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Louisiana Law Review

Volume 30 | Number 1
December 1969

Implied Duties and the Executive Right

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Repository Citation

Blance G. Iverson, *Implied Duties and the Executive Right*, 30 La. L. Rev. (1969)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol30/iss1/11

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torists did not drive at a speed greater than their range of vision permitted. But on today's superhighways this is simply not the case. Furthermore, an examination of the cases demonstrates that such an arbitrary rule is generally unworkable because of the vast array of possible circumstances in each case. Thus, the courts still speak of the doctrine as a general rule, but in fact the rule is that a driver must exercise reasonable care and prudence under the circumstances.

It is submitted that the assured clear distance doctrine is obsolete. The courts would clarify the law in this area a great deal by abandoning it as the so-called general rule laced with exceptions and counter-exceptions. It has been argued that many attorneys shy away from rear-end collision and similar cases because they feel that the motorist who is unable to stop is automatically liable. If this is the case, the courts could remedy the situation by recognizing the fact that the applicable principles are those of ordinary negligence.

Winston R. Day

IMPLIED DUTIES AND THE EXECUTIVE RIGHT

There are several interests contained in the mineral right which have become objects of commerce. The most important of these are:

(1) The exclusive leasing privilege or executive right;
(2) Bonus interest;
(3) Royalty interest; and
(4) Interest in rentals.

Separation of these interests, especially royalty from the others, is not uncommon. It is necessary to distinguish between separation of these incidents and the creation of a full mineral right to a fraction of the minerals. A fractional mineral interest vests all the rights of a mineral servitude in the holder, whereas a separated incident carries only those rights of the particular interest held. The impact of this distinction becomes apparent upon consideration of the relative positions of these two types of interest holders. Whenever the executive right is separated from any of the other incidents, all those rights which accompany the leasing privilege are stripped from the newly created non-

executive interest. Normally, the grant of reservation of the right to execute leases carries with it the right to retention of bonuses and rentals, but the parties may, of course, contract for a different result. Because of the vital role the lease plays in mineral development, control of leasing by one of two interested parties creates an unbalanced relationship between them, and the right of the executive to retain bonuses and rentals is a distinct spur to self-interested negotiation. Absent contractual obligations the executive is in a position to manipulate the leasing privilege to the detriment of the other interest holders. Thus, questions arise as to whether the executive is under any duty to lease for the benefit of a non-executive interest. Additionally, once the executive undertakes to act, there are problems as to the limit of the executive's right to act in a self-interested manner. For example, the executive normally has the right to all bonuses. May he negotiate for an extremely large bonus and a small royalty when the choice is his as to whether the lease transaction should be so structured, or must he take a larger royalty and a smaller bonus? Further, there are questions concerning the interpretation of the word "bonus." Does the term mean only cash; does it include production payments; does it include overriding royalty?

Many decisions in this area give weight to the "intent of the parties" to the contract, but the essence of the problem is whether the law will impose certain obligations on the executive when the parties have been silent as a means of protecting the party who has given to another a right which entails the power to commit the first party to a contract under circumstances where the second party can be strongly affected by self-interest. All United States jurisdictions facing this problem except Louisiana have imposed implied duties on the executive in favor of the non-executive.[1] Non-executive interests take on varying forms which may change to some degree the imbalance of the parties' positions. The non-executive interest may be joined with the ownership of the land, it may be in the form of a mineral servitude, or may be held as a real right which is less than a servitude. The

1. 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 339.2, at 99, 198 (1964): "The great weight of authority holds that some sort of duty governs the exercise of the executive right." This source goes on to list six categories for the decisions in the area of executive duties. The fifth and sixth categories, (5.) "reasoning assumes no duty," (6.) "holding no duty"), are made up entirely of Louisiana decisions and federal decisions decided under Louisiana law. *See also* Risinger, *Recent Jurisprudence—II*, in THIRTEENTH INSTITUTE ON MINERAL LAW 133 (1966).

position of this right in the structure of a particular transaction may determine the susceptibility of the non-executive to abuse.[2]

This Comment discusses the Louisiana position on duty implication in the executive, non-executive relationship.

