

Louisiana Law Review

Volume 23 | Number 1

Louisiana Legislation of 1962: A Symposium

December 1962

Classifying Mineral Interests - Mineral Servitude v. Mineral Royalty

William Shelby McKenzie

Repository Citation

William Shelby McKenzie, *Classifying Mineral Interests - Mineral Servitude v. Mineral Royalty*, 23 La. L. Rev. (1962)

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gramming seems unquestionably a matter of taste, unimprovable by the Commission's present rules. For years broadcasters have responded to the subtle approach to regulation — various forms of policy pronouncements — and the Commission's rules have remained virtually unchanged, thus provoking no litigation of constitutional issues. But broadcasters' failure to improve present program quality invites increased regulation by the FCC. Experience has shown that broadcasters do not ignore policy pronouncements so that the Commission is not forced into rule-making. However, when broadcasting freedom faces serious limitation, broadcasters will be less receptive to policy pronouncements. At some point an impasse will be reached. Broadcasters will balk, no longer responding to the subtle approach, and the Commission will be forced to make rules incorporating broad assumptions of authority in its quest to improve program quality. The result will be litigation involving delicate constitutional problems of free speech.

If the Commission were to make rules that would attain a higher degree of quality programming, it appears that it would have a very difficult time sustaining them before the Court in view of the existing interpretation of the free speech guarantee. Perhaps the key to improved programming quality lies in the following statement by Chairman Minow: "To those few broadcasters and their professional associates who would evade the nation's needs by crying, 'Censorship! Oh, where will it end?' I ask, 'Responsibility! When will it begin?' "⁸⁴

David S. Bell

CLASSIFYING MINERAL INTERESTS— MINERAL SERVITUDE V. MINERAL ROYALTY

In Louisiana jurisprudence the distinction between the rights and obligations that accompany an ordinary mineral royalty and those that accompany an ordinary mineral servitude is well settled.¹ Many conveyances or reservations of mineral interests,

84. *Public Interest* 33.

1. *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So.2d 575 (1960); *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949); *Humble Oil & Ref. Co. v. Guillory*, 212 La. 646, 33 So.2d 182 (1947); *Union Sulphur Co. v. Lognion*, 212 La. 632, 33 So.2d 178 (1947); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So.2d 169 (1947); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

however, do not fall neatly into one classification or the other because the person who drafted the instrument did not clearly understand the distinction, or because the instrument was drafted before the interests were judicially distinguished, or because the parties desired to create an interest which lies somewhere between the two. The subject of this inquiry is the problems encountered in conveying and interpreting interests that are not distinctly either ordinary mineral royalties or ordinary mineral servitudes.

MINERAL SERVITUDE V. MINERAL ROYALTY

A mineral servitude is defined in *Frost-Johnson Lumber Co. v. Salling's Heirs*² as a right in the nature of a servitude to go upon land and reduce its minerals to possession.³ A mineral royalty, on the other hand, was defined in *Vincent v. Bullock*⁴ as a real obligation conditioned upon production—a passive interest only in a share of production.⁵ Although in some respects the rights acquired are similar, they differ significantly as to the right to develop and the rules governing accrual of prescription.

The Right to Develop

The owner of a mineral servitude has the right to go on the land to develop his interest, but the royalty owner does not, since his is a purely passive interest in actual production.⁶ From this

2. 150 La. 756, 91 So. 207 (1922).

3. *Long-Bell Petroleum Co. v. Tritico*, 216 La. 426, 451, 43 So.2d 782, 791 (1949): "When oil and gas were first discovered in the State and the interests of those asserting rights to such oil and gas as a result of sales or reservations became controversial, this Court, recognizing that under our system of law there can be no other land tenure than perfect ownership and imperfect ownership, decreed that there could be no mineral estate in oil and gas as such and that the sale or reservation of minerals was the mere grant or retention of a right to go on the land for the exploration or exploitation of such minerals. Such right was classified as being a real right in the nature of a servitude, to be governed by the laws of this State on the subject matter."

4. 192 La. 1, 187 So. 35 (1939).

5. A mineral royalty should be distinguished, as a matter of definition, from a "lease royalty" and an "overriding royalty." A lease royalty is that interest in a share of the production retained by the landowner and/or mineral owners which forms part of the consideration for granting the mineral lease. The remaining interest in production granted to the lessee under a mineral lease is called the "working interest." Any royalty right carved out of the working interest is termed an "overriding royalty." Neither the lease royalty nor the overriding royalty exists independently of the lease, and both are governed by the law of leases. On the other hand, a mineral royalty is a passive interest in production which may be granted subject to a mineral lease, but is a real obligation existing independently of such lease, and can be created without reference to any lease.

6. *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 1020, 117 So.2d 575, 577 (1960): "It is also well established that the right to search and

right to develop flows the right to grant a mineral lease, which not only is the ordinary means of ultimately obtaining production but also can be lucrative in itself because of bonuses paid for the lease and delay rentals paid to perpetuate it. Hence, the possessor of an unqualified mineral servitude is entitled to develop his interest, to grant leases, and to receive a proportionate share of the bonuses and rentals, whereas the royalty owner has none of these rights.⁷

Accrual of Prescription

A mineral servitude is governed by the prescriptive rules applicable to servitudes and thus is lost by ten years' nonuser.⁸ However, this servitude may be used by a good faith effort, even though unsuccessful, to obtain production.⁹ A mineral royalty, on the other hand, is treated as a conditional real obligation, and thus is lost by prescription liberandi causa upon nonoccurrence of the condition—production—within ten years after it is created.¹⁰ Therefore, good faith drilling operations will rescue a mineral servitude from loss by prescription, while production alone will preserve a mineral royalty.

