally disregarded by modern doctrinal writers on the subject of code interpretation. Taking a leaf from the book of judicial technique, the writer concurs generally in the remarks of Professor Yiannopoulos elsewhere in this symposium. However, some note of the impact of the decision on the field of mineral law is proper.

Anglo-American jurisdictions recognize what has become known as the doctrine of correlative rights which governs the relationship between parties having interests in a common source of supply of minerals. The following passage from an article by Professor Eugene Kuntz of the University of Oklahoma presents a good functional analysis of the basis for the doctrine of correlative rights:

"Because of the reciprocal effect which the conduct of the parties who own interests in a common source of supply of oil or gas will have on one another, they may be described as operating in a special community, and the conduct which will or will not be tolerated in connection with such operations will be determined by the social acceptability of such conduct within such special community. In determining whether a particular form of conduct is or is not socially acceptable, we may not only look to generally accepted standards, but we must look to the utility of such conduct in the light of the special consequences which may be expected to follow for the other parties in the same special community. The term 'correlative rights' is simply a term to describe such reciprocal rights and duties of the owners in a common source of supply."

In Anglo-American jurisdictions relief has been granted for waste of the common resource resulting from various causes. Relief has also been granted where an attempt was made to disguise waste beneath the cover of a sham, low magnitude economic utilization of the resources. Recovery has been allowed in the case of negligent waste of the common resource, as, for example by a blowout which due care could have

63. Id.
64. Louisvile Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368 (1903).
There does not, however, seem to be any instance to date in which courts have been willing to impose liability for waste of the common source of supply without either intent or negligence. This reflects a determination that the public interest in utilization of the resources is such that the ordinary risks of waste occasioned by occurrences which are not the result of intentional or negligent conduct should not be shifted from one party engaged in extraction to others engaged in the same utilitarian endeavor. The fact that ordinary risks have not been shifted among those engaged in extraction does not, however, mean that relief cannot be granted if, once an event has taken place, an operator does not take reasonable steps to remedy a situation resulting in waste. If, for example, a producing formation is menaced by a blowout resulting from an unavoidable accident causing waste of the common resource, the operator suffering the accident cannot fail to take all necessary and reasonable measures to minimize the damage to other interests in the common source of supply.

Other cases in Anglo-American jurisdictions have dealt with spoilage of the common reservoir. For example, excessive rates of withdrawal causing intrusion of water in the producing formation; failure to plug an abandoned well, permitting intrusion of water; and negligence in "shooting" a well. All these have been situations warranting relief. Modern techniques of pressure maintenance and secondary recovery are beginning to cause problems in other jurisdictions. In one instance, water flood operations deprived an owner of his right to primary production, and relief was granted.

This brief review of cases involving correlative rights in other jurisdictions reveals that those with interests in a common source of supply of oil and gas are generally regarded as constituting a special community in which each party using the common resource must behave as a good neighbor to the other members of the special community. The interest of each member of the community in the common resource extends

70. Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir. 1963).
beyond the limits of the geographical boundaries of the property in which he has an interest. It is precisely this sort of consideration which is involved in the basic principle underlying article 667 of the Civil Code. Those using the surface of land to erect structures or make any other utilization of their property constitute a special neighborhood or community. There are certain ordinary risks or inconveniences which the relationship of neighborhood entails and which must be endured. These ordinary risks are not transferred from one member of the community to another in the absence of negligence. There are other risks of land use, however, which are so severe that responsibility for damage can be fixed upon the user regardless of the manner of his performance of the particular use. Still other uses are so out of character with the general community or so dangerous that they can be completely prohibited. Control of this last type of use is now largely vested in zoning authorities which make determinations as to what uses can be permitted in particular neighborhoods considering the present use of the neighborhood, changes in its character, and all other factors relevant to the required adjudication. However, there are even now instances in which courts, through the issuance of injunctions, can prohibit new or unreasonably dangerous utilizations of land.