The Louisiana Jurisprudence

The Louisiana cases have generally rejected any sort of implied duty owed the non-executive interest holder by the executive. Two basic questions have arisen in Louisiana. The first is whether an executive who possesses the reversionary interest has any legal duty to lease or act in any other manner to prevent prescription of the non-executive interest. The second is whether an executive has any implied legal duty to bargain for and obtain fair and proportionate benefits for the non-executive's interest, if he does lease. Cases involving either question have relied on those involving the other as authority without clearly distinguishing the two issues.[3] Because of this interreliance, both groups will be treated together in chronological order.

The earliest case was *Mount Forest Fur Farms of America v. Cockrell*[4] decided by the Supreme Court in 1934. The dispute concerned the distribution of lease bonuses and rentals, the disposition of which had not been provided for by contract. The plaintiff who had purchased the land and a fraction of the minerals minus the leasing privilege contended the executive was his agent by implication for the purpose of receiving bonuses and rentals. The court, however, found that the parties intended that the executive should have these benefits. The reasoning was that the executive/vendor had bargained for the leasing power for the purpose of obtaining for himself all the lease benefits except those specifically granted to the non-executive. This case simply stands for the proposition that an executive is not an agent of a landowner (mineral interest joined) for the purpose of receiving bonuses and rentals where there is no provision for disposition of these benefits. Although this rejection of implied

2. Considering the unequal positions of the executive and the non-executive, as a basis for imposing duties, the royalty holder requires more protection than does the holder of a servitude. In regard to imposing duties on the executive the distinction between royalty and servitude should only be important where use requirements for prescription, or reverting royalty interest, are issues. 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 303.8 (1964).

3. *But see* Uzee v. Bollinger, 178 So.2d 508 (La. App. 1st Cir. 1965), distinguished from Horn v. Skelly Oil Co., 224 La. 709, 70 So.2d 657 (1954), on these grounds.

4. 179 La. 795, 155 So. 228 (1934).

agency is narrow when the holding is limited to the facts of the case, it has been used as authority in a variety of situations rejecting agency and lesser duty relationships between executives and non-executives.

Ledoux v. Voorhies,[5] a 1952 Supreme Court decision, was factually similar to *Mt. Forest*. The major distinctions were that the executive was the landowner and the non-executive interest was treated as a servitude rather than as a royalty. Again the unmentioned bonuses and rentals were held to belong to the executive on the basis of party intention. The court explained how it determined the intent of the parties by the statement: "bonuses and rentals are derived from the lease itself and not from the minerals when produced." *Mt. Forest* is cited as authority but no mention is made of any implied duty relationships, agency or otherwise. Consideration of this case with *Mt. Forest* reveals that in Louisiana bonuses and rentals, unless expressly granted or reserved, are accessories to the executive right which is either coupled with a royalty or mineral interest.

Vincent v. Bullock[6] was decided by the Supreme Court five years after *Mt. Forest*. The pertinent question was whether the landowner/executive has an implied obligation to a royalty owner to lease when a prudent administrator would have leased. The royalty owner contended that failure to lease when a reasonable opportunity existed created an obstacle which suspended prescription of his interest. The court held that the obstacle principle of Civil Code Article 792 did not apply to royalty interests. This holding disposed of the prescription problem so that it was unnecessary to treat the implied duty contention. This case left open the question of whether the above argument would be accepted to establish an obstacle to the use of a servitude. The court provided a negative answer one year later in *Hightower v. Maritzky*.[7] The exclusive leasing privilege was not considered an obstacle because it was created with the consent of the servitude owner. There is no suspension of prescription under article 792 when conditions exist by consent. The court in *Hightower* also considered the contention that the executive was an implied agent of the non-executive and therefore could not acquire by prescription the property rights held for his principal. This doctrine was held inapplicable on the grounds that it concerned

5. 222 La. 200, 62 So.2d 273 (1952).
6. 192 La. 1, 187 So. 35 (1939).
7. 194 La. 998, 195 So. 518 (1940).

acquisitive prescription only, and also that no contract stipulations purported to create an agency relationship.[8]