Under certain circumstances, the nature of the interest determines in whose favor it prescribes—the landowner or the min-

explore, which is implicit in the grant of a mineral servitude, does not attach to the sale of royalty and that the royalty owner's right to share in the production is necessarily dependent upon the development of the property by either the landowner and/or the mineral owner, in cases in which a servitude has been created, or by a mineral lessee, holding under a lease from the landowner or mineral owner or both."

7. *Continental Oil Co. v. Landry*, 215 La. 518, 526, 41 So.2d 73, 75 (1949): "The owner of the mineral right has the right of ingress to, and egress from, the land, the right to produce the minerals, the right to participate in the bonuses and delay rentals paid under the terms of any lease. On the other hand, the owner of a royalty right has none of these rights, nor is his consent even necessary for the execution of a lease by the mineral owner, his right being to share in production if and when it is had."

8. *Wemple v. Nabors Oil & Gas Co.*, 154 La. 483, 97 So. 666 (1923); *Nabors Oil & Gas Co. v. Louisiana Oil Refining Co.*, 151 La. 361, 91 So. 765 (1922); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

9. *McMurrey v. Gray*, 216 La. 904, 45 So.2d 73 (1949); *Hunter Co. v. Ulrich*, 200 La. 536, 8 So.2d 531 (1942); *Lynn v. Harrington*, 193 La. 877, 192 So. 517 (1939); *Louisiana Petroleum Co. v. Broussard*, 172 La. 613, 135 So. 1 (1931).

10. *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So.2d 575 (1960); *Gulf Refining Co. v. Hunter Co.*, 231 La. 1002, 93 So.2d 537 (1957); *LeBlanc v. Haynesville Mercantile Co.*, 230 La. 299, 88 So.2d 377 (1956); *Union Oil Co. v. Touchet*, 299 La. 316, 86 So.2d 50 (1956); *Union Sulphur Co. v. Andrau*, 217 La. 662, 47 So.2d 38 (1950); *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949); *Humble Oil & Ref. Co. v. Guillory*, 212 La. 646, 33 So.2d 182 (1947); *Union Sulphur Co. v. Lognion*, 212 La. 632, 33 So.2d 178 (1947); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So.2d 169 (1947); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

eral servitude owner. If the right which prescribed was a mineral servitude, then its extinction inures to the benefit of the landowner. However, if the prescribed interest was a mineral royalty which was conveyed either by a servitude owner or by a landowner who has subsequently created a servitude covering the same interest, then the owner of the mineral servitude interest out of which the royalty was carved profits through extinguishment of the obligation imposed on his interest.¹¹

INSTRUMENTS CLEARLY CONVEYING EITHER MINERAL SERVITUDES OR MINERAL ROYALTIES

Mineral Servitudes

Common law jurisdictions, absent statutory regulation, permit the sale of minerals in place.¹² In consequence of this influence from common law states, most deeds in Louisiana that convey mineral servitudes contain language in the form of a sale or reservation from the sale of land similar to the following:

"Grantor . . . does hereby grant, bargain, sell, convey, transfer, assign and deliver unto . . . Grantee, an undivided . . . [fractional] . . . interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described lands . . ., together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands. . . .

"This sale is made subject to any rights now existing . . . under any valid and subsisting oil and gas lease . . .; it being understood and agreed that said Grantee shall have, receive, and enjoy the herein granted undivided interest in and to all bonuses, rents, royalties and other benefits which may accrue under the terms of said lease" ¹³

11. *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959); *Arkansas Fuel Oil Co. v. Sanders*, 224 La. 448, 69 So.2d 745 (1954).

12. *WILLIAMS & MEYERS, OIL AND GAS LAW* §§ 201-16 (1959).

13. *OAKES, STANDARD OIL AND GAS FORMS* 197-98 (1952). See *Hodges v. Long-Bell Petroleum Co.*, 240 La. 198, 121 So.2d 831 (1960); *Arkansas Fuel Oil Co. v. Sanders*, 224 La. 448, 69 So.2d 745 (1953); *McMurrey v. Gray*, 216 La. 904, 45 So.2d 73 (1949); *Ober v. Williams*, 213 La. 568, 35 So.2d 219 (1948); *Gregory v. Central Coal & Coke Corp.*, 197 La. 95, 200 So. 832 (1941); *Hightower v. Maritzky*, 194 La. 998, 195 So. 518 (1940); *Smith v. Anisman*, 85 So.2d 351 (La. App. 2d Cir. 1956) (mineral acres); *Bennett v. Robinson*, 25 So.2d 641 (La. App. 2d Cir. 1946). The deed may express a sale or reservation of the right to the minerals rather than a sale of the minerals themselves: *Leiter Minerals v. California Co.*, 241 La. 915, 132 So.2d 845 (1961) (right to

In the quoted conveyance, the phrase essential to creation of a servitude seems to be "an undivided . . . [fractional] . . . interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described lands" The Louisiana courts have definitively held that the right of ingress and egress and the right to share in the lease benefits are implicit in the purchase of a mineral servitude.¹⁴ Consequently, failure to reserve these rights does not affect the nature of the interest. A different situation may exist, however, if the quoted phrase is qualified by additional stipulations. This problem will be discussed later.

