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The Need for Statutory Guidance in Louisiana Mineral Law*

Victor A. Sachset

During the past half century about twenty Supreme Court Justices have listened to countless arguments of counsel, have examined their briefs, and from the contradictory views thus presented and from their own research and convictions have hammered out a mineral law for Louisiana.

From the beginning it was evident that problems were being encountered which were wholly unanticipated by the authors of the Civil Code. This did not free the courts from dealing with the problems:

“The judge who shall refuse to determine under pretext of the silence, obscurity, or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice.”¹

The alternatives seemed to be to proceed according to equity in the absence of express law as directed by Article 21 of our Civil Code, or to try to apply the articles of the Code by analogy. The court took the latter alternative in keeping with the civilian principle of seeking and applying the legislative will.

Article 13 of our Civil Code provides that when the express language of the legislature is clear and free from all ambiguity, “the letter of it is not to be disregarded, under the pretext of pursuing its spirit.” But where the express language fails to cover the precise problem or where literal application of the words would produce an absurd or inequitable result, courts everywhere must and do search for the intent of the lawmakers, for law, to be supported by the people, must be a system of justice and not an excuse for injustice.

“The modern philosophy of law comes in contact with the natural law philosophy in that one as well as the other seeks to be the science of the just.”²

*Paper delivered by the author at the Ninth Annual Mineral Law Institute, Louisiana State University Law School, February 10, 1962.

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1. FRENCH CIVIL CODE art. 4.

2. Berolzheimer, quoted in Pound, *Scope and Purpose of Sociological Juris-*

Where a situation is not explicitly dealt with by the legislature, this usually means that the situation was not in the minds of the lawmakers; for it must be assumed that the legislators have the ability to express their will if the problem is before them. Actually, then, the search by the court is to determine from the legislative will clearly expressed what the legislative will would have been if the problem had been presented to the lawmakers.

Absolute certainty in the law can never be achieved, but where property rights are concerned, the orderly conduct of business presupposes the ability of the citizenry to determine in advance either alone or with professional help the legal effect of their acts.

Fortunes are made and lost in the quest of oil and gas. Sometimes fortunes are made and lost in litigation concerning these valuable natural resources because of the absence of positive legal guides. Much of the uncertainty has now been removed by the decisions of the court and a great body of mineral law judicially made is now available. It is my view that most of this body of mineral law is generally satisfactory to the people of this state, though it has been developed through the application of Civil Code articles which do not fully fit the situation.

It seems to me that since the *Glassell* case³ in 1936 and the *Vincent-Bullock* case⁴ in 1939, the court has made clear the basic principles it intended to follow. Also, it seems that the lawyers and lawmakers have had sufficient experience in the field to codify the desirable principles judicially formulated in order to give them the true legislative sanction so dear to the heart of the civilian. To bring the language of our Civil Code into harmony with the desired practical results achieved, to modify our Civil Code where different results are desired, and to provide guides for the resolution of problems we now know to exist but which are now settled by negotiation case by case or by buying more than once the desired right in order to avoid the uncertainty of litigation, seems to me to be the duty of the bar and of the legislature.

Historically, the civilian approach to law has been to legislatively classify rights, their use and disposition, through deter-

prudence, 24 HARV. L. REV. 591, 607 (1911); CARDOZO, NATURE OF JUDICIAL PROCESS 161 (1921).

3. *Gulf Refining Co. v. Glassell*, 185 La. 143, 168 So. 755 (1936).

4. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

mination of principles in a deliberative assembly in which all interests concerned may have a voice rather than settling the problems in the heat of conflict in court where only the litigants are present — and others having the same problems are not represented nor even aware that their property rights of great value are at stake. Generally speaking, the civilian is neither accustomed to nor desirous of the common law approach and for a long time it has seemed to me, and to many other lawyers as well as to many judges, that this civilian approach should be brought to bear upon this most important source of wealth.