In *Humble Oil & Ref. Co. v. Guillory*,[9] a 1947 case, the Supreme Court found no implied or contractual obligation on the part of the landowner/executive to grant a lease. Preservation of a royalty was made to depend on the simply potestative condition of the landowner leasing. Such a condition is not purely potestative because of the material detriment the landowner would suffer by turning down a reasonable lease offer.[10]

After the *Guillory* case, the Supreme Court handed down a decision which seemed to shake the foundation of the previous holdings. *Horn v. Skelly Oil Co.*[11] characterized a grant of the exclusive leasing privilege by a mineral owner as a "mandate coupled with an interest."[12] This statement was not necessary for resolution of the particular problem facing the court, but had the non-executive been a party to the suit the above characterization would have been a direct holding that the executive has a duty to act in the non-executive's best interest. Such a duty would require execution of a lease within the prescriptive period so that the servitude could be preserved by use or extended during the primary term of the lease. The apparent reversal of the previous thinking which this dictum indicates has not developed. The next case dealing with this problem, *Nolen v. Bennett*,[13] decided in the Second Circuit, ignored the *Horn* dictum altogether. On virtually identical facts the court held there was no contractual or implied agency relationship between the executive/landowner and the non-executive. Thus no extension of the prescription occurs during the primary term of a lease on the theory that agency makes the executive a joint lessor with the non-executive. This same court of appeal, however, in a later case, *Namie v. Namie*,[14] did find a contractual agency relationship to exist between similarly situated parties. This relationship made a lease, executed during the life of the non-executive interest, joint and therefore extended prescription for at least the primary term. A dissenting opinion, however, correctly points

8. Martel v. A. Veeder Co., 199 La. 423, 6 So.2d 335 (1942), followed the same reasoning as Hightower v. Maritzky, 194 La. 998, 195 So. 518 (1940), on similar facts.
9. 212 La. 646, 33 So.2d 182 (1947).
10. *See* LA. CIV. CODE arts. 2034, 2035.
11. 224 La. 709, 70 So.2d 657 (1952).
12. *Id.* at 719, 70 So.2d at 660.
13. 119 So.2d 636 (La. App. 2d Cir. 1960).
14. 134 So.2d 572 (La. App. 2d Cir. 1961).

out that any contractual agency relationship which requires the executive agent to, in effect, execute a joint lease, thereby possibly extending the prescriptive period, is potentially a means to waive prescription in advance, in violation of Civil Code Article 3460.

In *Uzee v. Bollinger*,[15] decided by the First Circuit in 1965, the issue was whether the executive/landowner owed his vendor/royalty owner the fiduciary duty of an agent or at least the lesser duty "to deal fairly and in good faith." The executive had secured for himself, in agreements subsequent to the lease, overriding royalties and production payments. The non-executive argued that obtaining the benefits of production for himself only was a breach of the executive's implied duty to his royalty interest. Implied agency was rejected. In support of this rejection the court relied heavily on the earlier cases favorable to its position and distinguished, on questionable grounds, the two decisions which were unfavorable.[16] The court also held untenable the contention that the executive had an implied duty of fair dealing and good faith. The court's position in regard to this duty is not as clear as the agency rejection but the result was just as definite. The stated basis for this result was construction of party intent and "express"[17] contract stipulations.

The most recent case in this area, *Gardner v. Boagni*,[18] was decided by the Supreme Court in 1968. The contract created a mineral royalty provided that the landowner/executive would obtain at least a 1/8th royalty in entering any lease. "Excess royalty" above 1/8th was expressly subject to the participation of the royalty owners. Bonuses, rentals, and other considerations "except royalties"[19] were granted to the executive.

The executive entered into a 1/8th lease and simultaneously executed a separate contract with the lessee securing an overriding royalty payable to the executive alone. The royalty owner alleged that the override was "excess royalty" in which he should share. The court held the overriding royalty was not

15. 178 So.2d 508 (La. App. 1st Cir. 1965).

16. The court distinguished Horn v. Skelly Oil Co., 224 La. 709, 70 So.2d 657 (1952), on the ground that the case being considered involved a question of distribution of lease benefits rather than prescription. Namie v. Namie, 134 So.2d 572 (La. App. 2d Cir. 1961), was distinguished because there was an express agency found in the *Namie* contract.