Mineral Royalties

The language used to create mineral royalties has not been so uniform as that used to create mineral servitudes. Most deeds specify in some way that the interest acquired is royalty:

- (1) "1/16 *royalty* of all the oil, gas and other minerals produced and saved from said premises"¹⁵
- (2) "A *royalty* interest of 1/256th out of all of the oil, gas, sulphur and other minerals, that may be produced"¹⁶
- (3) "One-fourth interest in and to all *royalties* stipulated for or hereafter to be stipulated for, in any oil, gas or mineral lease"¹⁷

mine and remove); State *ex rel.* Bourgaux v. Fontenot, 192 La. 95, 187 So. 66 (1939) (mineral rights); Calhoun v. Ardis, 174 La. 420, 141 So. 15 (1932) (mineral rights); Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922) (exclusive right and privilege to enter upon the lands, etc.). The mineral rights may also be sold for a limited term: Munn v. Wadley, 192 La. 874, 877, 189 So. 561, 562 (1939) ("reserves . . . , for a term of thirty-five (35) years, all oil, gas, sulphur and other minerals"); Hodges v. Norton, 200 La. 614, 8 So. 2d 618 (1942) (fifteen years).

14. Horn v. Skelly Oil Co., 224 La. 709, 719, 70 So. 2d 657, 660 (1954): "Such a reservation under our long recognized and established jurisprudence constitutes a servitude imposed upon the land, giving the owner thereof the right of ingress and egress for the purpose of exploring for and reducing to possession the minerals under the property so burdened. See Clark v. Tensas Delta Land Co., 172 La. 913, 136 So. 1 (1931) (right to lease benefits).

15. Vincent v. Bullock, 192 La. 1, 7, 187 So. 35, 37 (1939). See Union Oil & Gas Corp. v. Broussard, 237 La. 660, 112 So. 2d 96 (1959); St. Martin Land Co. v. Pinckney, 212 La. 605, 33 So. 2d 169 (1947).

16. Union Sulphur Co. v. Lognon, 212 La. 632, 635, 33 So. 2d 178, 179 (1947).

17. Humble Oil & Refining Co. v. Guillory, 212 La. 646, 649, 33 So. 2d 182, 183 (1947). This mineral royalty interest is charged against production only if development is under a lease.

- (4) "1/32 *royalty* in and to mineral rights, lying in and under the property above described" ¹⁸
- (5) "The *royalty* interests and rights herein sold, transferred and conveyed are:

"1/32 of the whole of any oil, gas or other minerals on and under and to be produced from said lands, delivery of said *royalties*" ¹⁹ (Emphasis added.)

All of the phrases quoted clearly convey only mineral royalties.²⁰ Certain instruments, however, seem to convey a right which lies somewhere between a mineral servitude and a mineral royalty.

CONTROVERSIAL INSTRUMENTS

The Louisiana Courts' Approach

In the last twenty years, eight instruments have been alleged to convey a mineral servitude by one party and a mineral royalty by another.²¹ On five of these occasions litigants have gone into the courts bitterly contesting the nature of the interests conveyed by provisions similar to the following:

"Grantor conveys to Grantee an undivided . . . [fractional] . . . interest in and to all of the oil, gas, and other minerals in and under and that may be produced from the following described lands

18. *Martel v. A. Veeder Co.*, 199 La. 423, 6 So.2d 335 (1942) (deed obtained from transcript). See *Gulf Refining Co. v. Goode*, 212 La. 502, 32 So.2d 904 (1947).

19. *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949) (deed obtained from transcript). See *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So.2d 575 (1960) (deed obtained from transcript).

20. Other instruments which unequivocally convey nothing more than a right to share in any production obtained from the lands, and are not couched in usual royalty or servitude language, are counted as royalty deeds:

(1) "one-half of the proceeds from the sale of oil or minerals under said described land . . ." *Arkansas Fuel Oil Co. v. Sanders*, 224 La. 448, 450, 69 So.2d 745 (1953).

(2) "1/8 of all oil or other mineral substances produced from said tract of land herein conveyed, free of all charges and expenses at the wells or mines where produced." *Gulf Refining Co. v. Hunter Co.*, 231 La. 1002, 1004, 93 So.2d 537, 538 (1957).

The large interests which both of these deeds create in favor of the royalty owners might lead to serious difficulties preventing development of the minerals.

21. *Horn v. Skelly Oil Co.*, 224 La. 709, 70 So.2d 657 (1954); *Gulf Refining Co. v. Goode*, 212 La. 502, 32 So.2d 904 (1947); *Standard Oil Co. v. Futral*, 204 La. 215, 15 So.2d 65 (1943); *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962); *Phillips Petroleum Co. v. Richard*, 127 So.2d 816 (La. App. 3d Cir. 1961); *Cormier v. Ferguson*, 92 So.2d 507 (La. App. 1st Cir. 1957); *Smith v. Anisman*, 85 So.2d 351 (La. App. 2d Cir. 1956); *Bennett v. Robinson*, 25 So.2d 641 (La. App. 2d Cir. 1946).