The relationship of neighborhood is as existent among users of the subsurface who are engaged in extracting oil, gas, or other minerals, as between users of the surface. The ordinary inconveniences or risks of this particular kind of neighborhood are not to be shifted from the shoulder of one producer to another without negligence. Thus, the risk of a blowout in oil and gas operations is, as among those in the business of extracting these minerals, an ordinary risk of operation, and it is not transferred from one operator or mineral owner to another in the absence of a showing of negligence. However, it is conceivable that certain ultrahazardous uses of a reservoir might be the occasion for fixing responsibility without regard to the degree of care exercised. Thus, utilization of an experimental technique such as a so-called "fire-flood" as a secondary recovery method might be a situation in which the party engaging in the use of controlled combustion in the reservoir to raise the temperature and thus decrease the viscosity of the reservoir substances would warrant the imposition of responsibility to others with interests in the pool, or even in other pools, if the process
got out of control and damage resulted, regardless of the care exercised by the operator.

The Louisiana Conservation Act is based upon the assumption that those whose property and mineral interests overlie a common source of supply of oil or gas have rights in the common reservoir even though their surface property lines encompass only a small portion of the area underlain by it. Analytically, these shared rights fall into two basic categories: (1) the right to an opportunity to produce a just and equitable share of the common resource and (2) the right to utilize the natural drive or energy of the reservoir which aids in producing the reservoir substances. The best device available in the Louisiana Civil Code for giving expression to these rights in private disputes is article 667.

The principle of good neighborhood embodied in article 667 is pervasive. The relationship of neighborhood can be established in many instances. It need not, and should not, be limited to the use of the surface of land, or to a particular form of utilization. Nor should it be limited strictly to "proprietors," which a literal interpretation of article 667 might support. The applicability of the principle of article 667 to mineral matters in Louisiana is sustained in the jurisprudence. For example, in Higgins Oil & Fuel Co. v. Guaranty Oil Co. a landowner left a well uncapped, decreasing the pumping efficiency of his neighbor's well. An injunction was granted against such conduct in specific reliance upon article 667.

It is noteworthy that one operating for oil and gas can be simultaneously a member of two or more communities or neighborhoods, and the same act may be an ordinary risk as to one and an ultra-hazardous or extraordinary risk as to another. For example, if the operator is drilling in a residential area and his well blows out, his responsibility may be fixed under article 667 for damage to neighboring homeowners without regard to the care he has exercised. However, his responsibility to the same parties for damage to a productive reservoir would entail consideration of whether he has been careful. The risk of blow-out as among the neighborhood or community interested in the reservoir is an ordinary risk of oil and gas operation. It is one

of the "inconveniences" involved in the relationship of neighborhood among those utilizing the oil and gas beneath the land.

It is significant that even without special articles corresponding to those in the Louisiana Civil Code, the French recognize the relationship of neighborhood. It would be a pity if Louisiana, by a narrow, restrictive interpretation of article 667 and its companion provisions took from its law a flexible, useful tool by refusing to recognize the underlying general principle. Certainly, if the Reymond decision stands, the court must be aware and bear carefully in mind that it has impact on a large number of areas of law. The danger of upsetting the jurisprudence cited by Justice Sanders is that it leaves the way open for enterprising advocates to argue that in cases similar to those formerly treated by use of article 667 the Reymond case means that defendants can no longer be made responsible for their actions. If the court is to embark on a course of distinguishing ordinary risks of land use from ultra-hazardous ones and fixing responsibility accordingly without use of article 667, it should do so with full awareness and extreme care.

CORPORATIONS

Milton M. Harrison*

The Supreme Court of Louisiana in 1933 in Fudickar v. Inabnet held that when there are outstanding claims against a dissolved corporation, which claims were disregarded by the liquidator, persons possessing the claims have a right of action against former stockholders who have become distributees of the assets. Following the Fudickar case, in which the claim had arisen from contract, the court in Ortego v. Nehi Bottling Works applied the same reasoning to a tort claim. Both of these decisions recognized the absence of specific authority in the Business Corporation Act for such a procedure and based the rulings on Louisiana Civil Code article 21. In Collins v. Richland Aviation Service, Inc. the Second Circuit Court of Appeal referred to the revision in 1968 of our corporation statutes but followed

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1. 176 La. 777, 146 So. 745 (1933).
2. 182 So. 365 (La. App. 2d Cir. 1938); Note, 13 Tul. L. Rev. 308 (1939).