17. *See* Uzee v. Bollinger, 178 So.2d 508, 513 (La. App. 1st Cir. 1965).

18. 252 La. 30, 209 So.2d 11 (1968).

19. Gardner v. Boagni, 252 La. 30, 34-36, 209 So.2d 11, 13 (1968) (opinion included the pertinent section of the partition agreement).

royalty, but a form of bonus[20] and therefore due the executive by the terms of the contract. The court rejected implied agency and fiduciary duty of the executive. In this regard *Uzee* was the only authority cited, indicating approval of that court of appeal's one-sided analysis of the cases in the area. The Supreme Court's "mandate coupled with an interest" dictum of *Horn v. Skelly Oil Co.*[21] was not mentioned. The *Gardner* case also indicated that any duty of fair dealing less than agency must be expressed in the contract to bind the executive.

In summary, Louisiana has not established any implied duty in the executive, non-executive relationship. On the contrary, the courts have clearly rejected the implied agency doctrine with its corresponding duties. Specifically, the executive is deemed not to be the agent of the non-executive for the purpose of collecting bonuses and rentals. The executive is, in fact, entitled to these interests for himself regardless of the characterization of the outstanding non-executive right. Failure to lease the mineral right by the executive is not considered a breach of duty, fiduciary or otherwise. This is true even though the executive holds the reversionary right in the non-executive's interest. Should the executive lease, he does so on his own behalf only, and not as agent of the non-executive. The non-executive is not a co-lessor with the executive and thus is not a necessary party to a valid lease.[22]

The rejection of executive duties less than those of an agent has not been as clear. Absence of duty, however, is indicated by the courts' refusal to impose executive obligations not expressed by contract. Even in dealing with contract stipulations the interpretation has favored freedom of the executive to act self-servingly. Where exceptionally high royalties have been obtained

20. This is contrary to the general United States view of the meaning of bonus. The former Texas definition of bonus as anything in excess of 1/8th of production. (State Nat'l. Bank of Corpus Christi v. Morgan, 135 Tex. 509, 143 S.W.2d 757 (1940), was repudiated by the Texas Supreme Court in Griffith v. Taylor, 156 Tex. 1, 291 S.W.2d 673 (1956). *See* 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 328, at 100 (1964), 1968 Supp. at 14, discussing the *Griffith* decision: "In effect, this opinion repudiates the theory that production interests in excess of the usual 1/8 royalty are bonus. It confirms the theory that royalty is an interest in production not coterminous with the lease. Other cases, save one, are in accord with this view." The excepted case is Sykes v. Dillingham, 318 P.2d 416 (Okla. 1957).)

21. 224 La. 709, 719, 70 So.2d 657, 660 (1954).

22. Vincent v. Bullock, 192 La. 1, 187 So. 35 (1939). *See also* Spiner v. Phillips Petroleum Co., 94 F. Supp. 273 (W.D. La. 1950), holding that under Louisiana law a royalty owner has no standing to sue to have lease obligations enforced on a lessee.

in the lease contract through bargaining, the executive has been able to secure these benefits solely for himself by simultaneous or subsequent agreement with the lessee.

Although the cases have involved related problems of similarly situated parties, they can be divided into three types of disputes. First are the disputes concerning distribution of benefits which were not provided for by contract. The second group of cases involves questions which directly pertain to prescription of the non-executive interest. The last category is more clearly concerned with the related questions surrounding imposition of an executive duty to deal fairly with the non-executive interest once the decision to lease has been made. Because of the interrelationship of these questions a decision in any of the three disputed areas could possibly affect one or both of the others. Creating an implied agency relationship to insure fair dealing could, for instance, have quite an impact on the prescription question. As discussed later in the section dealing with public policy, considerations such as these are indicated in all of the cases.