"Provided however, that *Grantor* reserves the right to and authority to execute at any time a lease covering said land without joinder of the *Grantee*, and all bonuses and rentals received under such leases shall be the exclusive property of the *Grantor*" ²²

On all except one of these five occasions, the courts found mineral servitudes to have been conveyed.²³ The four harmonious

22. (1) *Horn v. Skelly Oil Co.*, 224 La. 709, 713, 70 So.2d 657, 658 (1954) : "There is . . . reserved unto [vendor of the land] a one half mineral interest in and to all mineral and mineral rights in and under the above described property. It is provided, however, that the purchaser is hereby granted the privilege of leasing the minerals and mineral rights, including the said reserved interest, without joinder of [vendor] on the following conditions, to wit: . . ."

(2) *Standard Oil Co. v. Futral*, 204 La. 215, 230, 15 So.2d 65, 70 (1943) : "[Vendor] grant [purchaser] 1/64 of all the oil, gas, sulphur, and other minerals in and under, and that may be produced and saved from the following described land"

"It is understood and agreed that the purchaser is to receive as a royalty . . . one-eighth (1/8) of all royalties received by vendor . . . ; purchaser to receive said royalty under the now existing or any subsequent leases entered into by vendor; vendor however specifically reserving the right to enter into any new leasing contracts he may see fit"

(3) *Melancon v. Cheramie*, 138 So.2d 138, 139 (La. App. 1st Cir. 1962) : "[Vendor] does grant . . . unto [vendee] . . . the following described property to wit: One sixteenth (1/16) of the oil, gas, sulphur and other minerals, in and under and that may be produced from the following described lands"

"It is understood and agreed between the parties that no interest is sold in any money rentals that may be hereafter paid in order to keep such lease in effect without drilling but on the contrary, it is specifically understood that any and all such money rental will be paid to the vendor herein."

(4) *Phillips Petroleum Co. v. Richard*, 127 So.2d 816, 817 (La. App. 3d Cir. 1961) : ". . . vendor reserves for himself, his heirs and assigns, an undivided one-fourth of the oil, gas and other minerals under and produced and saved from said land, which reservation is equal to a one-thirty-second royalty interest under the said existing lease and as well a like royalty interest under future mineral leases . . . , it being agreed and understood that this reservation is made and granted subject to the right of the purchaser and heirs and assigns to grant and execute such future oil, gas, and mineral leases affecting the whole or any portion of the land conveyed hereunder, and this without the consent or joinder therein of the vendor . . . and all down payments paid to obtain such future leases, as well as all money, rental and/or bonuses received under such future leases shall be the exclusive property of the purchaser and shall be paid to him."

(5) *Cormier v. Ferguson*, 92 So.2d 507, 509 (La. App. 1st Cir. 1957) : "[Grantor] . . . does hereby grant . . . unto [Grantee] an undivided one quarter (1/4) interest in and to all oil, gas, sulphur and other minerals on, in and under the following described land"

"This grant is subject to the mineral lease above mentioned but includes one-quarter (1/4) of all the royalties in such lease. . . . Should said lease above referred to expire, then Grantor shall have the right and authority to execute at any time a lease or leases covering said land without joinder of the Grantee herein or assigns, and all bonuses and rentals that may be paid for or under such subsequent lease or leases shall be paid to Grantor. . . ."

23. *Horn v. Skelly Oil Co.*, 224 La. 709, 70 So.2d 657 (1954); *Standard Oil Co. v. Futral*, 204 La. 215, 15 So.2d 65 (1943); *Phillips Petroleum Co. v. Richard*, 127 So.2d 816 (La. App. 3d Cir. 1961); *Cormier v. Ferguson*, 92 So.2d 507 (La. App. 1st Cir. 1957). *Contra*, *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962) (mineral royalty).

opinions gave great weight to the fact that the first paragraph unquestionably was in the form of a conveyance of mineral servitude. Referring to that paragraph, the Supreme Court in *Horn v. Skelly Oil Co.* said that "such a reservation under our long recognized and established jurisprudence constitutes a servitude imposed upon the land."²⁴ However, in *Melancon v. Cheramie* the First Circuit Court of Appeal said of the language in the first paragraph, "there is no doubt that the clause is used interchangeably in mineral and royalty sales."²⁵ There seems, however, to be some doubt, for no prior Louisiana case was found in which the sale of an interest "in the minerals in and under and that may be produced from," not expressly modified by the term *royalty*, was counted a mineral royalty conveyance.²⁶ In fact, it was the sale of minerals in and under the land that was construed to be a *servitude* in the celebrated *Salling's Heirs* case.²⁷ Hence the presence of the phrase is strong evidence of the intent to convey a mineral servitude.

The proviso excepting lease rights from the conveyance has been given various effects, from manifesting intention to convey a servitude to being strong proof of a royalty deed. It has been held to evidence a qualified mineral servitude, since it creates a mandate coupled with an interest by which the grantee gives the grantor the privilege of leasing the grantee's mineral rights. A servitude owner, and not a royalty owner, has the right to grant such leasing privileges.²⁸ On the other hand, the court that held a mineral royalty to have been created argued that its purpose was simply to foreclose forever any controversy over who is to receive the bonuses and rentals under a royalty agreement.²⁹

Though the instrument itself is the best source of the parties'

24. 224 La. 709, 719, 70 So.2d 657, 660 (1954).

25. 138 So.2d 138, 144 (La. App. 1st Cir. 1962).

26. The abbreviated versions of the deeds cited by the court in *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949) and *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So.2d 575 (1960) might indicate support for the assertion of the court in *Melancon*, but a check of the entire deeds as set forth in the transcript dispels this doubt, since the interest is specifically identified as royalty. (See the fifth royalty deed presented earlier in the text.) The royalty deeds under discussion in *Gulf Refining Co. v. Hunter*, 231 La. 1002, 93 So.2d 537 (1957) and *Arkansas Fuel Oil Co. v. Sanders*, 224 La. 448, 69 So.2d 745 (1953) do not specifically refer to the interest as royalty, but the language was not that ordinarily held to create a servitude.

27. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1920).

28. *Horn v. Skelly Oil Co.*, 224 La. 709, 70 So.2d 657 (1954).

29. *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962).

intent, it may be so ambiguous as to defy interpretation. The Civil Code provides for this contingency by authorizing the courts to look elsewhere for evidence of their intent.³⁰ The courts have readily termed the instrument in question ambiguous, or conceded it as such for the sake of argument, thus allowing admission of parol evidence. The courts have also been very liberal in admitting such extrinsic evidence as the testimony of the parties,³¹ the testimony of witnesses such as the notary who drafted the instrument,³² subsequent agreements between the parties or with others concerning the same interest,³³ and similar conveyances by the same parties to other persons.³⁴ In those cases in which a mineral servitude was held to have been conveyed, the courts have passed briefly over the evidence, finding that it either substantiated or did not detract from the court's conclusion. However, in *Melancon*, it seems that extrinsic evidence of the parties' intent was the factor which most influenced the court to hold the interest a mineral royalty.³⁵ The testimony of the parties strongly indicated an intent to convey royalty, although confusion surrounded preparation of the deed.³⁶

The preceding discussion indicates that the first paragraph of the controversial deed set forth above contains the "magic words"³⁷ that create a mineral servitude. The second paragraph,

30. LA. CIVIL CODE arts. 1945-62 (1870).

31. *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962); *Cormier v. Ferguson*, 92 So.2d 507 (La. App. 1st Cir. 1957).

32. *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962); *Bennett v. Robinson*, 25 So.2d 641 (La. App. 2d Cir. 1946).

33. *Gulf Refining Co. v. Goode*, 212 La. 502, 32 So.2d 904 (1947); *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962); *Phillips Petroleum Co. v. Richard*, 127 So.2d 816 (La. App. 3d Cir. 1961); *Cormier v. Ferguson*, 92 So.2d 507 (La. App. 1st Cir. 1957).

34. *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962).

35. *Melancon*, the vendor, had been extremely irritated by the loss of rental payments due to a previous sale of a mineral servitude, and had vowed never to sell more than royalty again. The vendee, *Cheramie*, also testified that he had understood that he was purchasing "royalty acres." Unfortunately neither could read, write, or speak English, nor even sign the act. The notary, admittedly not fluent in French, testified that he had understood that a mineral servitude, rather than a mineral royalty, was to be conveyed. Under these circumstances, the court declared that the "ambiguous" instrument transferred only a royalty interest, as that was the intent of the parties. *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962).

36. In ascertaining the parties' intention, the court may accord some weight to the title or caption on the deed or to the endorsement on the check given in payment for the mineral interest. *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962) (title and endorsement); *Bennett v. Robinson*, 25 So.2d 641 (La. App. 2d Cir. 1946) (both).

37. ". . . [A]n undivided . . . [fractional] . . . interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described lands"

however, strips the grantee of the usual rights of the owner of a mineral servitude to lease and to share in rentals and bonuses. In substance, the grantor has limited the servitude conveyed by the first paragraph so that practically the grantee has no control over its use.³⁸ By the conveyance the grantee has gained little more than the right of a royalty owner to receive a share of production, thus leaving his interest more nearly a mineral royalty than a mineral servitude. To determine the applicable rules of prescription³⁹ or to quell controversies over rights not stipulated in the agreement,⁴⁰ the courts must ascertain whether the interest conveyed is a servitude or royalty. In this instance the crux of the problem is whether to treat the interest as described—a qualified mineral servitude—or, by closest analogy, as conveyed—a mineral royalty. Should more weight be given to form or substance?

In those instances in which the Louisiana courts have been called upon to determine the nature of such interest, they definitely seem to have accepted a formulary, rather than a substantive, approach. Once the interest has been described in the form of a mineral servitude, later qualification will not convert it into a mineral royalty even though such qualification placed very serious limitations on the usual servitude rights. This is clearly indicated by the four decisions⁴¹ holding the interest conveyed by the quoted controversial deed to be a qualified mineral servitude.⁴² Even in *Melancon*, which ruled in favor of a min-

38. The mineral servitude owner, grantee in the quoted deed, may have the right to go upon the land and search for oil and gas until the grantor executes a lease. However, since most exploration and development is carried out under a mineral lease, such a right would be of little consequence. Further development of the concept that a reservation of lease rights creates a mandate coupled with an interest may result in some fiduciary obligations upon the grantor to lease. Nevertheless, the development of such obligations would not result in the grantee's interest being less passive.

39. *Horn v. Skelly Oil Co.*, 224 La. 709, 70 So.2d 657 (1954) (whether landowner or servitude owner benefited by prescription of the interest); *Standard Oil Co. v. Futral*, 204 La. 215, 15 So.2d 65 (1943) (whether the interest had prescribed); *Phillips Petroleum Co. v. Richard*, 127 So.2d 816 (La. App. 3d Cir. 1961) (same); *Cormier v. Ferguson*, 92 So.2d 507 (La. App. 1st Cir. 1957) (same).

40. *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962) (dispute over lease rights).