I do not propose a separate mineral code. I believe that to fragment the law is to add to the difficulty of knowing it. My view, rather, is that amendments should be made to the Civil Code to incorporate or to modify the mineral law as judicially developed, and to resolve, as far as may be, presently unresolved problems. I hope this brief paper will demonstrate that such a plan is feasible.

Many of the difficult legal problems have resulted from the early determination that oil and gas in place were not susceptible of private ownership by one person to the exclusion of others. I believe that all of us view that determination as a spur to the development of oil and gas in Louisiana which has proved of great value to our people. You will recall that the minority of the court in the *Frost-Johnson* case⁵ in 1922, before any of the present judges were on the court, espoused the view that Article 505, which provides that the ownership of the soil carries with it the ownership of all that is directly below it should settle the matter. The majority rejected this simple approach by saying that the fugacious minerals were not susceptible of ownership unless made captive and this view prevailed despite Justice Provosty's arguments that the theory of the United States Supreme Court in *Ohio Oil Co. v. Indiana*⁶ was based upon misinformation.

It has sometimes seemed to me that the majority actually followed the spirit of Article 505 by holding that there was no severance of ownership of the minerals from ownership of the land in the sense that only the landowner had the right to dig for oil and gas or to permit others to do so. This is not the

5. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

6. 177 U.S. 190 (1899).

accepted theory, for it has been held that where mineral rights are reserved when the owner sells his land, the new owner cannot deal with those mineral rights until the rights of his vendor have expired. This decision was not reached easily, for the chain leading to the conclusion begins with *Lewis v. Bodcaw Lumber Co.*⁷ and then Professor Harriet S. Daggett's book on mineral law,⁸ *Gailey v. McFarlain*,⁹ *McDonald v. Richard*,¹⁰ and finally *Hicks v. Clark*.¹¹

At any rate, having rejected the ownership theory, a new classification had to be developed by someone. The legislature did not undertake to do so in any fashion at all until 1938.¹² The definition of mineral rights had to be and was wholly the work of the bench and bar, with many assists from Professor Daggett, the late Professor Eugene A. Nabors, and other members of the law faculties of our fine universities.

The Civil Code provides for two basic kinds of servitudes — personal and real. Of course, it was immediately understood that the cost of exercising mineral rights was far too great to make them depend upon a human life. Therefore, although the mineral right was treated as a servitude in the nature of a usufruct, it is not treated as a personal servitude because it does not die with the owner,¹³ and it was, therefore, made a real servitude though the Civil Code contemplated that a real servitude would be in favor of a dominant estate.¹⁴ This real, mineral servitude is, therefore, in favor of a person and not in favor of an estate.

The court found a gap in the statutory law. It related the express provisions of the Code dealing with problems known to its authors to ascertain what the intent of the authors would have been if the mineral problem had been presented to them while drafting the Code. Thus, necessity evoked a third kind of servitude — a mineral servitude, which can be written into the Code.

This would call for an amendment to the articles dealing with real servitudes from Articles 646 to 656, all of which seem

7. 167 La. 1067, 120 So. 861 (1929); DAGGETT, MINERAL RIGHTS IN LOUISIANA 69 (rev. ed. 1949).

8. DAGGETT, MINERAL RIGHTS IN LOUISIANA (rev. ed. 1949).

9. 194 La. 150, 193 So. 570 (1940).

10. 203 La. 155, 13 So.2d 712 (1943).

11. 225 La. 133, 72 So.2d 322 (1954).

12. La. Acts 1938, No. 205.

13. LA. CIVIL CODE art. 646 (1870).

14. *Id.* arts. 646-648.

so definitely to make a predial servitude one for the benefit of another tract of land "sufficiently near, for one to derive benefit from a servitude on the other."¹⁵ It also contemplates an amended Article 2012 which describes three ways in which real obligations are created, for the mineral servitude is often created not in the ways described in that article but by alienating the real right to be exercised upon the property while retaining ownership of the property itself.