The Louisiana Legislation

As the cases indicate, no Louisiana legislation clearly requires the implication of an executive duty in these relationships. On the other hand, no legislation precludes such a construction. The Civil Code requires good faith performance of all agreements[23] and provides for implication of obligations in certain circumstances. Louisiana courts have required the lessee to perform certain implied obligations in mineral leases. This implication is based upon the intention of the parties to produce the maximum of oil and gas from the lease. These obligations are obviously an application of a standard of care imposed on the lessee. Conceptually the legislative base for this reasoning would also support an implied duty in the executive, non-executive relationship. In this regard, several articles of the Civil Code appear to be important even though the cases discussed above did not mention them or any other legislation concerning this subject. When read together these articles require good faith performance of obligations and allow judges to extend contractual obligations beyond those expressed. To be susceptible of extension the obligation must by equity, law, or custom be incidental

23. LA. CIV. CODE art. 1901.

to the contract or necessary to carry it out;[24] be the "true intent" of the parties;[25] and not enlarge or restrain intent which is evident and lawful.[26] There is no reason why these articles would not support judicial enforcement of some implied executive obligations.

Public Policy Considerations

Discovery of the policy considerations which influenced the decisions in this area is somewhat difficult. The opinions have not expressed policy as a basis for the rejection of implied executive duties. In light of the legislation permitting such implication, however, policy is the most logical explanation for the direction the courts have taken. In an attempt to isolate the influential policy considerations involved in the courts' refusal to impose implied executive duties, the mineral lessor-lessee relationship is a valuable indicator. The fact that implied obligations have been found to exist in that relationship eliminates the possibility that some overriding policy in the area of Louisiana law of obligations precludes duty implication. The analogy to the mineral lease is particularly appropriate because it is part of the mineral property system. A major distinction between rights created by these two types of contracts in their relation to the property system is prescriptibility. Termination of outstanding mineral interests by prescription is the single most important feature of our mineral property system.[27] Mineral leases, however, are not prescriptible. It is conceivable, therefore, that in the case of prescriptible mineral rights the courts have been interested in protecting the system of prescription, whereas no such factor has marked evolution of the lessor-lessee relationship. The question is thus narrowed to whether imposing a standard of care on the executive necessarily offends Louisiana's liberative prescription policy.

One duty which other jurisdictions have imposed appears more troublesome than any other—the requirement that under appropriate circumstances the executive *must* lease. In the relationship between a landowner and the owner of a mineral servitude or between either a landowner of a mineral servitude and the owner of a mineral royalty, requiring the executive to

24. *See id.* arts. 21, 1903.
25. *See id.* art. 1945.
26. *See id.* art. 1963. *See also id.* arts. 1964, 1965.
27. *See* Hardy, *Public Policy and Terminability of Mineral Rights in Louisiana*, 26 LA. L. REV. 731 (1966).

lease might interfere with the system of prescription. In essence, the executive would be required to act to his own detriment, but on a general, and perhaps higher, level such a duty would by its nature be a hindrance to the running of prescription. Viewed in this light, those Louisiana cases which have refused to impose such a duty are well-founded. In reaching this result, it does not matter what standard is being argued, whether it be agency or some lesser duty, for the imposition of *any* duty to lease would be antithetical to the system of prescription.

Conceding, however, that the imposition of a duty to lease would damage the property system, this does not mean that Louisiana must, perforce, reject entirely the concept that some duty might be imposed in other appropriate situations. For example, according to the court's interpretation of the deed in *Uzee v. Bollinger*, plaintiff was entitled to one-fourth of any royalties. In this context, the question is the limit of the right of the executive to bargain in his own self-interest. The defendant then contracted for a cash bonus, a sizeable production payment, and an overriding royalty in addition to the "lessor's" royalty. The court limited the right of plaintiff to one-fourth of the lessor's royalty. Certainly plaintiff had no right to the bonus, and the right to share in the production payment is questionable.[28] But merely by changing the characterization of an interest in production running for the life of the lease from "lessor's royalty" to "overriding royalty," the executive was permitted to act to the detriment of the non-executive. In such situations the lessee would have no interest in this characterization because the economic impact is the same to him either way.