41. *Horn v. Skelly Oil Co.*, 224 La. 709, 70 So.2d 657 (1954); *Standard Oil Co. v. Futral*, 204 La. 215, 15 So.2d 65 (1943); *Phillips Petroleum Co. v. Richard*, 127 So.2d 816 (La. App. 3d Cir. 1961); *Cormier v. Ferguson*, 92 So.2d 507 (La. App. 1st Cir. 1957).

42. The courts in the three other cases cited in note 21, *supra*, in which instruments were alleged to convey mineral servitudes by one party and mineral royalties by the other also support the adoption of the formulary approach. *Gulf Refining Co. v. Goode*, 212 La. 502, 504, 32 So.2d 904, 905 (1947) ("1/64th royalty in all oil, gas and mineral rights" construed to be a mineral royalty);

eral royalty, the court was more concerned with form than substance when it found that the instrument was ambiguous.⁴³

Legal and Policy Considerations

Whether the court will continue to utilize a formulary approach in more extreme situations is another matter.⁴⁴ Suppose an instrument described the interest conveyed as a mineral servitude, but subsequent qualifications stripped that interest

Smith v. Anisman, 85 So.2d 351 (La. App. 2d Cir. 1956) ("1/6 of the oil, gas and other minerals, in and under and that may be produced" construed to be a mineral servitude); Bennett v. Robinson, 25 So.2d 641, 642 (La. App. 2d Cir. 1946) ("one-half interest in and to the oil, gas and other minerals in, under and that may be produced from" held to be a mineral servitude). None of these deeds qualified the interest conveyed. Thus no real issue between form and substance was raised.

By and large, common law jurisdictions treat deeds containing provisions similar to those set out above as transfers of royalty. *Hudgins v. Lincoln Nat. Life Ins. Co.*, 144 F. Supp. 192 (E.D. Tex. 1956); *Skelly Oil Co. v. Cities Service Oil Co.*, 160 Kan. 226, 160 P.2d 246 (1945); 1 WILLIAMS & MEYERS, OIL AND GAS LAW §§ 303-304.10 (1959). However, with the ever-present possibility of prescription, a different situation exists in Louisiana, making the distinction between royalty and servitude interests extremely important. A party might bargain away some or all of his participating rights, but have every intention of facing prescription as a mineral servitude owner. The real issue would seem to be how far the court will allow a party to qualify the ordinary rights of a servitude owner before declaring that substantively the interest is no more than royalty. This problem is discussed later in the text.

43. *Melancon v. Cheramie*, 138 So.2d 138 (La. App. 1st Cir. 1962). Its result differs from the other four decisions only because of the nature of the parol evidence admitted to show the intention of the parties. In effect, the court of appeal ascertained this intent, and then construed the "ambiguous deed" to express it. But, in light of the prior jurisprudence definitively holding that such instruments convey a servitude, it seems that such deeds are not actually ambiguous. Perhaps another method of reaching the same equitable result should have been chosen, especially in view of the notary's testimony that he thought the conveyance was of a mineral servitude. Reformation is a jurisprudentially recognized remedy for those who find that the act executed by them does not express their intent. *Wilson v. Levy*, 234 La. 719, 101 So.2d 214 (1958); *Reynaud v. Bullock*, 195 La. 86, 196 So. 29 (1940); *Rodgers v. S. H. Bolinger Co.*, 149 La. 545, 89 So. 688 (1921); Comment, 30 TUL. L. REV. 486 (1956). Reformation can be supported on the basis of LA. CIVIL CODE art. 1762 (1870). However, reformation will not be granted unless there is strong proof that the actual intent and agreement of the parties was at variance with their expressed words. If, as seems to be the situation in *Melancon*, there is "clear proof of the antecedent contract, and of the error in committing it to writing" (*Rodgers v. S. H. Bolinger Co.*, 149 La. 545, 89 So. 688, 690 (1921)), then the parties are entitled to have the instrument reformed. If the *Melancon* case is rationalized in this manner, the jurisprudence appears more consistent.

44. There are situations in which the court has regarded the substantive rights conveyed more important than the form of the conveyance: *Reinerth v. Rhody*, 52 La. Ann. 2029, 28 So. 277 (1900) (sale without consideration supported as donation); *McWilliams v. McWilliams*, 39 La. Ann. 924, 3 So. 62 (1887) (same); *D'Orgenoy v. Droz*, 13 La. 382 (1839) (same); *Haggard v. Rushing*, 76 So.2d 52 (La. App. 2d Cir. 1954) ("right to use" was held to create a usufruct and not the right of use). *Contra*, *Loranger v. Citizens' National Bank*, 162 La. 1054, 111 So. 418 (1927) (sale invalid on face as between husband and wife cannot be supported as a donation).

of *all* development and lease rights. Would the courts hold that the running of prescription was interrupted by an unsuccessful use under a lease from the grantor over which the grantee had no control, or would the court be forced to hold the interest to be royalty because functionally it has none of the substantive attributes of a servitude? A converse situation would exist if the ordinary royalty rights are enlarged, rather than those of a servitude restricted, by a conveyance of an interest which is expressly referred to as royalty, but which gives the grantee the right of ingress and egress for exploration and development, coupled with the right to lease the interest and receive lease bonuses and rentals.⁴⁵ Would this be treated as royalty, thus prescribing as such even if, for instance, the grantee spent vast sums of money drilling numerous, but unsuccessful, wells? In more extreme situations such as these, whether the courts would continue to focus their attention more strongly on form than substance depends upon the code compulsions and public policy governing the prescriptive regimes of mineral servitudes and mineral royalties and possibly, as suggested by the latter situation, upon the equities of the individual case.⁴⁶