Such an approach is not new to the bar or to the legislature, for Article 741 dealing with partitions was specifically amended in 1940 and again in 1950 to provide for mineral interests in partition suits.¹⁶

Article 2015 provides that leases are real obligations upon the land which accompany it in the hands of the person who acquires it.¹⁷ This does not mean that the warranties and covenants of the lessor follow the lease into the hands of the purchaser. For example, the Supreme Court in *Calhoun v. Gulf Refining Co.*¹⁸ limits the after-acquired interest clause to the obligation of the lessor himself. In the *Calhoun* case, Thompson, the lessor, had agreed that after-acquired interests would be subject to the lease, but the court held that Thompson's lease was effective to the extent only of the one-fourth mineral interest he had when he granted the lease and that as Thompson had sold the land before the outstanding interest prescribed, his vendee, Mrs. Calhoun, was not under any obligation to carry out Thompson's personal agreement as contained in his lease because the lease is not a *jus in re* but a *jus ad rem*, a right upon the thing. This, of course, followed naturally the views of the court in *Gulf Refining Co. v. Glassell*.¹⁹

In that landmark case the mineral lessee was held without the right to bring petitory action to protect the lease but was relegated to an action against his lessor. This decision definitely knocked out earlier cases such as *Arent v. Hunter*,²⁰ which spoke of an oil lease as being somewhat like a lease, somewhat like a sale, and somewhat like a servitude.

The legislature was not satisfied with the *Gulf-Glassell* de-

15. *Id.* art. 651.

16. La. Acts 1940, No. 336; 1950, No. 521.

17. See *Richard v. Sohio Petroleum Co.*, 234 La. 804, 101 So.2d 676 (1958).

18. 235 La. 494, 104 So.2d 547 (1958).

19. 185 La. 143, 168 So. 755 (1936).

20. 133 La. 178, 62 So. 623 (1913); 171 La. 1059, 133 So. 157 (1930).

cision, and Act 205 of 1938 gave mineral lessees the right to defend their leases through real actions. Neither was the legislature satisfied with *Arnold v. Sun Oil Co.*,²¹ which denied to a mineral lessee reliance upon the law of registry. This resulted in Acts 6 and 7 of the Second Extra Session in 1950.²² The oil lease is still not real property, though it has the benefits of laws relating to owners of immovable property, according to *Reagan v. Murphy*.²³ It seems to me that it was good to make sure that *Arent v. Hunter*²⁴ is no longer the law. Nevertheless, the decision leaves some questions to be answered. If a mineral lease is not real property and the mineral lessee is married and lives out of this state, is the mineral lease a part of the community? On the death of the lessee is the lease subject to death taxes in the state of his domicile, or is it subject to inheritance taxes in our state? Is its disposition upon death subject to the laws of Louisiana if the lease is owned by a person residing in another state? Would it not be desirable to be sure of the answers to these questions in order to advise our clients without the necessity of litigation? Some of this litigation may occur in other states. For example, if the State of New York undertakes to collect death taxes on a mineral lease affecting Louisiana land held by a resident of New York, the litigation will be there — but its outcome will depend upon our law. It seems clear that the industry and the people of the state want the mineral lessee to have all of the benefits accorded to owners of immovable property, and while I would surely not like to see *Arent v. Hunter*²⁵ reinstated, amendment to a few code articles²⁶ and addition of an extra article could give the lessee the right to defend his leasehold in addition to the right to call the lessor in warranty.

Article 3651 of the Code of Civil Procedure provides for a petitory action not only by the owner of the property but by the owner of a real right in property. Article 3655 deals with possessory actions and is drafted in much the same manner. It should be presumed that the *Reagan* case does not affect these articles. R.S. 9:1105, according the right to lessees to resort to real actions, has not been repealed, and R.S. 9:2221, formerly Act 7 of the Second Extra Session of 1950, giving the mineral lessee the benefit of the laws of registry, is also still in effect.

21. 218 La. 50, 48 So.2d 369 (1950).

22. Now LA. R.S. 9:1105-1106 (1950).

23. 235 La. 529, 105 So.2d 210 (1958).

24. 171 La. 1059, 133 So. 157 (1930).