Admittedly, policy underlying the property system militates against a duty to act positively for the protection of non-executive rights in certain situations; however, the principles of good faith in the performance of contracts, equity, and the prohibition of unjust enrichment are all reflective of policy in our law which disfavor unfair dealing.[29] Thus, it seems that duties could be imposed on the executive *once he does undertake to exercise his rights*. In this regard, it is worth observing that

28. Production payments have been held to be bonus rather than royalty in Texas. State Nat'l Bank of Corpus Christi v. Morgan, 135 Tex. 509, 143 S.W.2d 757 (1940). *See also* Jones, *Non-Participating Royalty*, 26 TEX. L. REV. 569 (1948). Allowing bonuses to be paid out of production possibly has the merit of increasing the availability of potential lessees.

29. *See* notes 23-26 *supra*.

not all executive, non-executive relationships are those in which the executive has an expectancy that the interest over which he has such rights will expire; and thus prescription may be irrelevant. For example, it is not uncommon that a mineral servitude owner will have executive rights over the landowner's mineral interest. In this situation, too, the executive could quite properly be required to deal fairly with the interest of his landowner once he undertakes to act.

Whether the standard of care to be imposed on the executive should be that of an agent toward his principal, a standard of "fair dealing," or some other standard is discussed below. At this point, however, it can be concluded that if there are policy considerations which override a duty when its imposition threatens the system of prescription, there are policy considerations of equal force favoring the imposition of a duty when the system of prescription is not threatened.

Implied Executive Duties in Other Jurisdictions

As stated earlier, Louisiana is the only United States jurisdiction treating this problem which has not found a duty in favor of the non-executive. Generally, the non-executive interest in these jurisdictions is not terminable by operation of law and the abuse of the executive permitting termination does not exist. When the interest is terminable, such as a defeasible royalty, even stronger duties are implied for that very reason.[30] This would not be the case, however, if termination by nonuse for a set period were an implementation of public policy of the jurisdiction in question. The conflict between duty and prescription is peculiar to Louisiana. The fact that the other jurisdictions have implied duties is, however, support for the argument that, absent conflicting policy considerations, imposition of some duty is the most equitable solution to these disputes.

The extent of the duty in other jurisdictions varies considerably.[31] Full fiduciary duty is applied by some jurisdictions, whereas others require only fair dealing. The questions of what constitutes breach of any of the degrees of duty have been settled quite differently in jurisdictions having the same standards.

30. *See* Jones, *Non-Participating Royalty*, 26 TEX. L. REV. 569 (1948). *See also* 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 339.2 (1964).

31. 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 339.2 nn. 9-15 (1964): "Judicial opinions have expressed the [executive] duty in a variety of

The United States jurisdictions have imposed a duty on the executive in a number of specific situations. In other situations, the facts of the executive's actions have been held not to be a breach of his duty. For instance, an executive's duty to lease and secure drilling operations has been found where there was a reasonable likelihood that oil was being drained by wells on adjacent lands.[32] The reasoning advanced in this decision indicates that a defeasible interest would receive equal protection when threatened by termination without the drainage factor. However, in regard to a duty to obtain lease terms designed to maintain a defeasible royalty, an executive was held to be under no duty to secure a shut-in royalty clause.[33] In deciding the questions presented concerning an implied executive duty to obtain available excess royalty in lieu of larger bonuses the particular situation also plays an important role. In some cases in which a "usual" royalty has been provided for, the executive has been allowed to obtain large bonuses in lieu of excess royalties.[34] However, if the executive obtains royalty less than "usual," obtaining excess bonus by the executive has been held to be a breach of his duty.[35]

Standard of Care

Acknowledging that in Louisiana the imposition on the executive of a duty to lease may be undesirable, it is nevertheless desirable to limit the executive's right to bargain in his own self-interest by some means. If the executive has a legal right to certain economic benefits flowing from the lease transaction, such as bonuses, he should be allowed reasonable freedom to maximize these personal advantages in the process of negotiation. But he should not by any device or scheme be permitted to procure for himself economic benefits of the kind in which the non-executive is entitled to share without procuring the proper proportionate share of such benefits for the non-executive. The standard of care, or the conceptual characterization of this duty is the next matter of concern.

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phrases, 'utmost fair dealing'; . . . 'relation of trust'; 'an implied covenant . . . [to] protect' the royalty interest; 'good faith in the performance . . . [to be discharged] with prudence and good faith, and with ordinary care and diligence'; and 'utmost good faith'." *See also* Jones, *Non-Participating Royalty*, 26 TEX. L. REV. 569 (1948).