The influx of law and public policy into the problem of classification is demonstrated by the following situation: Suppose a grantee desired only a royalty right with the exception

45. The deed in *Mt. Forest Fur Farms v. Cockrell*, 179 La. 795, 155 So. 228 (1934) was similar to the above except that the right to rentals and bonuses was not expressly reserved in addition to the right to lease. The court held that the exclusive right to lease carried with it all lease rights including the right to the rentals and bonuses. However, the court did not pass on the exact nature of the interest created, and the case in fact arose before the distinction between royalty and servitude was settled in *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939). *Ledoux v. Voorhies*, 222 La. 200, 62 So.2d 273 (1952) reaffirmed the proposition that the right to lease implies the right to the bonuses and rentals, and gave a slight indication that the interest in the *Cockrell* case was royalty. However, the nature of the interest was not there in question.

46. The cases previously discussed in the text stand for the proposition that one may exclude lease rights from a conveyance which creates a servitude without affecting the nature of the interest. However, in the latest Supreme Court case in this area there are indications that there may be a terminal point for a formula approach. The majority in *Horn v. Skelly Oil Co.*, 224 La. 709, 70 So.2d 657 (1954) emphasized that the proviso excluding lease rights did not reduce the interest to mere royalty, but instead created a mandate coupled with an interest. The concurring opinion stressed the fact that "without waiving or relinquishing its right of exploring for the retained minerals or of executing a lease therefor, the vendor merely gave to the purchaser the privilege (not an exclusive one) or the authority of leasing such interest, if and when he could, and then only under certain stipulated conditions." *Id.* at 725, 70 So.2d at 662. The dissenting opinion actually utilized a substantive approach, adopting the trial judge's findings that "regardless of what name might have been used in the first sentence of the contract, . . . the second sentence qualifies, limits and restricts it to a royalty interest only . . ." *Id.* at 729, 70 So.2d at 664.

that he also desired the prescriptive advantages of a servitude. An attempt to reach this end through the guise of a qualified mineral servitude is set forth above. Would the grantee, however, transgress any law or public policy if he eliminated the necessity for court determination for purposes of prescription of the nature of his interest by expressly stipulating that his interest was a mineral royalty, but that prescription would be interrupted by a use by the landowner, mineral servitude owner, or their mineral lessee sufficient to interrupt prescription of a mineral servitude?

The answer appears to depend upon whether the more rigorous rules of liberative prescription imposed upon mineral royalties is supported by any compulsion that does not apply to mineral servitudes or is merely a suppletive provision applied by the courts in the absence of any indication by the parties of an intention to the contrary. The position that the prescription of a mineral royalty is merely suppletive requires the recognition of a single policy requirement regarding mineral development and the absence of any legal requirement that the interruption of prescription be conditioned on production alone. It necessitates the recognition of a broad range of possible conditional obligations limited only by the fact that public policy dictates that no interest can be created more extensive than a mineral servitude. This position finds support in the courts' development of the concept that a royalty right is an "appendage" of the mineral servitude,⁴⁷ since the only limitation on an appendage could be that it can never be greater than that to which it appends. Thus it could be argued that the only restriction on freedom to contract regarding mineral interests is that a right to a share of production can never be more permanent than a mineral servitude.⁴⁸

47. *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1958); *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949). Earlier cases such as *Union Sulphur Co. v. Lognon*, 212 La. 632, 33 So.2d 178 (1947); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So.2d 169 (1947); and *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939) indicated that the concepts of mineral royalty and mineral servitude were quite distinct and that there was little to be gained by analogy. However, later cases, especially with regard to the appendage concept, have demonstrated a much closer relationship between servitudes and royalties.

48. *Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 938, 132 So.2d 845, 853 (1961): "Parties to a contract are free to stipulate as they please so long as their stipulations are not contrary to good morals or public policy or do not violate some law It has also been recognized in this state . . . that those entering into a contract may stipulate a different period of prescription or limita-

There are, on the other hand, at least two considerations suggesting that the differences between royalty prescription and servitude prescription are mandatory rather than suppletive. One stems from the code provisions which gave rise to the concepts that good faith drilling regardless of success interrupts prescription on a mineral servitude and production, on a mineral royalty. A servitude, by its very nature, creates the right to use the estate of another as, for instance, the mineral servitude gives the right to go upon the land and reduce the minerals to possession. Hence the use of a servitude is the exercise of the right created.⁴⁹ The mineral royalty, however, is not the right to use but the right to share in production. Hence it could be argued that if interruption of prescription is dependent upon the exercise of the right conveyed, then production alone will rescue the royalty from extinction by prescription regardless of whether the existence of the right is conditioned, as in the above example, on a "servitude use."⁵⁰

The other consideration is that public policy may dictate that prescription on a mineral royalty should be more stringent than that of a mineral servitude. It is possible that, as a corollary to the public policy embodied in the servitude theory which seeks to encourage the development of the natural resources of the state, there is a public interest in discouraging the existence of passive rights which cannot further the development of minerals and which, because they reduce the fraction of ultimate production available for leasing, may actually deter development. Though a mineral royalty is an appendage of a mineral servitude, the appendage is a more onerous burden than the servitude in this respect. Thus the rule requiring production to interrupt prescription on a mineral royalty may be mandatory, not suppletive, with definite legal or policy considerations limiting the parties' freedom of contract.⁵¹

tion from that provided by a state statute, and that the limitation or prescriptive period as thus stipulated, if reasonable, will be binding upon the parties."