25. *Ibid.*

26. LA. CIVIL CODE arts. 2703, 2704, 2696 (1870).

Moreover, Article 3664²⁷ of the Code of Civil Procedure declares that the mineral lessee or owner of any sort of mineral interest is the owner of a real right; and if this does not stand as a declaration of substantive law because found in a procedural code, it nevertheless should protect the procedural aspects.

There comes to mind the situation concerning the royalty. Professor Daggett and our Supreme Court, with Chief Justice Fournet as its organ, have made it clear that the royalty right is different from the mineral right, that the royalty right usually depends upon a lease already on the property or on a lease that may thereafter be placed on the property, or both; and while successful drilling operations in good faith will preserve a mineral right from the running of prescription, only production will save the royalty right. The royalty right has other aspects. If prescription runs against it and it ceases to exist, the owner of mineral rights rather than the landowner may benefit.²⁸ If the land affected by the royalty is included in the unit from which production is obtained within ten years from the granting of the royalty, though the well is on other land in the unit, the prescription running against the royalty is interrupted. In *Crown Central Petroleum Corp. v. Barousse*,²⁹ the court called the royalty right a species of real right running with the land. These cases all seem consistent with one another, but a codification of their principles would be helpful to all of us.

The distinction as to the right of the holder of royalty and the holder of mineral servitudes being established, there is still the problem of determining when the owner of the land has transferred a mineral right and when he has transferred a royalty right. In *Horn v. Skelly Oil Co.*,³⁰ it was clearly held that where the reservation was of a half interest in and to all of the minerals, this was a mineral reservation and not a royalty reservation even though only the purchaser of the property on which the interest was reserved had the right to grant leases.

27. LA. CODE OF CIVIL PROCEDURE art. 3664 (1960): "A mineral lessee or sublessee, owner of a mineral interest in immovable property, owner of a mineral royalty, or of any right under or obligation resulting from a contract to reduce oil, gas, and other minerals to possession, is the owner of a real right. These rights may be asserted, protected and defended in the same manner as the ownership or possession of immovable property, and without the concurrence, joinder, or consent of the owner of the land."

28. *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959).

29. 238 La. 1013, 117 So.2d 575 (1960). Distinguished from *Elson v. Mathewes*, 224 La. 417, 69 So.2d 734 (1954), as a matter of construction of the unitization agreements.

30. 224 La. 709, 70 So.2d 657 (1954).

Under that reservation, the landowner was to share the bonus and rentals. The court of appeal has recently held that where the landowner granted a mineral lease and then conveyed a 1/4th interest in his minerals equal to 1/32d royalty under the existing lease and a like royalty interest in future leases but reserved to himself the right to make the leases, to keep the bonuses or cash considerations and the delay rentals, this is nevertheless a mineral reservation and not a royalty reservation. Accordingly, prescription was interrupted by the drilling of an unsuccessful well.³¹ All of this *seems* to follow the concepts settled by the Supreme Court, but it now appears that the action may be identical and the result quite different, dependent upon whether the parties say royalty interest or mineral interest. In any event it seems that here too, either under the articles dealing with leases or under the articles dealing with the mineral servitude, the Civil Code might well declare the rights of the royalty owner and declare how to determine between a royalty owner and a mineral owner.

I believe too that some clarification in the Civil Code is needed with respect to the rights of the holder of a lease or of a servitude on less than the whole of the minerals or of the land. In *Huckabay v. Texas Co.*,³² the court decided that where a lessee held from the owners of 7/8ths of the mineral rights he had the right to drill on the property and produce, though he had an obligation to pay to the owners of the other undivided 1/8th their share of the product without deduction for cost of development and production. On appeal, the Supreme Court allowed deduction because otherwise the owner of the 1/8th interest would have been unjustly enriched. The court did not cite, but certainly had in mind, Article 1965 of the Code from which the language is derived. In *United Gas Public Service Co. v. Arkansas-Louisiana Pipe Line Co.*,³³ the court refused to use the equitable remedy of injunction to prevent the drilling of a well when its use would have led to injustice. Yet there are cases applying present code articles to the effect that one's right to use a servitude is suspended when the consent of a co-owner of the land has not been obtained, but the running of prescription against the servitude is not suspended.³⁴

Statutory direction is needed with respect to the usufruct.