32. Federal Land Bank v United States, 168 F. Supp. 788 (Ct. Cl. 1958). *See also* Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543 (1937).

33. Union Prod. Co. v. Scott, 173 F. Supp. 361 (S.D. Tex. 1958).

34. *E.g.*, Hudgins v. Lincoln Nat'l Life Ins. Co., 144 F. Supp. 192 (E.D. Tex. 1956).

35. *See* Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543 (1937).

Calling the relationship between executive and non-executive a principal-agent relationship is unsatisfactory. Primarily, such a characterization would inherently require the agent to act positively—to lease—for the benefit of the non-executive. The problems of this standard have already been elaborated insofar as the system of prescription is concerned. But other considerations disfavor this standard of care. The agent's duty is that of the utmost good faith. It allows no opposition of personal interest against that of the principal. The situations here under consideration, however, assume an opposition of interests between the parties; they assume a legitimate self-interest on the part of the executive. Thus, the principal-agent characterization is unsuitable.

Several other jurisdictions have characterized the duty as one of "fair dealing." Admittedly this is an imprecise term, but it is suitable insofar as it indicates a duty less than "utmost good faith." It is suggested that in Louisiana it would be appropriate to articulate the executive's duty as a duty of dealing fairly with the non-executive's interest once the executive undertakes to act, in the same manner that a prudent owner would act if the non-executive interest were joined with his own. This duty might be viewed as a specific application of the principle that all contracts must be performed in good faith. It is important in this context that a breach of this duty need not be of such severity as to be called fraud.

Better methods of drafting contracts granting or reserving executive rights could provide the non-executive with more protection. The most obvious improvements would be specific stipulations distributing bonuses, rentals, overriding royalties, and any other economic benefits. Other problems may be predicted and prevented by looking at those which have arisen in other states.[36]

But better drafting is only an aid for the future and will not benefit the non-executive interests already existing. Also drafting solutions often add needlessly to the length and com-

36. 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 339.3 (1964) discusses: 1. duty to drill: a. explore; b. develop; c. prevent drainage; 2. duty to lease; 3. duty to lease rather than develop; 4. duty to timely exercise leasing right; 5. duties relating to lease terms: a. length of primary term; b. size and nature of bonus, rental, and royalty; 6. duty to enforce implied lease covenants; 7. voluntary pooling and unitizations by executive. *See* Jones, *Non-Participating Royalty*, 26 TEX. L. REV. 569 (1948); Martz & Hames, *Implied Rights of Royalty Owners*, 1957 THIRD ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE 195.

plexity of contracts. Even as an aid in the future, drafting is a limited solution because many stipulated obligations would face the problems encountered by an implied duty. For example, an express obligation to lease might cause the courts to favor those policy considerations underlying the system of prescription, resulting in a refusal to enforce such a duty.[37]

The limitations of drafting solutions suggest that an alteration in the present position on judicial imposition of implied executive duties is the only manner by which non-executive interests can be assured of fair treatment at the hands of the executive. As indicated, it is proper for Louisiana to reject a duty to lease, but in granting a lease the executive should be required to treat the non-executive interest as an ordinary and prudent landowner would treat it if it were joined with his ownership of the land. In administering this standard of care, failure to lease or secure lessee obligations designed to prevent the non-executive interest from prescribing could simply, as a matter of law, be deemed no breach of the standard. If such protection is afforded existing interests, and progressive drafting techniques are successful in securing benefits for future interests, much of the imbalance present in the mineral executive, non-executive relationship will be alleviated.

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37. In regard to a duty to lease, it has been suggested that the obligation may be expressed as a personal one rather than real. This would give the non-executive whose interest had prescribed because of a breach of this duty a right to money damages only. This approach may well be a partial answer to the problem of drafting obligations which would otherwise encroach upon liberative prescription. The problem created by this suggestion, of determining the amount of damages in cases where there has been no development, should not be insurmountable. *See* Risinger, *Executive Rights in Louisiana*, in SIXTEENTH INSTITUTE ON MINERAL LAW (1969).