49. LA. CIVIL CODE art. 789 (1870). "A right to servitude is extinguished by the non-usage of the same during ten years."

50. *Id.* art. 3529. "This prescription has also the effect of releasing the owner of an estate from every species of real rights, to which the property may have been subject, if the person in possession of the right *has not exercised it* during the time required by law." (Emphasis added.)

51. No case was found in which the court articulated the desire to discourage passive interests. However, the very acceptance of the concept that a royalty is an obligation conditioned on production, rather than a concept more closely analogous to servitude theories, may indicate such a desire. Support for this may be found in the stringency with which the court applies the rule that there must be actual production within ten years (*Union Oil Co. v. Touchet*, 229 La. 316,

Conveyancing Technique

If these legal and policy considerations prevent the parties from stipulating a more liberal prescriptive period than that attributed to the ordinary mineral royalty, then the courts should proscribe attempts to reach the same end functionally through the subterfuge of a qualified mineral servitude. Prescription is a prime consideration in all mineral conveyances but is seldom mentioned in conveyance instruments. It would seem that the parties should spell out their understanding upon a matter so crucial as prescription in mineral conveyances. The courts should not declare a conveyance null if the stipulated prescription transgressed law or public policy, but should simply disregard the stipulation and apply the rules of prescription according to the nature of the interest.⁵² Therefore, stipulation of the prescription applicable to the conveyance should only clarify, and never endanger, an interest which lies between an ordinary mineral royalty and an ordinary mineral servitude.

CONCLUSIONS

The courts have adopted a formulary approach to classification of interests which lie between the ordinary mineral servitude and the ordinary mineral royalty—once the interest is described in the form of either a servitude or a royalty, later qualifications will not convert it into the other. Indicative of this approach are the courts' holdings that servitudes were conveyed by instruments in which the usual mineral servitude rights were qualified to the extent that its owner had no right to grant leases or receive bonuses and rentals therefrom. The possibility remains that further qualification of the servitude rights will create an interest so closely akin to a mineral royalty that the courts will feel constrained to declare the interest to be royalty.

86 So. 2d 50 (1956); *Union Sulphur Co. v. Andrau*, 217 La. 662, 47 So. 2d 38 (1950); *Union Sulphur Co. v. Lognon*, 212 La. 632, 33 So. 2d 178 (1947)) when compared with the leniency with which the court applies the rules concerning the use of servitudes in similar situations. *McMurrey v. Gray*, 216 La. 904, 45 So. 2d 73 (1949).

52. In the absence of any stipulation regarding prescription, the language of conveyance instruments generally indicates that the interest is perpetual. The court does not declare the conveyance null for this reason, but simply supplies the applicable rules of prescription. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922). It would seem, therefore, that the stipulation of a prohibited prescriptive period would not have a more adverse effect than an indication that the interest is perpetual. To assure this result the parties could stipulate that the prescription clause is severable.

Whether mineral interests can be created which have few or no rights of a mineral servitude except a share of production, yet are governed by the rules of prescription on servitudes, awaits elucidation of the legal and policy considerations governing mineral interests. In any event, it would seem beneficial, both to the parties to the conveyance and to the court which must interpret it, for the parties to stipulate the rules of prescription which they intend to apply to their agreement.

William Shelby McKenzie

DISMISSAL OF LOUISIANA STATE CIVIL SERVICE EMPLOYEES

The Louisiana Civil Service System is designed to establish as the basis of public employment a merit system of fitness and efficiency. A consequence of such a system is the elimination of appointment to or discharge from public office for political consideration.¹ Proper functioning of a merit system, however, requires an effective means of discharging employees who impair the efficient operation of the public service.² This Comment will critically consider the grounds and procedures for dismissal of Louisiana civil service employees³ and for review of the dismissal by the Civil Service Commission and the courts.

Grounds for Dismissal

The Louisiana Constitution creates the Civil Service System⁴ and provides that no person who has gained permanent civil service status⁵ shall be dismissed by his "appointing authority"⁶

1. *Gervais v. New Orleans Police Dept.*, 226 La. 782, 77 So.2d 393 (1954); *State ex rel. Murtagh v. Department of Civil Service*, 215 La. 1007, 42 So.2d 65 (1949); *Ricks v. Department of State Civil Service*, 200 La. 341, 8 So.2d 49 (1942); *Carr v. New Orleans Police Dept.*, 144 So.2d 452 (La. App. 4th Cir. 1962); *Gremillion v. Department of Highways*, 129 So.2d 805 (La. App. 1st Cir. 1961).

2. *Boucher v. Heard*, 228 La. 1078, 84 So.2d 827 (1955); *In re Coon*, 141 So.2d 112 (La. App. 1st Cir. 1962).

3. The role of the New Orleans City Civil Service Commission is beyond the scope of this Comment. However, as much of the jurisprudence concerning the New Orleans Commission is applicable to the State Commission, cases dealing with the former will be cited throughout this paper as authority whenever they are applicable.

4. LA. CONST. art. XIV, § 15.

5. A civil service employee is appointed for a probationary period of six months before being eligible for permanent status. CIVIL SERVICE RULES, rule 9.1(a), *as amended*, 1957.

6. LA. CONST. art. XIV, § 15.1(3) (b) defines "appointing authority" as "any