31. *Phillips Petroleum Co. v. Richard*, 127 So.2d 816 (1961).

32. 227 La. 191, 78 So.2d 829 (1955).

33. 176 La. 1024, 147 So. 66 (1933).

34. See, *e.g.*, *Hightower v. Maritzky*, 194 La. 998, 195 So. 518 (1940).

*Gueno v. Medlenka*³⁵ has settled the long-disputed question of the rights, if any, of the usufructuary with respect to the minerals on property subject to usufruct. The court cited and followed the holding of *Gulf Refining Co. v. Garrett*³⁶ before rehearing, that the usufructuary is entitled to royalty from the oil produced from wells which were producing at the time the usufruct was created or established,³⁷ but otherwise the usufructuary is not entitled to the minerals or mineral rights. This was followed by the holding of the court in *Buffington v. Buffington*³⁸ that the usufructuary not only is not entitled to the royalty, but is not entitled to the bonus and delay rentals paid. This decision, as well as the *Gueno* case, was disputed by Justice Hamiter on the basis of the holding of the court in *Milling v. Collector of Revenue*³⁹ that royalty from producing wells was in the nature of civil rent. Assuming that the *Gueno* and *Buffington* cases will stand, there nevertheless remains much to be decided. If a well has been drilled but is producing from only one sand at the time the usufruct is created, is the interest of the usufructuary limited to that sand, or does it extend to all of the sands passed in the well, or all of the sands that may thereafter be reached by deepening the well, or does it relate to that well alone and not to any other wells drilled to the sand from which the well is producing at the time the usufruct is established? I think that the industry and our people and the bar would like to know and that they would like to know before finding it out through litigation of their own or of others. It seems to me that this requires legislative determination and that the determination can be incorporated into the Civil Code by amendments to Article 551.

These are just a few of the problems that have occurred to me, and I suppose that I have not mentioned many that occur to you.

Our people were unwilling in 1938 to accept a wholly separate and complete mineral code. The late Professor Eugene A. Nabors devoted a great deal of effort to the preparation of a special mineral statute and wrote most enlightening articles on the subject.⁴⁰ I believe that many, if not most, of the lawyers

35. 238 La. 1081, 117 So.2d 817 (1960).

36. 209 La. 674, 25 So.2d 329 (1946).

37. LA CIVIL CODE art. 552 (1870).

38. 240 La. 955, 126 So.2d 326 (1961).

39. 220 La. 773, 57 So.2d 679 (1952).

40. *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 25 TUL. L. REV. 30,

who deal with this field of the law would be reluctant to see a separate code with new definitions and words used for one purpose in the Civil Code and another in a mineral code. I believe, as I have for years, that the proper place for the codification of the law on this subject is in the Civil Code.

As you know, the Louisiana State Law Institute is "chartered, created and organized as an official advisory law revision commission, law reform agency and legal research agency of the State of Louisiana" to "consider needed improvements in both substantive and adjective law and to make recommendations concerning the same to the legislature—to recommend the repeal of obsolete articles in the Civil Code and Code of Practice and to suggest needed amendments, additions and repeals."⁴¹ It is encouraging to me to know that the Louisiana State Law Institute's special committee on this subject is now headed by the highly respected Mr. Alex Smith of Shreveport. This Institute on Mineral Law has accumulated a great mass of carefully analyzed material in this field which will be of immense value to that committee. It is my hope that under Mr. Smith's leadership we shall find the way to codify and clarify this most important field of law within our cherished Civil Code.

155, 303, 485 (1950-51); 26 *TUL. L. REV.* 23, 172, 303 (1951-52).

41. La. Acts 1938, No. 166, now LA. R.S. 24:201, 204 (1950).